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THE  
FEDERAL REPORTER.

VOLUME 124.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

SEPTEMBER—NOVEMBER, 1903.

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FEDERAL REPORTER, VOLUME 124.

**JUDGES**

OF THE

**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.**

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<sup>1</sup> Resigned November 6, 1903.

<sup>2</sup> Appointed July 1, 1903.



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# CASES

## ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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### THE GERMANIC.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

Nos. 151, 152.

#### 1. SHIPPING—INJURY TO CARGO—HARTER ACT

The trend of judicial decision in the United States has been to construe the Harter act strictly, and not to extend the carrier's exemption from liability to doubtful and uncertain cases, but to leave such liability as it was defined and enforced by the law maritime and by the common law, unless the act plainly and unequivocally asserts a different liability.

#### 2. SAME—SINKING OF VESSEL AT DOCK—NEGLIGENT UNLOADING.

The unloading of cargo in the port of discharge by stevedores has no relation to the "management of the vessel," within the meaning of the third section of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), not being an act done with any view to such management, but relates to the "care or delivery of cargo," within the meaning of the first section; and where by the negligent and improper manner in which it was done it brought about a condition of instability in a ship, which, owing to a large accumulation of ice above her upper deck, rendered her top-heavy, and she rolled over and sank at her dock, injuring the remaining cargo, she is liable for the damage, although other acts done or omitted in the management of the vessel may have contributed to the injury.

Wallace, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Southern District of New York.

For opinion below, see 107 Fed. 294.

On appeal from a decree of the District Court of the Southern District of New York finding the Germanic in fault and awarding damages to libelants for loss of cargo due to the stranding of the steamer while lying at pier 45 North river, during the night of Monday, February 13, 1899.

¶ 1. Statutory exemption of shipowners from liability, see note to *Nord-Deutscher Lloyd v. Insurance Co. of North America*, 49 C. C. A. 11.

Everett P. Wheeler, for appellant.

Walter F. Taylor, for appellees Aitken and others.

Wilhelmus Mynderse, for appellees Insurance Company of North America and others.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts are stated with great care and accuracy by the District Judge and need not be repeated here. The *Germanic* (D. C.) 107 Fed. 294. His statement is challenged in a few unimportant particulars, but no error is pointed out which, in our judgment, affects the correctness of his conclusions. It is said, for instance, that the finding that the wind at the time of the first list to port was northerly is incorrect, the wind having suddenly shifted to the northwest about 4 p. m. It is also argued that the judge's estimate of the weight of ice on the steamer's decks and upper works at 213 tons is too high. We are inclined to regard this as a conservative estimate and much more reliable than the conjecture of the master who placed the weight at 180 tons. But even if the conclusions of the appellant in both these particulars be accepted as correct the same deductions follow. So far as the weight of the ice is concerned it is practically conceded by the libelants' counsel that the difference in the two estimates is immaterial. He says:

"The exact determination of this amount is unimportant, and for the sake of the argument we assume the correctness of Judge Brown's figures."

The District Court found that the damages were caused by two sudden lurches to port, the first knocking off the cover of the coal port and the second carrying the bottom of the port below the water line, and that these lurches were produced by the unstable and top-heavy condition of the steamer arising from the inconsiderate unloading of nearly all of her cargo without any regard to the great weight of ice and snow above her decks. We fully concur in these conclusions and in the reasoning by which they are supported and deem it unnecessary to add anything to the opinion of the district judge.

The contention that the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) constitutes a complete defense to the action necessitates further observation. The first section of the act is evidently in the interest of the shipper and was intended for his protection. It provides that it shall be unlawful to insert in a bill of lading any agreement relieving the vessel or her owner from liability "for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge." All words and clauses of such import inserted in bills of lading are declared to be "null and void and of no effect." It is plain that by virtue of this section a carrier cannot avoid liability for negligence in the loading, stowage, custody, care and delivery of merchandise.

The second section (27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) is also in the interest of the shipper. It makes it unlawful to insert

in a bill of lading any agreement whereby the obligation of the owner of a vessel "to exercise due diligence properly to equip \* \* \* and to make said vessel seaworthy \* \* \* or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided." This section recognizes the obligation to use due diligence to provide a seaworthy vessel and carefully to handle, stow, care for and deliver the cargo and makes it unlawful to insert a clause whereby these obligations are avoided or weakened.

The third section (27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), which is relied upon by appellant, is in the interest of the carrier and is evidently intended as a compensation for the loss of his right to limit his liability as provided in the preceding sections, the effort of the lawmakers, apparently, being to adjust the rights and obligations of each upon a fair and reasonable basis. The section provides that if the owner of a vessel shall exercise due diligence to make the vessel seaworthy and properly manned, equipped and supplied then and in that case neither the vessel nor her owner shall be responsible for damages "resulting from faults or errors in navigation or in the management of said vessel." Reading these provisions together and in the light of the interpretation placed upon them by the courts it seems plain that the carrier is still liable for negligence in the loading, stowage, custody, care, handling and delivery of the cargo and that neither the carrier nor the vessel is liable for faults or errors in the navigation or in the management of the vessel, but in order to avail himself of this exemption he must use due diligence to provide a seaworthy vessel properly manned and equipped.

The Supreme Court in the case of *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, decided that the act did not exempt the vessel from injury occasioned by a latent defect in the peak ballast tank caused by a broken rivet head which left a hole through which the water entered and injured the cargo. It was also decided that the third section exempted from liability only where the damage resulted from dangers of the sea or faults in the navigation or management of the ship. *The C. W. Elphicke*, 122 Fed. 439.

In *The Irrawaddy*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, the court, at page 192, 171 U. S., page 833, 18 Sup. Ct., 43 L. Ed. 130, says:

"Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel."

The court refused to extend the act so as to permit the owner to share in the benefits of a general average contribution to meet losses due to faults in management and navigation.

In the case of *Knott v. Botany Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90, a cargo of wool was injured by drainage from wet sugar taken on at a subsequent port. At a third port cargo aft was

discharged so that the ship was two feet down by the head, causing the drainage to flow forward and injure the wool. The supreme court held the damage was the result of fault in the loading or stowage of the cargo and not of a fault in the navigation or management of the ship.

In *The Manitoba* (D. C.) 104 Fed. 145, the court refused to extend the exemptions of the Harter act to a case where, through insufficient care during loading, a cargo port was left open on sailing. It was held that the condition of the port being unknown to the officers of the vessel made her unseaworthy as to cargo stowed in that compartment and that there was also "a failure in the proper stowage and care of the goods" within the first section of the act. At page 155 the court says:

"To entitle the ship and owner, however, to exemption under the third section of the Harter act, it is not enough to show that some of the several causes therein named contributed to the loss. To exempt the shipowner, the statute requires that the damage must have 'resulted' from one or more of those causes; and this requires that some one or more of those causes must have been the real, substantial or efficient cause of the loss. But if the causes of the loss are several, and one of them is negligence of the carrier not within section three and a sea peril has become operative and produced damage not by itself per se, but only in consequence of the carrier's negligence, which has made it operative, then the rule long applied as between ship and shipper in the construction of bills of lading (and the same rule must be applied here), is that the negligence and not the sea peril, is to be deemed the efficient and proximate cause of the loss. \* \* \* In such cases the damage does not properly 'result' so much from the sea peril as from the negligence that has given opportunity for the operation of that peril."

The leading case in which the ship has been relieved from liability is *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. The court there held that the vessel was actually seaworthy at the inception of the voyage and that the injury to the cargo was occasioned by the neglect to close the iron shutter of a port hole, the glass cover being broken during the voyage, and that this was a fault arising in the "navigation or management of the ship." The court says:

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the 'inroad of the seas.'"

In *Int. Nav. Co. v. Farr & Bailey Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830, the court refused to extend the doctrine of *The Silvia* to a case where damage resulted from water admitted through an open port as the vessel rolled in a heavy sea, it appearing that neither the glass cover nor the iron dummy was properly fastened when the vessel left Liverpool.

In *The Glenochil* (1896) Prob. Div. 10, 8 Asp. N. S. 218, the negligence consisted in the mismanagement of part of the appliances of the ship. In order to stiffen her so as to complete the discharge of the cargo it became necessary to fill one of the water ballast tanks. The tank was accordingly filled, but owing to an injury received during the voyage water was admitted from the tank to the cargo and



damage resulted. The filling of the tank was held to be an act done in the management of the ship.

The other authorities relied on by appellant, upon this branch of the case, are the decisions of foreign tribunals which it is unnecessary to examine in detail as they shed little light upon the point in controversy, especially in view of the opinions of the supreme court which, though based upon differing facts, seem to lead to contrary conclusions. These authorities, and many others bearing upon the construction of the Harter act, will be found in the comprehensive opinion of the court in *The Manitoba*, *supra*.

It must be admitted that the trend of judicial decision in the United States has been to construe the Harter act strictly and not to extend the carrier's exemption from liability to doubtful and uncertain cases. The tendency has been to leave the liability of the ship and the owner as it was defined and enforced by the law maritime and by the common law unless the act plainly and unequivocally asserts a different liability. It is idle to disguise the fact that the circumstances in the case at bar naturally predispose the court to hold the vessel liable unless her exemption be made apparent by the express terms of the act. In other words, it is not a case where the act should be strained to shield the ship. Where a staunch and strong vessel arrives safely at her destination and subsequently sinks at her berth, after being made top-heavy by the careless and premature removal of cargo, the situation compels the conclusion that the lawmakers could not have intended that the loss should fall upon the innocent cargo owners and that there should be a complete exemption from liability on the part of those whose negligence caused the loss. Such a result would be foreign to the intent and purpose of the act.

It is obvious that "faults or errors in the management of the vessel" do not include "fault or failure in proper loading, stowage, custody, care or delivery of" cargo. If this were otherwise the first and third sections would be antagonistic and the vessel which is made liable for improper handling of the cargo by the first section is relieved from liability by the third section. This distinction between the vessel and her cargo and between the management of the vessel and the management of her cargo is distinctly recognized in the act and in the decisions interpreting it. It is true that the word "unloading" is not used in the first section, but as pointed out in the opinion below, and in the briefs, it is certainly excluded from the meaning of the phrase "management of the ship" and so the obligation to discharge the cargo properly remains as it existed prior to the passage of the act. Indeed, it would not be an unnatural or strained construction to hold that the prohibition against any attempt to relieve from liability for negligence in proper "loading, stowage, custody, care or delivery" of cargo includes negligence in unloading as well.

We are of the opinion that a condition of instability brought about by the improper unloading, care and custody of the cargo is not a fault in the management of the vessel. This distinction was clearly recognized in the *Botany Mills Case*, *supra*. In that case by the careless discharge of cargo at Para the vessel was trimmed by the head

and the drainage ran into the compartment near the bow where the wool was stowed and injured it. In the case at bar by the careless discharge of cargo at New York the vessel became top-heavy and lurched violently to port until an open coal port was carried down below the water line, sinking the ship and injuring all the merchandise on board. Other faults may have combined to produce this result, but the improper loading and care of the cargo was the initial cause and produced a condition of affairs which gave to acts and omissions, harmless and even laudable in themselves, the appearance of grave and culpable errors. Conceding, arguendo, that loading the coal in the side bunkers helped to produce the condition of instability and that it was done in "the management of the vessel," it is by no means conclusive of appellant's liability. The only deduction to be drawn is that this fault, for which the vessel is not liable, contributed with other faults, for which she is liable, to produce the disaster.

The same conclusion would follow were a similar concession made regarding the failure to supply a substitute for the lost port cover. Where a disaster is due to a combination of negligent acts liability is established by the proof of one of these acts and the party so charged will not be exculpated by showing that other faults for which he is not responsible contributed to produce the result. Whether this exemption from liability for these contributing acts be established by proof or is the result of an express statute is immaterial. It is enough that the party charged with negligence has been proved guilty of negligence.

The act complained of, namely, the hurried and improvident removal of the cargo, had no relation to the management of the ship, as such. It was not undertaken with the intent to benefit, influence or change her in the remotest particular. It dealt with the cargo as distinguished from the ship. The fact that the unskillful loading by a stevedore may affect injuriously the sailing qualities of the ship does not make the loading an act undertaken "in the management of said vessel" any more than the loading or unloading of a freight car can be regarded as part of the management of a railroad train. This proposition is well stated in the brief of the libellant Aitken, as follows:

"The fact that an act primarily having to do with cargo must incidentally affect the ship, does not bring it within the class of acts done in the management of the ship. If the particular manner of performance adopted is not adopted with a view to its effect on the ship, but does affect the ship in a way that causes damage to cargo, the ship is not exempted from liability. \* \* \* The controlling fact is that the effect on the ship is produced without intention and by accident. The negligence is in the manner of performing the act intended, to wit, the act having to do with cargo. It is not in the management of the ship because no act intended to affect the welfare of the ship is being performed."

The evidence is overwhelming that after the Germanic was made fast she was given in charge of the "shore agents" of the owner and they alone assumed direction of the discharging and loading of cargo and preparing her for the return voyage. The officers and crew had nothing whatever to do with the employment of stevedores or the discharging, loading and coaling of the ship. All these operations were carried on by the shore department under orders from the dock.

They had charge of the unloading and loading of cargo, determined the place of stowage and the order in which cargo was taken in. It is probably true that the master has the right to interfere to protect the ship from the carelessness of the stevedores, but it is an authority seldom exercised. The general agent of the claimant at New York testified that he was unable to give an instance where the master has interfered with the judgment of the superintendent of the pier. There have been occasions, however, when the master has protested against the action of the superintendent in placing weight in certain parts of the ship and, upon appeal to the general agent, the protest has been sustained. As to the general proposition there can be no doubt that the stevedores had nothing to do with the management of the ship and the master and crew had nothing to do with the handling of the cargo. If to the negligent unloading of the stevedores can be imputed the primal fault, it does not become a fault in the management of the ship because the master used his best endeavor to remedy it. He did not cause the unstable condition, the damage did not result from his management; he simply endeavored to prevent the threatened disaster.

The merchandise loaded on the Germanic in New York for the outward bound voyage stands upon a somewhat different footing from that of the incoming cargo. In no respect, however, are the points of divergence favorable to the claimant and it is, therefore, unnecessary to discuss them. We are of the opinion that the damage was produced by negligent unloading, that this was not done in the management of the vessel, and that the vessel is not relieved from liability by the third section of the Harter act.

The decree of the District Court is affirmed with interest and costs.

WALLACE, Circuit Judge (dissenting). For the loss accruing to that part of the cargo of the Germanic which she carried from Liverpool, I think the libelants are not entitled to recover. As respects this part of the cargo, inasmuch as when its carriage began the Germanic was in all respects seaworthy, and properly manned, supplied, and equipped, if the loss resulted from "faults or errors in navigation or in the management" of the vessel, the vessel and her owners are exonerated from liability by the third section of the Harter act. The loss was caused by the sinking of the vessel at her dock at the termination of her voyage, while her cargo was being unladen, whereby water damage accrued to the part which had not been removed. It appears that she arrived at her dock Saturday, February 11th, at noon, with a list to starboard caused by the ice which had accumulated during her voyage to such an extent that it incrustated all her forward parts, including the bridge, rigging, and spars as high as the foreyard. On Monday, in the afternoon, when a large part of her cargo in the lower hold and on her orlop and steerage decks had been discharged, she suddenly rolled over to port, and in making this roll lost the cover to one of her coal ports. Thereupon her master undertook to rectify her instability by shifting some of the cargo in the lower hold from the port to the starboard side, and within an hour she rolled back again to her former starboard list. The discharge of her cargo was

then resumed, and coal was taken on board for her next voyage, with the effect of somewhat increasing her starboard list; but shortly after 9 o'clock p. m. she suddenly rolled over again to port, carrying the open port beneath the water line. The water flowed in through this opening faster than the pumps could control it, and she sank at her dock before outside relief could be obtained.

The District Judge found that the two lurches of the vessel to port were attributable to unloading the greater part of her cargo in the lower hold, and on the orlop and steerage decks, when she was top-heavy and unstable because of the ice upon and above her upper deck, and that the disaster was caused by negligence in these respects and in omitting to protect the open coal port. In his opinion he reasoned thus:

"Both contributed to the result—the first, by knocking off the coal port and leaving a large opening exposed; the second, by carrying the bottom of that opening below the water line. Without the second roll, the first would have produced no damage to the cargo. Without the first, the second would probably have carried away the cover, as the first did, and have resulted in substantially the same damage."

After the event it is apparent that it was injudicious, and perhaps culpable, to unload the lower parts of the vessel in her top-heavy condition; but I am not fully satisfied that this was a manifest risk at the time, or one which ought to have been foreseen, or that the unloading would have capsize the vessel, if it had not been for the fierce gale, which sprung up on Monday afternoon, and, deflecting from the building on the pier, bore against the starboard beam of the vessel. The assumption of the District Judge that, if the cover of the coal port had not been knocked off by the first roll, it probably would have been by the second, is merely conjectural. If it would have been knocked off by the second roll, the omission to protect it was not a contributory fault. For present purposes, however, I shall assume that the disaster was caused by the negligence of those in charge of the vessel.

If the acts of negligence were faults in the management of the vessel, it is quite immaterial that they were committed while she was in port. It is also immaterial that the unloading of the vessel was committed mainly or wholly to stevedores, and the suggestion that the master did not exercise any supervision over them, if warranted by the evidence, has no legitimate bearing upon the inquiry. The power of management resided with the master, and it was his duty to exercise it for the safety of the vessel during the time she was being unladen, as well as while she was at sea, and so long as he continued in command. As was said in *The Glenochil* (1896) Prob. 10:

"It may be that 'navigation' is a term applicable to something done during the voyage, but 'management' is a broader term and applies to everything done and which should be done for the safety and benefit of the vessel while her cargo is on board."

It is not fairly open to debate that the omission to protect the coal port was a fault in the management of the vessel. It was just such an omission which this court and the Supreme Court held to be within

the exemption of the Harter act in the case of *The Silvia*, 35 U. S. App. 395, 68 Fed. 230, 15 C. C. A. 362; *Id.*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. This fault, however, was not the proximate cause of the disaster. "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidents of a superior or controlling agency are not the proximate causes and the reasonable ones, though that may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." *Insurance Company v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395. The real inquiry, therefore, is whether the fault which consisted in not maintaining the stability of the vessel, or in not correcting her instability, was a fault in the management of the vessel. In other words, is it mismanagement of a vessel for the master to direct or permit such a distribution or disposition of the cargo as will endanger the vessel?

It seems to me this question is only capable of being answered in one way, and that any act done or omitted which necessarily affects the safety of the vessel herself, by those in charge of her management, is a fault in the management of the vessel. To read the statute as intended only to comprehend such acts as are intentionally or deliberately done or omitted with a view to the management of the vessel would be to read into it something which it does not contain.

It is urged, however, that the fault here was a fault in the management of the cargo; and that is the view which was adopted by the court below and is accepted by the opinion of this court. If this were correct in fact or in legal theory, it would neither be controlling nor persuasive. There was no fault in the management of the cargo, qua cargo, and the assertion is merely juggling with words. But, if it was a fault in the management of the cargo, it was also one in the management of the vessel, and therefore within the immunity of the third section. In the recent case of *Rowson v. Atlantic Transport Company* (1903) L. J. Rep. 72, K. B. D. 87, butter carried in the refrigerator of a vessel was injured upon the voyage by neglect in the management of the refrigerating apparatus. The court was of the opinion that, the refrigerating apparatus being a part of the vessel, the fault was one in the management of the vessel, within the meaning of the section. In that case there was more obvious fault in the management of the butter than there was in the management of the cargo in this case; but, because there was a fault in the management of a part of the vessel, it was held to be within the exemption of the third section. Here there was no want of care of the cargo itself.

The exemption created by the third section is not qualified by the terms of the first section. The first section of the statute interdicts shipowners from protecting themselves by special contract with shippers from losses arising from negligence in "proper loading, stowage, custody, care, or proper delivery" of any property committed to their charge. This section refers to acts which directly or primarily affect the cargo. In a broad sense any mismanagement of the vessel which imperils the cargo is a fault; and Congress could hardly have intended by the first section to prohibit shipowners from relieving themselves

from liability for faults in the custody or care of cargo, and by the third section to relieve them from such liability.

The case of *The Glenochil*, which has been referred to, is directly in point upon the general question. In that case, after the arrival of the vessel at her port of destination, and during the discharge of the cargo, in order to give her stability for the purpose of discharging her cargo, the engineer ran water into the ballast tank, but neglected to ascertain the condition of some of the connections, which had become broken in the heavy weather of the voyage, and through which the water damaged part of the cargo. The principle of the decision was that the fault was not in a matter affecting the cargo, but one in the management of the vessel "in doing something necessary for the safety of the ship herself." In that case what was done was done affirmatively in connection with the management of the vessel. In the present case the act was one of omission instead of commission.

The case of *Knott v. Botany Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90, is distinguishable from the present case. The fault there consisted in stowing wet sugar in such juxtaposition to certain bales of wool that, when a certain other part of the cargo was discharged, the drainage from the sugar injured the wool. No injury would have resulted from the original stowage of the wool near the wet sugar, if the discharge of the cargo had not altered the trim of the ship. But the stowage was improper in view of what was subsequently done, and what should have been anticipated as likely to be done. The stowage was the original and proximate cause of the loss, although that cause became operative through a different cause. The court said:

"The wool should not have been stowed forward of the wet sugar, unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship should not get down by the head."

I think that, in construing the Harter act, the judgment of the court has been unduly influenced by the supposed hardship of the case. It is suggested in the prevailing opinion that Congress could not have intended that losses should fall upon "innocent" cargo holders under circumstances of such culpable negligence as this case is assumed to disclose. In enacting the statute Congress had under consideration the interests of innocent ship owners, as well as the interests of cargo owners and the underwriters who insure the vast majority of cargoes carried by sea for compensation which they deem adequate for the risks. The language of the statute implies the intention of Congress, on the one hand, to exact the highest diligence on the part of ship owners to provide vessels in all respects seaworthy and properly equipped, supplied, and manned, and, on the other hand, when they have exercised it to relieve them from the consequences of the faults of those over whom, as their business is usually conducted, they have no immediate control, and to whom they must commit the navigation and management of their vessels. The statute does not discriminate between gross faults and trivial faults, and when a loss has been caused by a fault of navigation or management of the vessel, and the ship owner has fully performed his obligation, it is the meaning of the statute that he shall not be liable.

For the loss accruing to that part of the cargo which was not carried by the Germanic from Liverpool, but was put on board at New York late on Monday afternoon and shortly before she sank, I think the libelants are entitled to recover. When it was taken on board the vessel was not in a seaworthy condition. Crippled with ice, unstable, and with an exposed port hole, she was not in a condition to carry cargo safely.

I am therefore of the opinion that the decree of the court below should not be affirmed, but should be modified.

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SEBECK v. PLATTDEUTSCHE VOLKSFEST VEREIN.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 129.

1. NEGLIGENCE—AMUSEMENT GROUNDS—FIREWORKS—CARE REQUIRED.

Defendant was the owner of a park, at which it held public amusements, for admission to which it charged a fee. Plaintiff attended a festival held at the park, at which defendant gave an exhibition of fireworks, which were manufactured and furnished by a skilled manufacturer, who had previously furnished the same to defendant. Plaintiff was injured by fragments of a mortar, which burst by the premature explosion of a bomb, alleged to have resulted from negligence in its construction. *Held*, that an instruction that it was incumbent on defendant to use the care and prudence which would have been exercised by an ordinarily prudent and intelligent man to protect plaintiff from unnecessary risks, and that if defendant, by its amusement committee, who were not experts, exercised due care to employ a competent and skillful person to manufacture, produce, and discharge the fireworks, and exercised proper precautions to protect spectators by keeping them at a reasonable distance from the place of discharge, it was not guilty of negligence, was proper.

2. SAME—INSPECTION.

Where plaintiff was injured by the premature explosion of a bomb, discharged as a part of certain fireworks on an amusement field, which he attended as a spectator, and the evidence tended to show that the accident may have resulted from the improper charging and timing of the bomb, but such defect, if it existed, was not apparent or discoverable on inspection, a failure on the part of the owners of the amusement field to ascertain such defect was not negligence.

3. SAME.

Where plaintiff, a spectator at a park where certain fireworks were discharged, was injured by the premature bursting of a bomb, and it appeared that defendant exercised proper precautions for the protection of the spectators by keeping them a reasonable distance from the place of danger, the fact that one witness testified that the place where the fireworks were discharged was so narrow that it was not a safe one to set off bombs of the character used did not require a charge that, if the jury found that the place was so small as to render it a dangerous one, they must find for plaintiff; the court having charged that it was a question of fact for the jury whether the place in which they were set off, in view of the precautions which were taken to keep the audience a proper distance away, was reasonably safe.

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¶1. Negligence causing injury to persons at public entertainment or exhibition, see note to *Texas State Fair v. Brittain*, 56 C. C. A. 502.

**4. SAME—REMARKS BY COURT.**

Error, if any, in the court's stating to plaintiff's counsel during the trial that he was injecting a false issue into the case, was cured by a statement in the court's charge that perhaps he ought not to have made such remark, and then fully stating the issues as claimed by both parties.

**5. SAME—WEIGHT OF EVIDENCE—OPINION OF COURT.**

In an action for injuries to a spectator at an amusement park by the bursting of a bomb, discharged as part of certain fireworks, an instruction that, if defendant's committee employed a couple of Italians about whom they knew nothing to produce and discharge the fireworks, they did not exercise the prudence which an intelligent man would have exercised, and then stating, "For myself I do not believe for a minute that they did any such thing, but that is a question of fact for you to determine, and not me," was not error.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon a writ of error to review a judgment rendered in favor of defendant by the United States Circuit Court for the Southern District of New York on a verdict of the jury in an action brought by plaintiff for damages caused by the explosion of a bomb at an exhibition of fireworks given on defendant's grounds.

Clarence P. Moser, for plaintiff in error.

R. F. Rohe, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The defendant is the owner of certain grounds, known as "Schuetzen Park," in North Bergen, N. J., at which it holds festivals and other public entertainments, for admission to which it charges a fee. On the night of August 21, 1898, it held its annual festival, at which, among other things, was given an exhibition of fireworks. The plaintiff attended said exhibition and paid an admission fee of 25 cents. An exploding bomb burst the mortar in which it had been placed, and some fragments of the mortar struck and injured the plaintiff. He brought suit in the circuit court of New Jersey to recover for said injuries, but was nonsuited therein, and said nonsuit was affirmed by the Court of Appeals in said state. 46 Atl. 631. Said court in its opinion reviewed the facts attending said accident, and held, inter alia, as follows:

"The defendant having invited the public to its park, it was chargeable with the duty of using reasonable care to see that the premises were kept in a safe condition for the use of its guests; and if the exhibition, although given by an independent contractor, was of a character to jeopardize the safety of those who were present on the defendant's invitation, the duty was cast upon the latter of taking due precautions to guard against injury. We, however, have been able to find nothing in the evidence which will justify the conclusion that the injuries of the plaintiff resulted from the failure of the defendant to properly perform any duty which it owed to him for his protection. \* \* \* That the premature explosion of the bomb in question resulted either from carelessness in its construction or in setting it off can fairly be presumed from the testimony; but for such carelessness the defendant is not responsible. Its duty in that regard was limited to the use of reasonable care in selecting, as the person with whom to make its contract, one who is skilled in the manufacturing of fireworks and conducting exhibitions thereof; and the evidence clearly shows that it fully dis-



charged this duty in the selection of Gerhardt. Assuming that the accident resulted from such carelessness as has been recited, the blame for it attaches, not to the defendant, but to Gerhardt."

Thereafter, the plaintiff brought this suit. It appeared from the evidence herein that defendant designated the place where the fireworks were to be discharged, and that it was the place which had been used for similar purposes for nearly 20 years, and that a committee of members of the association and a sufficient force of policemen were engaged in keeping the spectators at a distance of from 100 feet to 150 feet from the fireworks. The fireworks were furnished by one Gerhardt, a person skilled in their manufacture and who had previously furnished same to defendant, and they were manufactured by his employes under a contract with the defendant by which the providing of the fireworks and the conducting of the exhibition were left in his hands. The accident resulted from the premature explosion of the bomb while inside the mortar.

It was not definitely shown what caused the explosion. It appears from the opinion of the New Jersey court that the evidence herein does not differ materially from that introduced on the former trial, except as hereinafter stated. Gerhardt, the fireworks manufacturer, had testified on the former trial that the galvanized iron mortars furnished by him were made under his orders and were of the same construction as was used generally by other fireworks manufacturers. He died after said trial and before this action was brought, and his son was produced by plaintiff to prove that the mortars and bombs were improperly constructed, and that the accident resulted from such faulty construction. He testified that one charge of powder was put into the lower compartment of the shell and another into the bomb itself at the upper end of the shell, said charges being connected by a fuse; that the lower charge was arranged to first throw the shell out of the mortar, and thereafter to ignite the fuse leading into the inside of the bomb. He explained the operation of the fuse as follows:

"If this fuse is not properly charged, if it is charged loosely, the flash from the charge that should drive out the contents of the mortar lights this charge, and it immediately flashes right inside the mortar, and then it explodes. If the bomb that burst on that night had been properly charged and properly timed, it could not have burst inside of the mortar. I saw the Italians make up these bombs. I learned how to make shells from them. The explosive in these shells was made out of black needle antimony. No American manufacturer would use that, because it is very dangerous."

On cross-examination he testified as follows:

"Q. You said that those bombs were improperly charged, didn't you? A. I didn't say they were improperly charged. I say there might have been one that was improperly connected. Q. There might have been? A. Yes; it often happens there is a mistake. Q. Do you believe that your father would employ men who did not understand their business? A. I don't think my father would employ men who did not understand their business. No, sir; but accidents are liable to happen."

He further testified that the mortars usually used in the trade in sending up these bombs are either steel or brass, and that when he used such mortars he buried or banked them, and that he did not use

sheet-iron mortars, such as those furnished by his father, because they were "dangerous" and because "they will not throw the shells off."

The court charged the jury generally that:

"Under those circumstances it was incumbent upon the defendant to use the care and prudence which would have been exercised by an ordinarily prudent and intelligent man to protect him, and to protect the others who were there, from unnecessary risks."

And further charged as follows:

"The defendant's amusement committee did not warrant the safety of spectators who were there. Everybody who went there went there with full knowledge that, where fireworks are to be exploded, there is always some risk. The amusement committee were not experts, and did not claim to be. So I instruct you that if you find that this defendant, by its amusement committee, exercised due care to employ a competent and skillful person to manufacture, produce, and discharge the fireworks upon this occasion, and in addition to that exercised proper precautions for the protection of the spectators by keeping them a reasonable distance from the place of discharge, if you find the defendant observed its duties in this respect, it was not guilty of negligence."

To this charge the plaintiff has excepted, and has further excepted to the refusal of the court to charge, as requested by the plaintiff, as follows:

"The defendant, by inviting the plaintiff and others to come upon its grounds and receiving pay therefor, assumed the duty of using reasonable care to protect them against injury."

But plaintiff's contention is that defendant owed to plaintiff "a higher duty than that implied by the term 'ordinary care,'" and that it was defendant's duty "to protect plaintiff from harm," and that, therefore, although defendant had employed a competent and skillful person to manufacture and conduct said exhibition, defendant was also bound to oversee and control the construction and operation of each piece of fireworks furnished for said exhibition. Although the court had, in effect, charged as thus requested, the ground of plaintiff's exception appears to be that the subsequent limitations therein had the effect to relieve the defendant from an alleged legal obligation to see that steel or brass mortars were used, or that the mortars were buried or banked, and that there was no negligence in the making or setting off of the fireworks.

An examination of the cases cited by plaintiff shows that they do not sustain his contentions. In *Thompson v. Lowell, Lawrence & Haverhill Street Railway Company*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, defendant advertised performances at, and hired a manager of, a pleasure resort on its line. The manager hired an armless performer to shoot at a target, and provided the target butt, which consisted of spruce plank with steel back. Plaintiff claimed that he was injured by a small fragment of bullet flying off from the impact when the bullet hit the butt. The court charged the jury that the defendant "was not responsible, unless the exhibition was in its nature such that it would necessarily or probably cause injury \* \* \* unless guarded against, and the defendant failed to exercise due care to prevent harm." The jury having found for the plaintiff, defendant excepted to the above charge,

and claimed there was no evidence of its negligence to go to the jury. The Supreme Court held that the instruction given was right, and that defendant was bound to use due care, and said as follows:

"And the jury might come to the conclusion that in the general arrangements for an exhibition of this nature the butt should be so placed that fragments which might fly from the impact of the bullets could not reach the spectators, and that due care was not taken in the arrangement of the stage with reference to possible accidents of this kind, and that the defendant itself failed in its duty in this respect. We cannot say that this was so much a matter of transitory detail that the manager alone was responsible for an omission to pay proper attention to securing the safety of spectators from such a risk. The case, therefore, was rightly submitted to the jury."

In *Barrett v. Lake Ontario Beach Improvement Company*, 174 N. Y. 310, 66 N. E. 968, the defendant had constructed and maintained for years a toboggan slide connected with its bathing establishment, and had leased it to a third party for the season, reserving the right of entry to care for and preserve the structure. There was evidence that the toboggan slide as constructed by defendant was unsafe for the specific use intended by defendant, and for which it let it to the third party, and the sole question presented was that of "the omission or the neglect of a duty in preparing a structure to be put to a particular public use to make it reasonably fit or safe for that use." The Court of Appeals held that the court below properly left to the jury the question "whether the platform structure had been constructed with the due care which, in the judgment of prudent men, in view of the purpose, should have been exercised by the defendant."

These cases merely discuss and apply the exceptions to the general rule that an owner of property is not liable for damages occasioned by its unsafe condition while leased to and occupied by a tenant, and hold that the question of the exercise of due care in such excepted cases in construction and arrangement should be submitted to the jury. The principle upon which the liability of an owner of property rests, in the case of damages occasioned by its unsafe condition while leased to and occupied by a tenant, is the lessor's neglect or wrong. Thus in *Barrett v. Lake Ontario Beach Improvement Company*, supra, the court says:

"If the premises are rented for a public use, for which he knows that they are unfit and dangerous, he is guilty of negligence, and may become responsible to persons suffering injury while rightfully using them. Such instances would be where he lets a warehouse so imperfectly constructed that the floors will not support the weight necessarily upon them, or where he lets a building for public amusements or exhibitions, or other public purposes, and its construction is so unsafe structurally as to be the cause of injury to any one. *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed 163 N. Y. 559, 57 N. E. 1109; *Edwards v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659."

The same rule was applied in *Thornton v. Maine State Agricultural Society* (Me.) 53 Atl. 799. There the defendant was giving a fair and had let certain space for a shooting gallery. Plaintiff's intestate was killed by a bullet so unskillfully fired that it failed to hit the target, but passed outside a shield placed behind it. As to this shield the court said as follows:

"Was a shield 5 feet by 3½ feet, the top of which was only a little more than 6 feet from the ground, a sufficient protection against such shooting as should have been anticipated? We think a jury might reasonably conclude it was not; and a jury also might reasonably have concluded that the defendant was careless in placing a shooting gallery in such a place as this one was in."

It is true that the court in its discussion of the facts suggests that the jury might have believed that the defendant was liable for having failed to provide against the continuance of the use of unsuitable rifles and ammunition which it had inspected. But these suggestions are obiter, and the court concludes said discussion as follows:

"Upon the whole, we think the verdict is sustainable within the rules of law which imposed upon the defendant the duty of using reasonable care to furnish the plaintiff's intestate safe exhibition grounds to visit and safe approaches thereto."

So that what was really decided in said case was that the jury were justified in finding that the defendant failed to use ordinary care in the selection of such a location for a shooting gallery, and in permitting a shield to be used when it was patent that such shield would furnish insufficient protection.

In the case at bar we think the court fairly stated the law as to the obligations of the defendant, in view of the evidence. The inconclusive testimony of the single witness as to improper construction fails to state any fact from which negligence or wrong could be imputed to defendant. It only serves to show that the proximate cause of the accident may have been the improper charging and timing of the bomb, which caused it to burst inside the mortar. But, if such defect existed, it was not one which was apparent or discoverable upon inspection. Therefore, even if defendant should be charged with the duty of inspecting and examining the fireworks, such inspection would not have disclosed such defect in manufacture. All the cases cited hold that the defendant is only liable in case of negligence or failure to use reasonable care in regard to such matters as are known or should reasonably be known. Furthermore, defendant's officers were not experts. They could not be expected to know whether mortars should be constructed of steel, iron, or brass, or whether it was necessary to bury or bank the mortars in order to guard against danger of accident from defective construction of the bomb. The court, therefore, left to the jury the question of whether defendant exercised ordinary care in the selection of a competent and skillful person to manufacture and discharge said fireworks. The portion of the charge of the court excepted to was merely an application of its general charge that the defendant assumed the duty of using reasonable care to protect the plaintiff against injury, to the facts material to the case.

Plaintiff further excepted to the refusal of the court to charge as follows:

"If the jury finds that the place where the fireworks were set off was so small as to render it a dangerous one, they must find for the plaintiff."

The only testimony to support this request was that of Gerhardt's son, to the effect that the place was so narrow that it was not a safe

one to set off bombs of the character used that night. But it was immaterial what was the width of said place, provided, as the court charged the jury, the defendant "exercised proper precautions for the protection of the spectators by keeping them a reasonable distance from the place of discharge." Furthermore, when the attention of the court was called to said exception, the court further charged as follows:

"You will recall the testimony of the plaintiff that where the bomb was discharged was about 100 feet from where the plaintiff stood, and that there was an open space, according to the testimony of one of the Gerhardts, about 150 or 175 feet across, and, according to the testimony of some of the other witnesses, about 300 feet across. I leave the question with you as a question of fact whether the place in which they were set off, in view of the precautions which were taken to keep the audience a proper distance away, was reasonably safe."

No exception was taken to this charge.

The exceptions to the exclusion of the questions, on rebuttal, as to whether Gerhardt's employes were doing work on and furnishing the fireworks for Gerhardt or on their own responsibility, were not well taken, because the questions called for a conclusion of law. Moreover, they were not proper on rebuttal.

The plaintiff further excepted to the following remark addressed by the court to plaintiff's counsel during the trial:

"I do not doubt your good faith in the least, but it strikes me you are setting up a false issue in the case. There is enough in the case without injecting into it a false issue. It is perfectly apparent, from the young man's testimony, what the transaction really was."

In its charge the court, referring to the remark excepted to, said as follows:

"What are the facts? I made a remark during the examination of a witness, which perhaps I ought not to have made, that it seemed to me that the plaintiff was injecting a false issue into this case."

The court then fully stated the claims of plaintiff and defendant. We think that, in these circumstances, if there was originally any error prejudicial to plaintiff, it was corrected by said reference thereto and statement of said claims.

Plaintiff also excepted to the following expression of opinion in the charge of the court, referring to plaintiff's claim that defendant employed irresponsible and unskillful persons to discharge said fireworks. The portion of said charge in which such expression was used was as follows:

"I leave it to you to say whether the defendant employed a responsible and skillful person, or whether it employed an irresponsible and unskillful person. If the committee employed a couple of Italians about whom they knew nothing, they did not exercise the prudence which an intelligent man should have exercised. For myself, I do not believe for a moment that they did any such thing; but that is a question of fact for you to determine, and not for me."

In the federal courts an expression of opinion upon the facts is within the discretion of the judge. *Baltimore & Potomac Railway Company v. Fifth Baptist Church*, 137 U. S. 568, 574, 11 Sup. Ct. 185, 34 L. Ed. 784. "And it is so well settled, by a long series of de-

cisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. *Vicksburg, etc., Railroad v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; *United States v. Philadelphia & Reading Railroad*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; *Lovejoy v. United States*, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389." *Simmons v. United States*, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968.

The judgment is affirmed, with costs.

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BOARD OF COUNCILMEN OF CITY OF FRANKFORT et al. v. DEPOSIT  
BANK OF FRANKFORT et al.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1903.)

No. 1,172.

1. APPEAL—JURISDICTION—CIRCUIT COURT OF APPEALS.

An order of the Circuit Court, made on an application for leave to file a bill of review for the purpose of setting aside a decree in favor of a bank, which quashed the service of notice of the application on the ground that the bank had become defunct as a corporation, but which also denied leave to file the bill on the merits, although for the same reason, did not relate wholly to matters of jurisdiction, and an appeal therefrom lies to the Circuit Court of Appeals.

2. SAME—MATTERS REVIEWABLE.

Where, after an application for leave to file a bill of review had been denied, the court considered and denied on the merits a second application to file an amended bill which was tendered, such action was in effect an opening of the first order, and an appeal from the later order brings up the entire question of the right to file the bill on the merits.

3. CORPORATIONS—EFFECT OF REPEAL OF CHARTER—RIGHTS PRESERVED BY KENTUCKY STATUTES.

Ky. St. 1894, § 1987, relating to the chartering of corporations by the Legislature, and which provides that, "whilst privileges and franchises so granted may be changed or repealed, no amendment shall impair other rights previously vested," is broad and general in its language, and preserves against impairment the vested rights of all persons, whether of the corporation and its members or of other persons against it; and a corporation whose charter has been repealed still exists for the purpose of being sued on obligations previously incurred, or of being brought into court by notice in proceedings previously instituted.

4. BILL OF REVIEW—APPLICATION FOR LEAVE TO FILE—REVIEW ON APPEAL.

Leave given by the Supreme Court, after its affirmance of a decree of the Circuit Court, to apply to the latter court for leave to file a bill of review, merely lifts the bar of its own decree, and leaves the application to be determined by the Circuit Court on its merits, subject to the right of either party to have its decision reviewed on appeal by the court having jurisdiction.

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¶ 1. Orders, decrees and judgments reviewable in Circuit Court of Appeals, see note to *Salmon v. Mills*, 18 C. C. A. 374.

5. SAME—GROUNDS IN FEDERAL COURT—OVERRULING OF FORMER DECISIONS BY STATE COURTS.

A decree of the Circuit Court of the United States, based on an estoppel created by a judgment of a state court between the parties, and which has been affirmed by the Supreme Court, will not be reversed on a bill of review because the judgment creating the estoppel is subsequently reversed by the highest court of the state on appeal, where, when rendered, it was in accordance with the law of the state as declared by such court, which afterwards overruled its former decisions.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

For opinion below, see 120 Fed. 165.

W. H. & Ira Julian, for appellants.

Frank Chinn, for appellees.

Before SEVERENS and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an appeal, prosecuted in behalf of the city of Frankfort and the state board of valuation and assessment of Kentucky, from an order made by the Circuit Court of the United States for the Eastern District of that state (120 Fed. 165), refusing leave to file a bill of review proposed by the appellants for the purpose of reconsidering a decree made by the said Circuit Court on June 25, 1898, whereby the appellants were enjoined from proceeding under a law passed by the Legislature of Kentucky November 11, 1892 (Laws 1892, p. 277, c. 103), to value and levy a tax upon the franchise of the above-named appellee, the Deposit Bank of Frankfort, for the years 1895-98, and subsequent years, until the expiration of its charter, which decree was rested upon the ground that the above-mentioned law was an impairment of a contract between the state and the bank, which stipulated for a different and lesser rate of taxation than that contemplated by the law complained of. That decree was affirmed by the Supreme Court of the United States on May 15, 1899. In January, 1902, the defendants in that suit, the present appellants, moved the Supreme Court for leave to file a bill of review, upon a petition setting forth that the said decree against them was founded solely upon an estoppel arising from a former judgment of the Fayette Circuit court, one of the state courts of Kentucky having general jurisdiction, in a suit between the same parties brought against the bank to recover the taxes of a former year, in which it was determined that the said law of November 11, 1892, was void for the reason above stated, and that the taxes for which the suit was brought were not recoverable; and it was further stated in said petition that after the final determination of the cause, which had been pending in the United States Circuit Court and Supreme Court, the defendants in the cause in the state circuit court removed it by appeal to the Court of Appeals of the state of Kentucky, wherein the decree of the lower court was reversed upon the ground that the lower court erroneously held the said law of 1892 invalid, and the cause was remanded, and that thereupon such proceedings were had in the lower court that the plaintiffs recovered judgment. It does not appear that the bill of review which the petitioners proposed to file was exhibited to the Supreme Court,

and we infer that none such was there shown. Notice of the motion was served upon Frank Chinn, as the attorney, and upon Buford Hendrick, as president, of the bank. They appeared and moved to quash the return of service of the notice upon affidavits made by them that the charter of the bank was repealed by an act of the Legislature of the state passed March 22, 1900 (Laws 1900, p. 88, c. 28), whereby, as they insisted, the bank ceased to exist, and that all relationship between them and the bank was completely ended, so that service upon them was nugatory. Under a stipulation that there should result no waiver of their motion, they filed a response in which they set forth the act repealing the charter of the bank and other matters not now necessary to be repeated. The Supreme Court thereupon made the following order:

"On consideration of the motion for leave to file a bill of review herein, and of the arguments of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court that permission be, and the same is hereby, granted the appellants to apply to the Circuit Court of the United States for the Eastern District of Kentucky for leave to file such bill as counsel may be advised."

This order having been certified to the Circuit Court, the petitioners applied to that court for leave to file their bill of review, in which they recited the proceedings in the original suit, the reversal by the Kentucky Court of Appeals of the judgment of the Fayette circuit court which, as they allege, was held by the United States Circuit Court to constitute an estoppel against the contention of the defendants in said former suit; and they thereupon prayed that, upon consideration of the removal of said estoppel by the judgment of the Kentucky Court of Appeals, the court would review and vacate its former judgment and enter a decree in favor of the defendants. Service of notice was made as before on the persons supposed to represent the bank as its president and attorney. They appeared and made the same objection to the service of notice, and made the same representation in regard to the repeal of the bank's charter by the Legislature on March 22, 1900. The Circuit Court, having filed an opinion stating its reasons, sustained the objection to the service of notice, quashed the return of service, and overruled the motion for leave to file the bill of review. Thereupon the petitioners filed an amended bill of review and renewed their motion for leave. The amendment made by the new bill consisted of allegations of certain matters of fact designed to show that the bank was not extinguished by the act of March 22, 1900, but that it was reorganized on April 28, 1900, under a law passed in 1856, and had since continued its operations at its former place of business. The petitioners filed affidavits tending to show that the new bank was not a reorganization of the old, but was a new corporation, and they renewed their motion and their objection to allowing the bill to be filed. Whereupon the court entered an order which, after reciting the tender of the amended bill, the motion to quash service of notice, and the objection to allowing the bill to be filed, continued as follows:

"And said offer to file said amended bill of review being heard, upon said amended bill and the exhibits referred to therein, and upon the said affidavits, objections, and motions to quash, and the court being sufficiently advised, delivered an opinion herein, and it is ordered that said motion to quash and



objections to the filing of said amended bill of review be sustained, and the said offer to file an amended bill of review be refused. And it is further adjudged that the said respondents recover of the petitioners their costs herein expended."

The petitioners, having assigned errors, first, in the order quashing the service of notice, and, second, in refusing to allow the amended bill to be filed, appealed to this court. The appellees moved to dismiss the appeal upon the ground that the order appealed from was one which involved the jurisdiction of the Circuit Court and should have been taken to the Supreme Court. This motion was, by order, reserved until the hearing, and must now first be disposed of. As will have been seen, the order complained of not only quashed the service of notice, but also finally denied permission to file the bill. It is true it may be said that a similar reason to that on which the motion to quash was granted was relied on as an objection to the filing of the bill, namely, that the bank was a defunct corporation, which had neither capacity to have representatives nor to be pursued in a legal proceeding. But the order extended beyond the mere quashing of the service; and, in the face of the issue as to whether the bank still existed, it finally denied the application and ordered costs against the petitioners. We think that, in this condition of the case, there being a question of jurisdiction and also one of the merits, it was competent to bring the case to this court, if the petitioners were so advised.

It is objected that, as this appeal purports to be taken from the order made on the tender of the amended bill, and not from that made on the bill first tendered, the appeal is nugatory; that the order first made was the essential judgment, and that the matter of leave became *res judicata*, so that the second order did not disturb it. But it is evident that it was not so dealt with in the court below. The court treated the second application as a continuance of the first, and did not at all consider the first order as foreclosing the inquiry. What the court did was in effect to open the first order and hear the original application upon the amended bill. This objection to the appeal, as one taken from the order finally made, is not tenable.

The court below, upon a survey of the Kentucky statutes bearing upon the subject, reached the conclusion that by the act of March 22, 1900, the bank's charter was immediately repealed, and the corporation completely extinguished, and that there was no statute of Kentucky which continued its existence for the purpose of enforcing its liabilities previously incurred. Section 1 of the act of March 22, 1900, with the preamble, reads as follows:

"Whereas, by virtue of a recent decision of the Supreme Court of the United States, all banks of this state, both state and national, are now required to pay state and local taxes in Kentucky, except the Bank of Kentucky, the Farmers' Bank of Kentucky, and the Deposit Bank of Frankfort, which three last-named banks, by virtue of said decision, are now claiming exemption from all state and local taxes, except as provided in the Hewitt law, during their corporate existence; therefore be it enacted by the General Assembly of the commonwealth of Kentucky:

"Section 1. That an act, entitled 'An act to establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof, also an act, entitled 'An act to incorporate the Farmers' Bank of Kentucky,' approved February sixteenth,

eighteen hundred and fifty, and all amendments and extensions thereof, also an act, entitled 'An act to incorporate the Deposit Bank of Frankfort,' approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are hereby repealed: provided, that if said banks, or either of them, on or before May first, nineteen hundred, file in Secretary of State's office their or its written consent to pay taxes under state and local levies of nineteen hundred and subsequent years, as provided in the Constitution and revenue statutes of this state, the bank or banks thus agreeing shall be excepted from the operation of this act." Laws 1900, p. 88, c. 28.

The bank did not file its consent, but organized under the act of 1856, as before stated. Counsel are at variance as to whether this act was intended to destroy the corporation immediately or to allow it to live until the 1st day of May, whereupon, if it had not complied with the condition, it should then cease to exist. We do not think it necessary to pass upon this question, nor upon the question whether there was a reorganization of the bank. The learned judge in the court below, in his examination of the statutes of Kentucky to find whether the existence of the bank was continued for the enforcement of its liabilities, referred, first, to section 2 of the act of February 14, 1856, which reads as follows:

"That where any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid." 1 Laws 1855-56, p. 15, c. 148.

And he said:

"It is conceded that if section 2 of this act is still the law, then the defendant bank's existence has been preserved thereby for the purposes of the bill of review sought to be filed, because its charter was granted after the act."

He then proceeds to show that it was carried into the General Statutes of Kentucky of 1888, and became section 9 of chapter 68. He then points out that this section was omitted in the revision known as the "Kentucky Statutes of 1894," and that this omission, being from a chapter relating to the general subject which was revised at that time, shows that it was intended to be dropped; and he cites Kentucky decisions that such was the effect of such an omission in the revision of that year. The reason for this omission from the context in which it had stood, the judge suggests, was probably "because it was thought its subject-matter was covered by a provision of the act providing for the creation and regulation of private corporations enacted as part of the same revision."

We quite agree that upon the omission of a provision so important to the winding up of the affairs of defunct corporations we should expect to find elsewhere some provision which would govern the subject. In section 1087 of the same revision it is declared "that whilst privileges and franchises so granted may be changed or repealed, no amendment shall impair other rights previously vested," which provision is still in force. The court below was of opinion that this re-

ferred only to "the rights of the corporation and persons interested therein, not the rights of persons who have claims against the corporation." To this conclusion we do not agree. The language is broad and general, and we must think was intended to guard against the impairment of vested rights of all persons, whether of the corporations and its members, or of others, against it. Such, evidently, was the view of Mr. Justice Harlan in delivering the opinion of the Supreme Court in *Covington v. Kentucky*, 173 U. S. 234, 19 Sup. Ct. 383, 43 L. Ed. 679. Other statutes of Kentucky are referred to by counsel for the appellant as tending to show the solicitude of the Legislature in preserving vested rights upon the repeal or alteration of the charters of corporations, but we are content to rest our decision upon the one above referred to.

We therefore conclude that the court erred in holding that the notice did not bring the corporation before the court, and by this we mean, of course, the corporation which was party to the original suit. Having thus decided the preliminary question, we are in some doubt, in view of the somewhat anomalous position of the case, as to our further duty; that is to say, whether we should remand the case, with direction to the lower court to entertain the application and proceed to determine it upon its merits, or should ourselves consider the merits of the application. From the terms of the order of the Supreme Court, we must suppose that it was intended merely to lift the bar of its own decree and leave to the Circuit Court full authority to inquire and determine whether leave to file the bill ought to be granted. But we cannot suppose that it was intended that its determination should be final, and, undoubtedly, the permission thus given by the Supreme Court would not have precluded that court from reviewing the action of the Circuit Court, if its appellate jurisdiction had not been transferred to the Circuit Court of Appeals. For the Supreme Court did not have before it a proposed bill, and could not, therefore, determine the fitness of the bill which the petitioner might be advised to file, or the propriety of granting leave to file it. It would seem, therefore, that this court should have and exercise the same power as the Supreme Court would have had but for the transfer of its appellate jurisdiction to this court, or as we should have had if the final decree in the original case had been made by this court, and we had granted the like permission to apply to the lower court as the Supreme Court has granted. The Circuit Court has made a final order denying the application, and upon grounds which extend to its merits, as its opinion and order clearly show. We think the whole matter is before us, and that we should not simply decide a part of it and remand the case, to be, perhaps, brought here again upon another appeal.

We have held that the court below was in error in holding that the bank was extinguished by the repeal of its charter to the extent that it could not be served with process to bring it before the court to respond to the application for leave to file the bill, and it is a necessary consequence, if not an identical proposition, that it was competent to be a party to the proceedings. We must therefore hold that the Circuit Court gave an insufficient reason for refusing and dismissing the application. But we think that upon other grounds its order was

right. The proposition is to obtain the review and reversal of the former decree of the Circuit Court of the United States, affirmed by the Supreme Court, upon the ground that the judgment of the Fayette circuit court, upon which the United States court relied as an estoppel and made the basis of its decree, has since that time been carried to the Court of Appeals of Kentucky and been there reversed. No other ground for the bill of review is suggested, and the bill brings forward no other. Some question is made by the appellee whether, upon an inspection of the record in the original case, the estoppel by judgment was in fact the only basis of the decree. We think there can be no doubt that it was the controlling reason for it.

But is the ground assigned a sufficient reason why the original decree should be now reversed? The course of decision in the courts of Kentucky upon the question of the validity of the act of the Legislature of November 11, 1892, which was held void by the judgment of the Fayette circuit court above referred to, illustrates the consequences which would ensue if the fact that, since the judgment of the United States court became final, the judgment of the state court upon which it rested has since been reversed, should be accepted as a valid reason for reversing the judgment of the United States Court. The judgment of the Fayette circuit court was itself rested upon a former decision of the Kentucky Court of Appeals, which held the act of November 11, 1892, void as an impairment of the state's contract with the banks by a bare majority. After the decree of the United States court in question, the membership of the Kentucky Court of Appeals was changed, and, the question being again brought up, that court overruled its former decision by a bare majority, and, on the Fayette circuit judgment being brought up, it was reversed. We do not think it can be admitted that the final judgments of the courts of one jurisdiction can be thus made dependent upon the changing views of the courts of another. In the present case the ultimate and controlling fact relied upon is that the Kentucky Court of Appeals has swept away the foundation on which the former decree of the United States court was decided; for it was the inevitable result of the new law of the state, as declared by its Court of Appeals, that the Fayette circuit court judgment should be reversed. Suppose the United States Court should reverse its decree, and the state court should again change its views and revert to its former opinion; shall the United States Court restore its decree? The principles upon which the finality of judgments rests preclude such consequences. Even in the same jurisdiction a judgment which has become final and was rightly decided as the law then stood will not be reversed upon a bill of review upon the ground that the law has been changed by later decisions. To hold otherwise would leave the judgments and decrees of the courts on very unstable foundations, and dependent, not upon their own rectitude, but upon the vicissitudes of shifting opinions in regard to the governing law. *Tilghman v. Werk* (C. C.) 39 Fed. 680 (Jackson, Circuit Judge); 3 Encl. of Plead. & Prac. 581, notes.

In *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, the Circuit Court had decided a case upon its own interpretation of a statute of Missouri, and afterwards the Supreme Court of the state

rendered a contrary decision in a case against the same defendants at the suit of a different plaintiff raising the same question. But the Supreme Court of the United States, upon an appeal from the judgment of the Circuit Court, held it was not bound by the decision of the state court, and affirmed the ruling of the Circuit Court. Now the correctness of the judgment of the lower court was open to the correction of the Supreme Court, but it refused to make any, and affirmed the judgment. Suppose that, instead of an appeal to the Supreme Court of the United States, an attempt had afterwards been made to review the judgment upon the ground that the law of Missouri had been declared by its Supreme Court to be the contrary of that on which the decree had been rested. No one can doubt that it would have been fruitless. Yet such an application would have stood in one respect on better ground than the present, for there the statute had never received a construction by the Supreme Court of the state. We do not lose sight of the fact that there was an actual reversal of the judgment of the Fayette circuit court; but, as we have said, that was the necessary consequence of the change in the law upon which it rested. Suppose, again, that in the present case the courts of the United States had founded their judgment directly upon some statute of the state, holding it to be a valid law. The sanction of such a law would be of equal force at least with the estoppel upon which it did found it. Would the decree be reopened and reversed upon a showing that the statute had been since then held invalid by the highest court of the state? We do not think so. And yet such later decision would as completely annihilate the foundation of the decree as did the reversal of the judgment of the Fayette court. We are not required to determine which of the two conclusions of the Kentucky Court of Appeals was right, and we therefore pass over that subject. It was undoubtedly competent for that court to change its opinion if it saw good reasons for doing so, and no other tribunal is privileged, without necessity, to challenge the sufficiency of its reasons. We have here only to determine whether in point of law its later decision reversing the judgment of the Fayette circuit court gives ground for reopening and vacating a final judgment of the courts of the United States founded upon it, and our conclusion is that it does not.

The order of the Circuit Court is affirmed.

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**CARROLLTON FURNITURE MFG. CO. v. AMERICAN CREDIT  
INDEMNITY CO.**

(Circuit Court of Appeals, Second Circuit. July 1. 1903.)

No. 14.

**1. INSURANCE—PLACE OF CONTRACT.**

Where an application for insurance was made, the policy was accepted, and the premium paid in Kentucky, no place of payment in case of loss being named therein, the contract was a Kentucky contract, and governed by the laws of that state.

**2. SAME—AVOIDANCE OF POLICY—MISREPRESENTATIONS.**

Subsequent to the issuance of a policy insuring plaintiff against losses generally on sales of merchandise in its business to a certain class of

customers, a rider was attached by which it was insured against losses on sales to a particular firm to a limited amount; the rider containing a clause, "all other terms and conditions of the said policy to remain in full force and effect." *Held*, that representations made in the original application as to plaintiff's previous gross sales and losses were immaterial to the particular risk assumed by the rider, and were not incorporated into such contract by the clause quoted, which must be construed as referring only to terms and conditions which were pertinent.

8. SAME—MATERIALITY OF REPRESENTATIONS—WHEN QUESTION OF LAW.

Representations made in writing in an application for insurance in response to written questions, and warranted by the applicant to be true, as the basis of the contract, are thus made material by the action of the parties in so treating them; and their materiality is a matter of law, arising from the contract, to be declared by the court, and not a question for the jury.

4. SAME—AVOIDANCE OF POLICY—TRUTHFULNESS OF REPRESENTATIONS.

A warranty in an application for insurance must be literally and exactly fulfilled, but a representation is satisfied if it is substantially true; and a slight variance, which would not have influenced the action of the insurer in making the contract, will not defeat the policy.

5. SAME—QUESTION FOR JURY.

Whether a representation of fact made in an application for insurance is substantially true or substantially false is a question for the jury.

6. SAME—ESTOPPEL.

Defendant issued a policy insuring plaintiff against losses on sales of merchandise to customers having a commercial rating in the last published book of Dun & Co. The application called for a statement by plaintiff of its gross sales and losses each year for the five last preceding years. In an action on the policy, it was shown that the losses during that time largely exceeded the amounts stated in answer to the question; but there was also evidence tending to show that defendant's agent stated to plaintiff that the question called for a statement of the losses only on sales to customers having the commercial rating, which was the class to be insured, and that such agent himself ascertained the amounts from plaintiff's books, and wrote the answers, which were substantially correct as to such losses. Under the state statute, the answers were representations, and not warranties. *Held*, that if plaintiff, in signing the application, acted upon the construction placed by the agent on the question, which was a question for the jury, defendant was estopped to claim that the policy was avoided by the misrepresentation.

On Rehearing. For former opinion, see 115 Fed. 77.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The reargument of this cause was granted upon the application of the defendant in error because it was urged that the decision of the Supreme Court in *Northern Assurance Co. v. Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, was so wide a departure from some of its previous decisions as to virtually overrule them—especially those which had been referred to in the opinion of this court. At the time of the former argument that decision had just been announced, and, although it was adverted to by counsel, it was not cited in the briefs, and was only cursorily discussed; and it was not referred to in the opinion of this court. Upon the reargument, not only has the bearing of that opinion been discussed, but all the questions presented by the writ

14. See Insurance, vol. 28, Cent. Dig. § 560.

of error have been discussed; and, as one member of the court was present who was absent at the former argument, all the questions have been reconsidered.

In the former opinion the reasons for the conclusion that the contract was a Kentucky contract were not assigned, because we did not suppose that conclusion to be reasonably debatable. Its correctness, however, has been challenged upon the reargument, and the defendant in error insists that the contract was a New York contract. This contention rests wholly upon the fact that the contract, upon its face, purports to have been executed at the city of New York. The policy provides that the proofs of loss are to be presented at the central office of the company, in St. Louis, Mo., and is silent as to the place where payment of losses is to be made. It provides that no claim shall be provable under it for a loss accruing prior to the payment of the premium, "even though the policy has been delivered prior to such payment." When the cause was before this court on a previous writ of error, the facts with reference to the making of the contract did not fully appear, and the contract was held to be a New York contract, because, so far as appeared, the application for insurance was accepted in New York, and the policy had been executed there, and from there transmitted to the plaintiff. It appears by the evidence in the present record that the application for the policy was made at Carrollton, Ky., and forwarded thence to the office of the defendant at St. Louis, Mo., which office seems to have been the principal place of business of the defendant. It further appears that the application was not accepted by the defendant, and, after a correspondence between the defendant and plaintiff, the defendant sent to the plaintiff a policy which did not conform to the original application, or to the terms suggested in the correspondence, with a letter expressing the hope that the plaintiff would accept the policy "as now submitted," and remit a check for the premium. This letter was addressed to the plaintiff at Carrollton, Ky., and thereafter at that place the plaintiff mailed his check to the defendant at St. Louis. Thus the application was made in Kentucky, the policy was accepted in Kentucky, and the premium was paid in Kentucky. The facts bring the case directly within the decision in *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497, where the application was made in Missouri, and the policy, although executed in New York, was accepted in Missouri. The court said:

"The conclusion is inevitable that the policy never became a complete contract, binding both parties to it, until the delivery of the policy and the payment of the first premium in Missouri, and consequently that the contract is a Missouri contract, and governed by the laws of that state."

In the former opinion we did not consider and did not intend to decide whether the untruth of the representations in respect to the gross sales and losses should preclude a recovery by the plaintiff for the losses arising upon the sales to Elliott & Cougle. As that question has been somewhat discussed upon the reargument, we deem it proper to give our views in regard to it. By a rider annexed to the policy the defendant undertook to insure the plaintiff against losses

upon sales to that firm to an amount not exceeding \$7,500. The rider contained the clause, "all other terms and conditions of the said policy to remain in full force and effect." This was a very different contract from that embodied in the original policy, not being an insurance against losses upon sales to the plaintiff's debtors generally. However influential information as to the amount of the plaintiff's gross sales and gross losses during previous years might be in estimating the risk likely to arise in insuring the plaintiff's debtors generally, it could not be of any importance in estimating the risk arising from sales to a particular debtor. The risk as to the latter would depend wholly upon circumstances peculiar to that debtor—such as the antecedents of that debtor, or the nature of the business transactions and relations between the plaintiff and such debtor. The clause incorporating the other terms and conditions of the policy into the contract made by the rider was not intended to refer to those which were wholly foreign to the particular insurance, and which the parties must have understood to be exclusively applicable to a different class of risks, and it should not be construed as importing into the contract a representation of the truth of immaterial statements.

Upon the question whether the materiality of the representations was for the jury or for the court, in addition to what was stated in our former opinion we quote the language of the court in some of the adjudged cases. In *Campbell v. New England Mutual Life Insurance Co.*, 98 Mass. 402, in an opinion by Gray, J. (the late Justice Gray of the Supreme Court), after stating that where the question of the materiality of the representations depends upon circumstances, and not upon the construction of any writing, it is a question of fact to be determined by the jury, he said:

"But where the representations upon which the contract of insurance is based are in writing, their interpretation, like that of other written instruments, belongs to the court; and the parties may, by the frame and contents of the papers, either by putting representations as to the quality, history, or relations of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material; and, when they have done so, the applicant for insurance cannot afterward be permitted to show that a fact which the parties have thus declared to be material to be truly stated to the insurers was in fact immaterial, and thereby escape from the consequences of making a false answer to such a question."

Lord Chancellor Cranworth, in *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, used this language:

"Whether certain statements are or are not material, where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material; and if they choose to do so, and to stipulate that, unless the assured has answered a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy."

In *Miller v. Mutual Benefit Life Insurance Company*, 31 Iowa, 216-232, 7 Am. Rep. 122, the court observed:

"A misrepresentation by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating



the latter from the contract as if the fact had been material, since by making such inquiry he implies that he considers it so. In all jurisprudence this distinction is recognized. It is particularly applicable to written answers to written inquiries referred to in a policy. The rule is so because a party in making a contract has a right to the advantage of his own judgment of what is material, and if, by making specific inquiries, he implies that he considers a fact to be so, the other party is bound by it as such."

In *Graham v. Fireman's Insurance Co.*, 87 N. Y. 69-77, 41 Am. Rep. 348, the court said:

"And in a case like this, where a specific inquiry is made, the question of the materiality of the statement in respect to the risk is settled by the parties as a matter of contract. A broad distinction exists whether the statement is made in answer to inquiries or otherwise. In the one case the answers are made material by the act of the assured, whether they are in fact or not, while in the other case, even though the statements are made part of the policy, they are not efficacious as warranties, although material in fact."

In the present policy the application, by its terms, was "made part of this contract of indemnity"; and the application, in terms, warranted the answers to be true, and offered them as a consideration of the policy to be issued. The representations were thus warranted to be true as the basis of the contract, and notwithstanding by the Kentucky statutes they are to be regarded as representations, and not warranties, they cannot be regarded as immaterial representations.

It is urged for the defendant in error that the court below would have been justified in directing a verdict for the defendant upon the facts proven in respect to the gross losses for the year 1891, the amount of which was stated in the application as being \$498.90. This contention rests upon the theory that the losses for that year were shown to be in amount \$2,813.99, including in that amount a loss upon sales to W. F. Mayer of \$1,963.39, and on sales to A. F. Henning of \$319.20. There was evidence controverting the existence of the Mayer loss and the Henning loss, and, excluding these from the amount of the losses for that year, it would appear that the losses of the plaintiff were \$531.40, instead of \$498.90, as represented. Assuming that a discrepancy of \$32.50 existed between the losses represented and the actual loss, the trial judge would not have been warranted in directing a verdict for the defendant. Treating the statement in the plaintiff's application as a representation, and not as a warranty, as must be done because of the Kentucky statute, it was for the jury to determine, in view of the insignificant discrepancy, whether the representation was substantially true. A warranty must be literally and exactly fulfilled, but a representation is satisfied by showing a substantial compliance. If it is substantially true (that is, if it is so far true that the conduct of the insurer would not have been different if the exact truth had been represented), the variance will not defeat a policy; and whether a representation is substantially true or substantially false is a question for the jury. 1 May on Insurance (3d Ed.) § 186; *Missouri, etc., Trust Company v. German National Bank*, 40 U. S. App. 710, 77 Fed. 117, 23 C. C. A. 65.

Upon the remaining question which has been considered upon the reargument, we adhere to the views expressed in the former opinion of the court, and are entirely satisfied that the present case is con-

trolled by the Chamberlain Case, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341, as an authority directly in point which this court, as a subordinate tribunal, cannot disregard. The strict similarity of the two cases leaves no room for an attempt to distinguish one from the other. In this case, as in that, there was an untrue statement in the application signed by the insured; and in this case, as in that, because of the untrue statement the policy was void when it was issued, unless the insurance company was estopped from asserting the untruth of the statement. In this case, as in that, the misrepresentations consisted in an answer to a question in the application, the answer was prepared by the agent of the insurance company, and the insured, in making it, acted upon the construction placed by the agent upon its meaning. The two cases cannot be differentiated by any divergence in the contract of insurance between the parties. The policy in the Chamberlain Case provided that "the contract between the parties is completely set forth in this policy and the application therefor taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated." The contract in the present case provides that the "entire agreement" between the parties shall be constituted by the application and policy, "any verbal or written agreement by any agent of said insurance company to the contrary notwithstanding." The difference in the phraseology of the provisions is immaterial. Each contract makes the application and the policy the complete contract between the parties, and precludes any modification of that contract by any agent of the insurance company, other than a principal officer. The two cases differ merely in the cogency of the evidence to prove the fact that the agent of the insurer, and not the insured, was the responsible author of the misrepresentation. In the Chamberlain Case the evidence was irresistible; in this case it is conflicting, and presents a question of fact for the jury.

In our former opinion we did not advert to the Fletcher Case, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, because the Chamberlain Case was a later judgment of the Supreme Court, and if there were any conflict in the two decisions the later must prevail, and also because the court distinctly declared in the Chamberlain Case that the Fletcher Case was distinguishable, and a discussion of it "would not serve any useful purpose." The Northern Assurance Case, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, is wider than the Fletcher Case from impinging upon the Chamberlain Case. The policy contained a provision that it should be void if the insured had any other contract of insurance upon the property covered by the policy, and another that no agent or other representative of the insurance company should have power to waive any condition of the policy otherwise than by a written waiver made upon or attached to the instrument. At the time the policy was issued there was a prior insurance upon the property, which had been procured by the insured, and the fact was well known to the agent of the insurance company who procured it and delivered the policy; but there was no written waiver of the condition. The court said:

"Accordingly it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the condition. The question before us is therefore reduced to one of waiver."

The court decided that the act of the agent in issuing the policy with full knowledge of the prior insurance was not a waiver of the condition by the insurance company, placing its decision upon the principle that the parties had agreed that there could be no waiver unless it should be manifested in writing. In an opinion reviewing numerous adjudged cases, the court reached the conclusion that when the parties saw fit to agree that there should be no waiver, except one in writing, and that no agent of the company should have power to make a waiver in any other way, that contract must stand, and, the contract being in writing, it could not be overthrown or varied by parol evidence of what took place at the time it was made. The principle of estoppel, upon which the Chamberlain Case turned, is not discussed in the opinion, nor is the Chamberlain Case adverted to. In view of the very exhaustive review of the prior adjudications, it is reasonable to assume that the Chamberlain Case was not referred to because its facts so differentiated it that no reference to it was deemed necessary. It is urged by counsel for the plaintiff in error that the Chamberlain Case is overruled or discredited by the Northern Assurance Case. We cannot for a moment assent to this proposition. In the Chamberlain Case the court held that the insurer was estopped from adopting a different meaning to an answer to a question in an application from that given to it by its agent who procured the application. In the Northern Assurance Case the court held that the insurer had not waived a condition of its policy by the verbal waiver of its agent, because the contract precluded such a waiver, and required one manifested in writing. In the Chamberlain Case the insurer was charged with knowledge when it received the premium that the policy was void if the condition could be treated as operative. In the Northern Assurance Case the insurer was not charged with such knowledge, because by the force of the contract the knowledge of its agent was not its knowledge, unless manifested by written evidence. The two decisions proceed upon different lines. We think there is no inconsistency between them, and, if there were, it is not for this court to assume that the Supreme Court intended to overrule the Chamberlain Case by indirection. As we stated in our former opinion, the Chamberlain Case was approved, and the principle of the decision followed, in *McMaster v. New York Life Insurance Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64—a case decided at the same term as the Northern Assurance Case. It is inconceivable, in view of this fact, that the court overlooked the Chamberlain Case. If the policy in the Chamberlain Case had contained a provision that no estoppel could arise out of the act of an agent, which should be binding upon the insurance company, unless evidenced in writing upon or attached to the policy, the two cases might be irreconcilable; but, had that been so, we should not feel justified in holding that the Chamberlain Case had been overruled or discredited by the Northern Assurance Case, when it was not referred to in the opinion in the lat-

ter case, and when it was expressly approved in another opinion of the court delivered at the same term.

Our former decision reversing the judgment is reaffirmed.

COXE, Circuit Judge. I concur in the result but am not prepared at this time to indorse the view taken in the opinion as to the Elliott & Cougle claim.

### KEITH et al. v. ALGER.

(Circuit Court of Appeals, Sixth Circuit. July 21, 1903.)

No. 1,166.

1. **BILL OF REVIEW—APPLICATION FOR LEAVE TO FILE—DECREE ENTERED ON MANDATE.**

Where a decree has been entered on the mandate of an appellate court which left no question to be determined by the lower court, the sufficiency of the reasons alleged in support of a proffered bill of review should be determined by the appellate court, although, where material matters are involved, which have transpired in the court below since the decision of the cause, or for other sufficient reasons, the appellate court may remit the inquiry, in whole or in part, to the lower court, and authorize it to settle the matter.

2. **SAME—GROUNDS—NECESSITY FOR SHOWING SUBSTANTIAL INEQUITY IN DECREE.**

It is not enough to entitle a party to maintain a bill of review that the new evidence presented shows the decree to have been technically erroneous, and, if presented on the hearing of the cause, would have induced a different decision, but it must further appear that, by reason of the decree entered, the party complaining was deprived of some substantial equity.

3. **SAME—MATTER OF ABATEMENT.**

A decree rescinding a sale of lands to plaintiff, and awarding him judgment for the purchase money paid, will not be set aside on a bill of review merely because of newly discovered evidence that plaintiff had executed a conveyance of the lands pending the suit, where it was conclusively shown on the trial that the sale was induced by gross frauds and the bribery of plaintiff's agent, by which he was led to pay for the lands a price greatly in excess of their value, and no equity of the defendants was impaired by such conveyance.

4. **SAME.**

The making of a deed to lands by a plaintiff pending a suit by him for a rescission of the contract by which he purchased the same, where it was understood by the parties to such deed that it was conditional, and should become effective only in case, as the result of the suit, the grantor should retain or acquire the title to the lands, and which deed, by agreement, was not recorded, did not deprive the grantor of control of the lands, so as to prevent his complying with any decree of the court with respect thereto, nor did it amount to a ratification of his purchase, such as would have abated the suit if it had been shown therein; and it is not sufficient, when shown by a bill of review, to require the court to set aside a decree subsequently rendered rescinding the sale on the ground of the fraud of the defendants.

Petition for Leave to File Bill of Review in the Circuit Court of the United States for the Eastern District of Tennessee.

This is a petition for leave to file a bill of review in the Circuit Court for the Eastern District of Tennessee in the case of Alger v. Keith, which was

before this court some time ago, and is reported in 44 C. C. A. 371, 105 Fed. 105. The complainant had filed the bill for the purpose of rescinding the sale to him of a large tract of land in the southeastern part of Tennessee, which he had purchased upon the supposition that it was valuable coal and timber land. His complaint was that he was induced to make the purchase of the land by the fraudulent representations and practices of the defendants' agents, and by the bribery of his own agent, sent into the locality for the purpose of examining the land and reporting to him its quality before the purchase was made, and who had made a favorable, but false, report. The circumstances are fully stated in the opinion given by this court when the original case was here. Incident to the rescission prayed for, he asked for the declaration of a lien upon the land for the purchase money which had been paid by him. The decree of the Circuit Court, which was for the defendants in the original cause, was reversed, and the cause was remanded to that court, with a direction to enter a decree for the complainant, that the sale be rescinded and the price refunded, that he was entitled to a lien for the purchase money, and that the land be sold to realize it. A decree was entered in the Circuit Court in conformity with the mandate. The sum which the complainant was decreed to be entitled to recover was \$202,258.47, besides the costs. The lands were sold, and the complainant became the purchaser for \$50,000. He proved the balance of his claim in the probate court against the estate which the defendants represented. The estate was insolvent, but he realized therefrom a further sum, the amount of which does not appear.

The defendants in the original cause have presented a petition to this court praying for leave to file a bill of review in the Circuit Court to re-examine the decree entered upon the mandate of this court, that the said decree be vacated, and that the decree of the Circuit Court which was here reversed be reinstated, and the petitioners be restored to their former estate. An order to show cause why the prayer of the petition should not be granted was made, and the respondent has answered.

R. H. Williams and Foster V. Brown, for petitioners.

J. J. Lynch and Floyd Estill, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

This is an original petition filed in this court, in conformity with the requirement that, where a bill of review is proposed for the purpose of vacating or modifying a decree entered in the lower court pursuant to the mandate of the appellate court, the permission of the appellate court must first be obtained. In respect to the extent of the inquiry which the appellate court will make upon the presentation of such a petition, the practice has been somewhat elastic, and seems to have been regarded as in some measure a matter of convenience, and we find that often in the same court different courses have been pursued. Having it in mind that in such a case as this the decree proposed to be reviewed is in fact our own decree, entered by the Circuit Court upon a mandate which leaves no question for the determination of that court, we have held that the sufficiency of the reasons for disturbing such decree ought to be determined by the court whose decree it is, rather than by the court whose hand has entered it. *Society of Shakers v. Watson*, 77 Fed. 512, 23 C. C. A. 264; *Jourolman v. Ewing*, 85 Fed. 103, 29 C. C. A. 41; *Kissinger-Ison Co. v. Bradford Belting Co.*, 123 Fed. 91. This practice presupposes that this court has sufficient data before it to form a satisfac-

tory conclusion as to whether the grounds shown by the petition are such as that, in justice to the parties, the decree should be reopened and the new grounds considered. No doubt, circumstances may arise where, from lack of means of information, or where matters are involved which have transpired in the court below after the entering of the decree of the appellate court and which are material to be considered, or for other reasons, the appellate court might think it best to remit the inquiry, in whole or in part, to the lower court, and authorize it to settle the matter. It seems anomalous that the decree of an appellate court should in any case be subject to the discretion of the lower court, but it is settled by long practice that the appellate court may delegate its authority to the lower court if it finds it expedient to do so. In the present case we find no reason for departing from the general rule which we have indicated.

The conditions of the case which we have to consider are, briefly stated, these: In the original cause it was proved beyond doubt that the contract of sale was brought about by the grossest frauds. We need not again go over the particulars. There was only one ground of defense worthy of consideration and that was that the complainant had, with knowledge of the facts, slept upon his right to rescind, and had dealt with the purchased property as his own. And we held that, although it did appear that he had for a considerable time before he demanded a rescission of the sale known that he had been deceived, he was confronted with the fact that he had sent his own agent—an expert in such matters—to make thorough examination of the land, with a view to finding out whether the representations of his vendor were true or not, and the agent reported that they were true. This was before the purchase. But the agent had been corrupted, and reported falsely. This was not found out by the complainant for a considerable time, but when he learned of it he promptly began his suit. The final decree for the complainant was entered in the Circuit Court January 11, 1901. The petitioners now make application for leave to file a bill of review upon the ground that they have lately discovered new and important evidence, which, as they claim, entitles them to a reversal of our former decree. The newly discovered evidence is that of a deed of conveyance of the lands in question in the original suit by the complainant to Gov. Bliss, of Michigan, in February, 1897, between two and three years after the suit was commenced. This deed, as the petition states, was withheld from record, and was finally destroyed, and a new deed given in its place, after the complainant had acquired the title by his purchase under his decree. The petitioners thereupon further aver “that said facts with reference to said sale by defendant Alger were purposely concealed from the court and the plaintiffs, and a fraud thereby worked upon the plaintiffs, in that they were prevented from taking advantage of their legal right to have said suit for rescission dismissed because of said act of defendant Alger in making a sale of said lands during the pendency of said suit.” To the petition an affidavit of one of the solicitors of the petitioners is attached, in which he states that he learned of the deed of February, 1897, from a statement casually made to him by Gov. Bliss in June, 1902, in the course of some busi-

ness negotiations he was having with the Governor about some related matters. The two principal grounds upon which the application is rested are, first, that the deed of February, 1897, disabled the complainant in that suit from performing his part in the rescission prayed for, by reconveying the lands to the defendants in that suit; and, secondly, that the complainant thereby ratified the contract of sale which he was seeking to rescind.

1. Counsel for petitioners remind us of the rule stated in *Society of Shakers v. Watson*, 77 Fed. 512, 23 C. C. A. 264, and *Jourolman v. Ewing*, 85 Fed. 103, 29 C. C. A. 41, that "it is a leading rule that the new evidence must be of such a character and so controlling in its effect as that it would probably induce a different conclusion from that on which the former decree was based, in order to give ground for the filing of such a bill," citing 2 Daniell, Ch. Prac. 1577; and it is urged that the new evidence is of that character. But this statement by no means exhausts the conditions upon which a bill of review can be maintained. Another condition is that the party complaining must have been deprived of some substantial equity thereby; and this means not some technical advantage, upon which, if it had been known, that party would have been entitled to a different decree. Moreover, the court, in inquiring whether the party has been aggrieved, will look to the consequences which have ensued or are likely to ensue in consequence of the fault complained of. In other words, the court takes into view all the circumstances of the situation, for a bill of review is a *dernier ressort*, devised to relieve a party who has suffered a substantial wrong from the miscarriage of justice in the former proceedings. And the inquiry deals with the state of things existing at the time of filing the bill of review. That facts which might have availed to prevent the decree, or to reverse it upon appeal, will not suffice to enable a party to maintain a bill of review, unless such facts defeat a substantial equity, is a doctrine well established. In *Thomas v. Harvie's Heirs*, 10 Wheat. 146, 6 L. Ed. 287, there had been a decree requiring the defendant to convey certain lands to Harvie's heirs. Afterwards the defendant filed a bill of review, in which he alleged that Harvie died pending the original suit, and that the suit was revived in the name of his heirs, to whom the defendant was decreed to convey, and further alleged that since the decree a will of Harvie had been found, wherein he devised the lands to certain devisees, only one of whom was an heir. This, of course, showed error in the decree. But the Supreme Court held that it was not an error which touched any equity of the defendant, but was an error which the other parties might adjust among themselves. In *Whiting v. Bank of United States*, 13 Pet. 6, 10 L. Ed. 33, the defendant had died pending the suit, and it was not revived. Upon a bill of review filed by his heirs, assigning this as error, and that another necessary party had not been brought in, the court held that, assuming that these were errors which might have been complained of in the original suit, they were not available in a bill of review; and Mr. Justice Story, delivering the opinion, said:

"No party can, by the general principles of equity, claim a reversal of a decree upon a bill of review, unless he has been aggrieved by it, whatever

may have been his rights to insist on the error at the original hearing or on the appeal."

And in his work on Equity Pleading (section 411) the learned author instances under this rule that "matter of abatement has been also treated as not capable of being shown for error to reverse a decree"—a matter bearing a strong analogy to that in the present case. To the same effect is Lube's Eq. Pl. (2d Am. Ed.) 178.

It clearly appears that the petitioners have lost nothing by reason of the decree, except the technical advantage which they lost from not being able to present it in time to abate the suit. The consequences have been the same as if the deed had never been made, and their situation has not been impaired in respect of any equity of their own.

We have assumed in this discussion, so far, that the fact of the conveyance would have been ground for an abatement of the suit if it had then been known and presented. And we have also considered the conveyance as absolute and unconditional. The result is that the petitioners present no sufficient equitable ground on which to demand a review of the decree.

2. But in response to the order to show cause, the respondent has appeared and answered under oath, admitting the execution and delivery of the deed in question at the time stated in the petition, and states in explanation thereof, in substance, that it was done in pursuance of an understanding with Gov. Bliss that the conveyance was to be provisional only, and was to have effect if, as the respondent expected, he should, at the end of the litigation in which the lands were involved, have title to the land. His reasons for expecting that result were that in case he failed in his suit he should have the lands, and that if he succeeded he would in all probability acquire the lands by becoming the purchaser at the sale under the decree. The estate of the vendor was insolvent, and there was no likelihood that it could redeem, or those concerned in it would purchase, the land. And this was what in fact has happened, as the petitioners state. Certain business relations between the respondent and Gov. Bliss are narrated in the answer, giving color to this explanation, and it is confirmed by the affidavit of Gov. Bliss which is attached to the answer. The probabilities seem to us to favor the explanation. It was known to the parties to the transaction that the suit involving the lands was pending, and no purpose appears to have been entertained of withdrawing it. It must have been anticipated by Gov. Bliss that during its continuance the lands would be subject to such disposition as the court might make, and it seems unlikely that the respondent would have disqualified himself from surrendering the lands if his suit should succeed and the court should so order. The deed was not recorded, and this fact is relied upon by the petitioners as showing that it was known to be injurious to the objects of the suit, and was therefore concealed. But it is quite consistent with the explanation given that it should not have been recorded. The title to some of the tracts was unsettled, and the testimony shows that it remained unsettled until after the litigation was ended. Besides, if the agreement between the respondent



and Gov. Bliss was such as they state, the transaction was not definitely closed. And moreover the record would not show the conditions upon which the deed was made. In the end a new deed was given for such of the lands as it was shown the respondent could give a good title to, and the deed was recorded. The first deed was given as a conditional payment of certain obligations of the respondent to Gov. Bliss, and it is stated that a final adjustment was made at the time the new deed was given. If these were the facts, it is not singular that the second deed should have recited only a nominal consideration. It amounted to a confirmation of the original, with such modifications in the descriptions of the land as might be required. If there had been any purpose to mislead, it would be more natural to expect that the full consideration should have been stated.

We have gone somewhat into detail for the purpose of showing that there are at least plausible grounds for believing that the first deed, which is the basis of the petition, did not remove the land from the complainant's control, and was not intended to do so, and that it continued at all times subject to the exigencies of the suit. Standing alone, it would have had the effect claimed for it. But as the whole transaction is explained, it did not. And there can be no doubt that it is competent for the respondent to make the explanation. The petitioners were not parties to the deed, and it is familiar that, the parties to the deed being strangers to them, it is competent to show what the real transaction was. Certainly this is so in a case to be determined upon the broad principles of equity applicable to bills of review.

These conclusions lead to the result that a case is not shown such as would meet the requirements of the rule as stated by us in *Jourolman v. Ewing*, supra, that "the new evidence must be of such a character and so controlling in its effect as that it would probably induce a different conclusion from that on which the former decree was based, in order to give ground for the filing of such a bill," or, as more tersely stated by Mr. Justice Nelson in *Southard v. Russell*, 16 How. 546-569, 14 L. Ed. 1050, it must be "of a very decided and controlling character." The general rule applicable to the case was also stated by Mr. Justice Story in *Wood v. Mann*, 2 Sumn. 334, Fed. Cas. No. 17,953, in speaking of such a bill, as follows: "But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause"—which observation was said by Waite, C. J., in *Craig v. Smith*, 100 U. S. 226-234, 25 L. Ed. 577, to "state the rule none too strongly."

3. Did the complainant by the execution of the deed of February, 1897, ratify the contract of sale by which he purchased the land? There was no communication of such a purpose to the defendants in the suit. And the purpose was not in fact entertained. Was the transaction between the respondent and Gov. Bliss of such a character as to indicate that, irrespective of his actual purpose, he dealt with the lands in a manner inconsistent with the election to rescind

which he had already made? For the reasons already stated, we think not.

Our conclusion is that the circumstances do not "demonstrate it to be indispensable to the merits and justice of the cause" that the former decree should be reviewed. The petition is therefore denied.

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UNITED STATES v. BALTIC MILLS CO.

(Circuit Court of Appeals, Second Circuit. May 4, 1903.)

No. 162.

1. ALIENS—CONTRACT LABOR LAW—ADVERTISEMENT PROMISING EMPLOYMENT.

An advertisement, in an English newspaper: "Wanted—First-class weavers, on fine combed work. \* \* \* First-class weavers can earn per week 35s. to £2. \* \* \* Baltic Mills Company, \* \* \* Baltic, Conn., U. S. A."—is within Act March 3, 1891, c. 551, § 3, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1295], amending the Alien Contract Labor Law (Act Feb. 26, 1885, c. 164) § 1, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], and making it penal to "assist or encourage" migration of aliens "by promise of employment through advertisements" published in a foreign country, provided this shall not apply to states advertising the inducements they offer for immigration to such states.

Coxe, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Connecticut.

For opinion below, see 117 Fed. 959.

F. H. Parker, for the United States.

W. A. Briscoe, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant upon a demurrer to the complaint.

The action was brought to recover penalties incurred, as is alleged, under section 3 of the act of Congress of March 3, 1891, entitled "An act in amendment of the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." 26 Stat. 1084, c. 551 [U. S. Comp. St. 1901, p. 1295]. Section 3 is an amendment of the first section of the act known as the "Alien Contract Labor Law," passed February 26, 1885. 23 Stat. 332, c. 164 [U. S. Comp. St. 1901, p. 1290]. That section enacted as follows:

"That after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia under contract or agreement, parol or special, express or implied, made previous to the importation

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¶ 1. Importation of contract labor, see note to *Railroad Co. v. Wilson*, 1 C. C. A. 52.

or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories or the District of Columbia."

By section 3 of the amendatory act (Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1295], it is provided as follows:

"That it shall be deemed a violation of said act of February 26, 1885, to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under a contract as contemplated by such act; and the penalties by such act imposed shall be applicable in such a case: provided, this section shall not apply to states and immigration bureaus of states advertising the inducements they offer for immigration to such states."

The complaint alleges that the defendant, a Connecticut corporation, published October 4, 1901, in a newspaper called the "Cotton Factory Times," at the city of Manchester, England, the following advertisement:

"Wanted—First-class weavers on fine comb work, in one of the most beautiful villages in Connecticut, U. S. A. First-class weavers can earn per week 35s. to £2. Families preferred. Reasonable rents in six-room cottages on line of railroad and electric cars. This is a new mill starting up. None but first-class weavers and respectable people need apply. Baltic Mills Company, H. Lawton, Manager, Baltic, Conn., U. S. A."

The complaint also alleges that on or about October 4, 1901, one Hargrave, an alien owing allegiance to the king of Great Britain and Ireland, and then residing near said city of Manchester, read the said advertisement, and in consequence thereof migrated to and came into the United States and to the village of Baltic, and that the said defendant knowingly and in violation of the statutes aforesaid assisted and encouraged the said alien to migrate to this country in violation of said statute by the promise of employment held out to said alien through said advertisement, so printed and published by said defendant in said foreign country. The court below sustained the demurrer upon the ground that the complaint failed to show that the defendant had encouraged the migration of the alien by promise of employment, being of opinion that the statute, being penal, should be strictly construed, and the advertisement did not contain any definite promise, or a promise in any legal sense.

In legal definition a promise is a declaration, verbal or written, made by one person to another, for a good or valuable consideration, by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to demand and enforce fulfillment. *Newcomb v. Clark*, 1 Denio, 226-228. In a general sense, it is a declaration "which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain act specified." One definition, according to Worcester, is "assurance of a benefit." The meaning of the term as used in the statute is not necessarily its meaning in legal definition. The rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context. *United States v. Hart-*

well, 6 Wall. 385, 18 L. Ed. 830. In the language of Chief Justice Marshall:

"Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. This maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which these words in their ordinary acceptation, or in the sense in which the Legislature has obviously used them, would comprehend." *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

The advertisement in question was an assurance to first-class weavers that they could find employment at their trade with the defendant which would yield a stated return varying between specified rates; but it was not equivalent to a contract to employ such as might apply, or to employ them for any definite period. A proposal addressed to some person in particular becomes a contract, if its terms are accepted by the promisee before it is withdrawn; but one addressed to the world at large does not become a contract until some one of those to whom it is addressed has performed its conditions. The employé whose services have been accepted by the employer pursuant to such a proposal may rely upon the terms of the proposal as to wages and other conditions expressed; but the promisee has no right of action for breach of the contract, express or implied, from the refusal of the promisor to employ him. The newspapers teem with advertisements for employés of all kinds, many of which specify the wages and other conditions of the service expected; but it has never been supposed that the person who offers himself for the employment, by the inducement of the advertisement, and is refused, can maintain suit for a breach of contract. The privilege of the advertiser to exercise his personal judgment as to the character and habits, and other qualifications generally, of the applicant, is an implied condition of his proposal, and no contract arises consequently until the applicant has been accepted.

It was the obvious purpose of the amendatory act to remedy the defects in the pre-existing statute in two particulars. Under the pre-existing statute the penalty did not accrue unless (1) the alien had previous to his migration entered into a contract to perform labor or service in this country, and (2) had actually migrated here, and (3) the defendant had, by prepayment of transportation or otherwise, encouraged or assisted his migration, knowing that such a contract had been entered into. In *United States v. Craig* (C. C.) 28 Fed. 799, the court said:

"So far from the contract being the sole cause of action, primarily it is not necessary that the defendant should have been a party to it at all."

And again:

"The penalty is attached, not to the making of the illegal contract, but to the encouraging and assisting the migration of the alien to perform labor, knowing that such illegal contract or agreement has been made."

The statute was capable of being read so that the penalty would not accrue from the making of a previous contract with the alien by the defendant himself, if the alien's migration had not been other-

wise encouraged by the defendant, as by the prepayment of his transportation or some analogous act, though it was capable of a reading by which the contract, if made with the defendant, might be deemed a sufficient assistance or encouragement.

The amendment was intended to dispense with the necessity of proving that there had been a contract with the alien "made previous to the importation or migration," or that there had been any other assistance or encouragement to his migration than a promise of employment. It adds to the acts penalized by the former statute another, and makes it penal to "assist or encourage" the migration "by promise of employment through advertisement." The word "promise" is used in the sense in which advertisements commonly promise employment to applicants. Under the former statute there could be no antecedent contract by an advertisement, however explicit the terms of the promise might be, because the promise could not, until the alien entered upon its performance, become a contract. Under the present no antecedent contract is necessary, and it would seem to suffice if there is a promise of employment sufficiently explicit to induce those to whom it is addressed to apply to some particular employer in the expectation of receiving employment of a specified kind at specified compensation. The proviso indicates that Congress did not use the word "promise" in its strict legal meaning, but rather in the sense of an assurance or inducement to encourage aliens to migrate. The proviso withdraws from the operation of the section the "inducements advertised by states and immigration bureaus of states offered for immigration to such states." These advertisements do not ordinarily contain promises of employment in the nature of specific proposals, but contain assurances of opportunity for employment and of the remuneration that may be expected. The office of a proviso is to carve an exemption out of the enacting clause, to except something which would otherwise have been within it (*Wayman v. Southard*, 10 Wheat. 30, 6 L. Ed. 253; *Minis v. United States*, 15 Pet. 423, 10 L. Ed. 791); and this proviso denotes the intention of Congress to exempt states and their immigration bureaus from a liability which might otherwise be incurred by the advertisement of their inducements to immigrants. We are of opinion that any assurance of probable employment, definite as to the kind, the place, and the rate of wages, is a promise of employment within the meaning of the statute. If this conclusion is correct, the advertisement published by the defendant was within the interdicted class. Obviously both the defendant and the alien regarded the advertisement as holding out a promise of employment specific enough to induce the alien to migrate and accomplish the purpose intended by the defendant.

The question which was presented by the demurrer is not altogether free from doubt, especially in view of the very strict construction which the courts have placed upon the alien contract labor law; but we are constrained to the conclusion that the complaint was sufficient.

The judgment is reversed, with instructions to the court below to order judgment for the plaintiff, but without prejudice to an application by the defendant for leave to answer.

COXE, Circuit Judge. I think the decision of the District Judge was right and should be affirmed. Two propositions are, in my judgment, established beyond controversy: First, in order to bring the defendant in error within the statute, there must be proof that it assisted or encouraged the migration of Hargraves "by promise of employment," and, second, the advertisement in question contains no such promise.

There is no ambiguity in the statute. Its meaning is plain. There is, therefore, no necessity for resorting to extrinsic considerations or contemporaneous debate to arrive at its proper construction. The plaintiff in error seeks an interpretation which eliminates the words "by promise of employment" altogether, or he seeks to accomplish the same result by making the word "promise" synonymous with "expectation" or "hope." The word has never been so construed when used in legal documents or statutes. It means an "engagement," "undertaking," "assurance," "obligation" or "agreement." If not actually a contract it implies a declaration which becomes such when accepted by the person to whom it is addressed. Had the advertisement in question contained such a promise the migration of Hargraves pursuant thereto would probably be deemed an acceptance. The advertisement contains no promise of any kind. It is hardly more than a statement of facts and conditions existing at the Baltic Mills. The newspaper press teems with similar "want" advertisements. It cannot be seriously contended that one who advertises for a coachman or a cook has made a "promise of employment." On the contrary, he is at liberty to reject, arbitrarily, all applicants.

It was admitted at the argument by the learned District Attorney that the Baltic Mills Company was under no legal obligation to employ emigrants coming here from Manchester. They could have turned all alien applicants from their mills without a word of explanation, and there would have been no redress.

The District Judge has carefully and ably discussed the question involved and in his conclusion I fully concur.

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MARANDE et al. v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 100.

1. JURORS—BIAS.

Where, in an action for loss of cotton destroyed by fire, it was claimed at the opening of the trial that it might appear that the real party in interest was an insurance company, it was not error for the court to excuse a juror for bias on his statement that he could not act impartially as against an insurance company.

2. SAME—PREJUDICE.

Error, if any, in excusing a juror for bias, was not prejudicial to plaintiffs, where it was not contended that the jury impaneled was not fair and impartial.

3. SAME—EVIDENCE—STATEMENTS OF SERVANTS—HEARSAY.

In an action for the value of cotton destroyed by fire alleged to have resulted from defendant's negligence while the cotton was in its pos-

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¶ 3. See Evidence, vol. 20, Cent. Dig. §§ 910, 912, 915.

session, statements made by defendant's servants, employed to guard the premises, as to the cause of the fire, after it had occurred and their duties had been terminated, were not admissible as *res gestæ*.

4. WITNESSES—CROSS-EXAMINATION.

Where a railroad engineer, in an action for loss of property alleged to have been fired by defendant's switch engine, on his direct examination testified that the engine alleged to have set the fire was in good condition, and provided with an arrester which made the emission of sparks impossible, questions on cross-examination as to how many times he had been to New York to testify what, in his judgment, was the standard among engineers for the best construction of locomotives, what route he took in traveling from New Orleans to New York, and whether he had noticed at night any sparks from the locomotive that was pulling his train, were irrelevant and immaterial.

5. TRIAL—RECEPTION OF EVIDENCE—REBUTTAL.

In an action to recover the value of property destroyed by fire alleged to have been set by defendant's engine, evidence that on the night of the fire the water hydrants were blocked, and the hose would not operate, was a part of plaintiff's main case, and inadmissible in rebuttal.

6. SAME—FAILURE TO CALL WITNESSES—UNFAVORABLE INFERENCE—INSTRUCTIONS.

At the time of the trial of an action for loss of property alleged to have been destroyed by fire set by defendant's engine, one of several watchmen employed by defendant through a detective agency to guard the premises was dead, but his testimony had been previously taken, and was accessible to both parties. Two other watchmen were present in court, but the whereabouts of the fourth was not accounted for. *Held*, that an instruction, under such circumstances, that to withhold testimony which it was in the power of a party to produce in order to rebut a charge against it, where it was not supported by other equivalent testimony, may be as fatal as positive testimony in support of the charge, was sufficiently favorable to plaintiff, and it was not error to refuse to charge that defendant's failure to call the watchmen as witnesses raised a presumption that their testimony would have been unfavorable to defendant.

7. SAME—INSTRUCTIONS AFTER SUBMISSION OF CAUSE.

Where, in an action for negligence, the jury, after submission of the cause, asked whether the judge charged that, even if they found there was negligence on the part of the defendant, they must find for the defendant, unless that negligence caused the loss of the property sued for, it was not error for the court to answer, "Yes, the court so charged," and to refuse a request by plaintiff's counsel that, if the jury found there was negligence, they must find a verdict for plaintiff, unless they found that the negligence did not cause the loss.

In Error to the Circuit Court of the United States for the Southern District of New York.

This action has been twice tried. At the first trial the Circuit Court directed a verdict in favor of the defendant. The judgment entered on the verdict was affirmed by this court. 102 Fed. 246, 42 C. C. A. 317. The plaintiffs thereupon sued out a writ of error and the Supreme Court reversed the judgments below and granted a new trial. 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. The second trial resulted in a verdict for the defendant. The plaintiffs ask for a reversal of the judgment upon various exceptions taken at the trial. The facts bearing upon this controversy are stated with great care and elaboration in the opinion of the Supreme Court and need not be repeated.

H. W. Hayward, George Richards, and Treadwell Cleveland, for plaintiffs in error.

Rush Taggart and Arthur H. Masten, for defendant in error.

Before TOWNSEND and COXE, Circuit Judges.

COXE, Circuit Judge. This action is to recover for the loss of cotton destroyed by fire while in the custody of the defendant. During the impaneling of the jury the counsel for the defendant asked the jurors whether, if it should appear that the real party in interest was an insurance company, that fact would influence their judgments. One of the jurors answered in the affirmative. A discussion thereupon arose as to the probability of the question of insurance arising upon the trial. That the question was likely to arise was stoutly asserted by the counsel for the defendant and as stoutly denied by counsel for the plaintiffs. The court ruled as follows:

"It is apparent from this stipulation that somehow or other in the course of this trial some question is going to be made as to insurance and the effect of it. I am not undertaking to rule upon it now; but in view of that fact, if the juror says he will be prejudiced one way or the other by the circumstance that he is himself in the insurance business, I am inclined to let him stand aside."

The plaintiffs contend that the court erred in excusing the juror and in permitting questions regarding insurance to be asked of the jurors generally. It is argued that this action of the court was calculated to produce the erroneous impression in the minds of the jurors that the issue was between an insurance company on the one hand and a railroad company on the other. "It is quite unnecessary," says the plaintiffs' counsel, "to dwell upon the effect which these remarks and these rulings of the judge may have had upon the minds of the jury. The unreasonable prejudice of so many jurors against insurance companies is well known. \* \* \* The poison was instilled early in the trial, and we submit that the court instead of allowing these questions to be asked jurors should have spoken in no uncertain tone on this evident attempt to prejudice their minds on an issue that was not in any respect possible in the case." The entire argument is based upon two propositions: First, that jurors of the Southern District of New York are prejudiced against insurance companies and in favor of railroad companies, where these corporations are opposed to each other in litigation; and, second, that the jury were informed that this cause presented such a controversy. Neither postulate is well founded. There is absolutely nothing of which to predicate the theory that insurance companies receive different treatment from other litigants at the hands of juries in the federal courts. In order, however, that there might be no confusion on the subject in the minds of the jury the trial judge charged them explicitly that there was "no question of insurance in this case at all." It should be remembered that these rulings were made before the cause was opened to the jury and when the judge was compelled to rely upon the statements of counsel as to the nature of the controversy. The defendant's counsel insisted that it would appear that the real plaintiff was an insurance company and the juror, who was, ap-



parently, engaged in the business of insurance, stated that if this were so he could not act impartially. In such circumstances it was a wise exercise of discretion to excuse the juror and no error, in a civil cause at least, can be assigned because of such action. The plaintiffs were not injured. They do not complain that the jury actually impaneled was not a perfectly fair and impartial one.

The theory that the plaintiffs were prejudiced by the preliminary proceedings is founded upon the most unsubstantial conjecture and proceeds upon the assumption that a trial judge should be something more than a finite being, possessed, at least, of the divine attribute of omniscience. No judgment can survive such criticism. It is doubtful if a fiercely contested and long-continued jury trial can be conducted with absolute freedom from mistake. In the hurry and excitement of the conflict theoretical and technical precision is well-nigh impossible. When the record of such a trial is reduced to cold type and is calmly and deliberately examined the danger is that trivial and inconsequential errors, which passed unnoticed at the trial and produced no effect whatever upon the result, are apt to be magnified and given undue consideration. Realizing the perplexities and responsibilities of the trial court and the travail which precedes the birth of a verdict, the reviewing judges should approach the consideration of the record in no hypercritical spirit, not as controversialists, but with a determination to sustain a just verdict if convinced that it was rendered after a fair trial. If the trial judge had sustained the objections and had left the juror to be retired by the defendant's peremptory challenge the situation, from a practical point of view, would have been essentially the same. The judge could not foresee the course of the trial, his rulings were proper when made and, in view of his subsequent explanation to the jury, were not injurious to the plaintiffs. As is said by Mr. Thompson in his work on Trials, § 120:

"No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appear that his cause has been tried by an impartial jury. It is no ground for rejection that, against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting others, not qualified, has been purposely created."

See, also, *North. Pac. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *South. Pac. v. Rauh*, 49 Fed. 696, 1 C. C. A. 416.

The second point argued by the plaintiffs is that the court erred in excluding evidence of statements made by alleged agents of the defendant as to the origin of the fire. The defendant had employed the Boylan Detective Agency of New Orleans to furnish watchmen to guard its premises at Westwego. An officer of this agency was called by the plaintiffs and asked whether he saw these watchmen on the night of the fire and what they said to him. Assuming that these men were employes and agents of the defendant, it is clear that their declarations, after the fire and when their duties for the time being had terminated, were not competent as against the defendant and were hearsay only. If these statements of the watchmen had been made while the fire was still raging or during the continuance

of their agency in the performance of a duty which they owed to the defendant they might have been admissible; but they were not so made. They were no part of the *res gestæ*, were not made by the watchmen while acting as such and had no relation to their acts as guardians of the property in controversy. That property had been destroyed and their admissions thereafter were narratives of past occurrences not binding on the defendant.

In *V. & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 172, 30 L. Ed. 299, the court says:

"The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes, an appreciable period of time, after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness; a proposition that will find no support in the law of evidence."

See, also, *Packet Co. v. Clough*, 87 U. S. 528, 22 L. Ed. 406; *Luby v. Hudson R. R. Co.*, 17 N. Y. 131.

The third point argued by the plaintiffs is that the court erred in limiting the cross-examination of the engineer who was in charge of the defendant's switching engine at Westwego on the day of the fire. His direct testimony tended to show that the engine was in good condition and was provided with an arrester which made the emission of sparks impossible. On cross-examination he was asked how many times he had been to New York to testify what in his judgment was the standard among engineers for the best construction of locomotives, what route he took in traveling from New Orleans to New York and whether he had noticed, at night, any sparks from the locomotive that was pulling his train. These questions were objected to and the objections were sustained. A mere statement of the questions is sufficient to demonstrate their irrelevancy and immateriality.

Error in excluding evidence offered in alleged rebuttal is the subject of the plaintiffs' fourth ground of complaint. The simple question is whether the testimony offered was proper in rebuttal. If not, the judge in the exercise of his discretion was at liberty to exclude it.

After the defendant had closed its proof the plaintiffs sought to show that on the night of the fire the hydrants were blocked and the hose would not operate. This was clearly part of the plaintiffs' main case. The testimony was as available then as later in the trial and if they intended to rely upon the defective condition of the hydrants at the time of the fire as a ground of negligence they should have presented their testimony so that the defendant would have had an opportunity to answer it. No excuse for not doing so is suggested.

It is, perhaps, possible that, as the watchmen were employes of the defendant, the plaintiffs expected that they would be called by

the defense, thus giving the plaintiffs the wide latitude of cross-examination. If this surmise be well founded, the plaintiffs, in the expectation of securing larger advantages, took the risk of losing what they possessed and have no reason to complain of the result. The trial judge had the entire situation before him and was much better qualified than an appellate court to determine whether the case could be reopened upon the new averment of negligence with justice to the defendant. He evidently thought that it could not be and there is no pretense that in so ruling there was any abuse of discretion.

The court was requested to charge that the failure of the defendant to call the watchmen as witnesses raised a presumption that their testimony would not have been favorable to the defendant. This proposition is argued as plaintiffs' fifth point. One of these watchmen was dead but his testimony had been previously taken and was accessible to both parties; in fact, the plaintiffs attempted to read it on rebuttal. Two others were actually present in the courtroom and the whereabouts of the fourth was not accounted for. They were employed by the Boylan Agency to guard the cotton on defendant's premises and when the cotton was destroyed their connection with the defendant ceased; at least it does not appear that it continued. In these circumstances we are of the opinion that the plaintiffs were entitled to no more favorable charge than was actually given by the judge. He said:

"To withhold testimony which it is in the power of a party to produce, in order to rebut a charge against it, where it is not supplied by other equivalent testimony, may be as fatal as positive testimony in support or confirmation of a charge."

The last proposition argued relates to an alleged error in answering a question asked by the jury after they had retired to their room. The question was as follows:

"Did the judge charge that even if we found that there was negligence on the part of the defendant, we must find for the defendant unless that negligence caused the loss of this lot of cotton?"

The answer was "Yes, the court so charged."

This answer was in exact accord with the fact, he had so charged, the charge was correct and no exception was taken. It will be observed that the jury were not asking for new instructions, but were in doubt as to an instruction already given. It was, in legal effect, as if they had sent for a copy of the charge upon the point in question. After the judge had announced the answer which he intended to send to the jury counsel for the plaintiffs made the following request:

"I ask the court to charge that if the jury finds that there was negligence they must find a verdict for the plaintiffs unless they find that that negligence did not cause the loss."

After the jury has retired the functions of counsel cease and there should be no interference by them with communications between the jury and the court. It is too late to present additional arguments or new requests. Information of what takes place should not however, be withheld from counsel and they may enter an exception to any action of the court which they deem prejudicial to their client's rights.

There is no pretense that the answer actually sent to the jury was erroneous and we might safely rest the decision upon the proposition that the court in such circumstances is under no obligation to adopt the language of counsel even though more accurate than his own. It is enough that the answer was correct.

An examination of the plaintiffs' request makes it apparent that it states negatively the instruction given by the court and presents a question of metaphysics which a jury would hardly pause to consider. The difference, from a practical point of view, is so unimportant as to become negligible. Were it necessary, however, to choose between the two propositions we should have little hesitation in selecting the one charged by the court, remembering as we must that the burden was unquestionably upon the plaintiffs to prove that the loss occurred through the negligence of the defendant.

It follows that the judgment must be affirmed with costs.

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McCORMICK v. SHIPPY.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 183.

1. CHARTER PARTY—CONSTRUCTION AND VALIDITY OF PROVISIONS—LIABILITY OF CHARTERER FOR LOSS OF YACHT.

It is competent for a charterer of a pleasure yacht to stipulate in the charter party against his liability for loss or damage to the vessel through his negligence, there being no question of public policy involved, as in case of a common carrier.

2. SAME.

A provision of a time charter party for a yacht that "the charterer shall assume no responsibility for loss or damage to the yacht" must be construed to include loss through his negligence, since for a loss from any other cause he would not be liable without such provision, and when considered in connection with other provisions requiring the payment of hire until redelivery, "unless lost," and the return to him of hire paid in advance, should the vessel be lost, it shows that it was the intention of the parties thereby to exempt him from liability for loss in any event.

3. SAME.

A provision in a time charter party for a yacht that the charterer shall "maintain the yacht in a thoroughly efficient state in hull and machinery for and during the service" binds him only to make the wear and tear repairs which would otherwise be imposed by law upon the owner, and is not in conflict with a clause exempting him from responsibility for loss or damage to the vessel.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Appeal from a decree (119 Fed. 226) dismissing a libel against the charterer for loss of libellant's yacht.

Robert S. Benedict, for appellant.

Chas. C. Burlingham, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The court below in its opinion has fully stated and discussed the facts herein, from which it reached the

conclusion that the charterer was the owner pro hac vice, and would have been responsible in all respects for the master's negligence, provided he had not exonerated himself by a special and binding stipulation in the contract.

The contract between the parties was expressed by a charter party which provided that the owner let the yacht from August 15, 1901, to September 15, 1901, "fitted for service, including necessary equipment," on certain conditions, those relevant to this inquiry being as follows:

"(1) That the charterer shall provide and pay for all coal, port charges, pilotage, provisions, wages of crew, deck, engine room and other necessary stores, and all other charges whatsoever, and shall maintain the yacht in a thoroughly efficient state, in hull and machinery, for and during the service. The yacht to be delivered in commission by the owner.

"(2) That the charterer shall assume no responsibility for loss or damage to the yacht."

"(4) \* \* \* Hire to continue until her delivery in like good order and condition to the owner, unless lost, at New York, N. Y."

"(7) That, should the yacht be lost, hire paid in advance and not earned, reckoned from the day of her loss, shall be returned to the charterer."

The charter was subsequently extended to October 31st, and the full amount of charter money, \$6,500, was paid to the owner.

The circumstances bearing on liability for the loss of the yacht are well stated in the opinion of the District Judge, as follows:

"I find that the yacht was delivered to the charterer in conformity with the provisions of the contract, and remained under the charge of the master, who had been for some time before employed by the owner when the yacht was in his own service, and who was regarded by him as entirely competent to navigate the yacht, both as master and pilot, in any waters with which he was familiar, and in any waters within the limits of the contract, in conjunction with local pilots. The owner recommended the master to the charterer fully in these respects, and he was accepted and relied upon by the latter, who was not himself competent to navigate the yacht, in all respects in which a yacht owner or charterer might reasonably depend upon an expert navigator. During the earlier part of the chartered period the yacht had been employed in trips east, through Long Island Sound. Upon one of these trips the charterer had mentioned to the master a possible trip to the Delaware Bay, in the vicinity of Cape May, and on the 8th of September, when the yacht was in New York Harbor, the charterer gave orders to the master to fit her out for such a trip. The master was not familiar with the waters of Delaware Bay, or the approaches thereto, but said there would be no difficulty in making a daylight run, and asked for charts of the vicinity, which the charterer provided. The start was made on the 10th, though not at as early an hour as was expected, and it was getting dark when the vicinity of Atlantic City was reached; but the master did not suggest the necessity of making harbor there, and the charterer, relying upon the master's ability to navigate the yacht safely to her destination, gave no orders for a harbor. The weather was very fine at the commencement of the voyage, but it had become somewhat overcast, and the sea had increased, with a southerly breeze, but there was nothing then to excite apprehension, and the voyage was continued. About 8 o'clock in the evening the vicinity of Cape May was reached. At this time the sea was rough enough to affect this small yacht, and the master concluded to seek the shelter of the Delaware Breakwater, near Cape Henlopen, instead of going to Cape May, as originally intended. He had been studying the charts on the way down, and concluded that he was competent to navigate the vessel into the harbor without the aid of a pilot, and was so confident of his ability that he not only did not seek a pilot boat, but suffered a steam pilot boat to pass him, without observing her, on her

signaled offer to furnish a pilot, notwithstanding the charterer, and a guest who was with him, suggested to him that a pilot should be obtained. Proceeding with a view that he understood the situation, having passed the Over Falls Lightship on his port hand, he steered, as he thought, for an entrance to the breakwater harbor, but made no allowance for a strong ebb tide, with the consequence that he lost his bearings, and, still going ahead, brought the yacht up on the point of Cape Henlopen, where she became a total loss, fortunately without loss of life."

Upon these facts the court held as follows: "There can be no doubt that the loss was attributable to the master's negligence; \* \* \*" and that the charterer "was responsible in all respects for the master's negligence, unless he had exonerated himself by a special and binding stipulation in the contract."

As the determination of the question whether the charterer was the owner of said yacht, *pro hac vice*, is unnecessary to the decision of the case, we express no opinion thereon.

Nor is it necessary to decide whether the evidence justified the conclusion of the court below that the charterer would have been liable if he had not exonerated himself by stipulation in said charter party. Whether the master was himself negligent or not, there was no negligence on the part of respondent in employing him. He was selected, hired, and recommended by libelant, and he had entire charge of the crew and of the yacht and its navigation without interference from respondent.

It is contended, however, that respondent was personally negligent in the failure to provide a pilot in unfamiliar waters. There might be considerable force in the argument that the charterer could not by said general clause exempt himself from liability for negligent failure to comply with the specific agreement in said charter that he should provide pilotage, if the evidence showed any negligence in this regard. But he was not a seafaring man; he had had no experience in the management of yachts; he might reasonably have supposed that, if a pilot was needed, the master, confessedly a competent navigator, would notify him, especially in view of the fact, as found by the court, that "the charterer was willing and desirous of furnishing a pilot on this occasion, but the master did not consider the employment of one necessary."

It is not clear from the evidence in what respect, if any, the charterer was guilty of negligence. But if it be assumed either that the loss was attributable to his negligence, or to such negligence of the master as should be imputed to the charterer, the question arises whether he has exempted himself from such liability by the clause in the charter party, "The charterer shall assume no responsibility for loss or damage to the yacht."

The contention of the libelant is that the language is not sufficiently specific to free the contracting party from liability arising out of his negligence; that it is repugnant to the clause providing that the charterer shall maintain the yacht in a thoroughly efficient state; and that, read in connection with other clauses in the charter, it shows that the charterer agreed to do certain things, and was liable for a failure, through negligence, to keep such agreement.

The general doctrine is stated by Judge Nelson in *New Jersey*

Steam Navigation Company v. The Merchants' Bank, 6 How. 344, 383, 12 L. Ed. 465, as follows:

"If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

There is no question of public policy involved in this charter party, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. *Hartford Fire Insurance Company v. Chicago, Milwaukee & St. Paul Railway Company*, 175 U. S. 91, 98, 20 Sup. Ct. 33, 44 L. Ed. 84; *Baltimore & Ohio Southwestern Railway Company v. Voight*, 176 U. S. 498, 505, 20 Sup. Ct. 385, 44 L. Ed. 560. It is also well settled that an ordinary bailee for hire can only relieve himself from liability for negligence upon clear and convincing proof that such was the intention of the parties. The question herein is whether the evidence fulfills this requirement.

It appears from inspection of the second article of the charter party that it originally read as follows:

"(2) That the yacht shall be insured for the benefit of the owner, and that the charterer shall assume no responsibility for loss or damage covered by the terms of said insurance; the premium on the policy of insurance to be paid by the charterer."

It was amended by erasing all reference to insurance, and adding the words "to the yacht," and the owner procured insurance on the yacht. The only legitimate inference to be drawn from such erasure and interlineations is that the owner originally proposed that the charterer should insure the vessel for his (the owner's) benefit; that, the charterer refusing to do so, the charter party was so amended in order to relieve the charterer from liability for loss or damage. The clause must be interpreted to include loss through his negligence, because for loss not arising from negligence he would not be liable. The charterer of a vessel is a bailee for hire, and "is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed." *Clark v. United States*, 95 U. S. 539, 542, 24 L. Ed. 518; *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 654, 22 Sup. Ct. 240, 46 L. Ed. 366.

The charter, taken as a whole, shows that in no event was the charterer to be liable in case of loss. Thus, article 4 provides for the continuance of the hire until delivery, "unless lost"; article 7 provides, "should the yacht be lost, hire paid in advance" should be returned to the charterer.

But it is contended that the charterer's agreement in article 1 of the charter, to "maintain the yacht in a thoroughly efficient state in hull and machinery for and during the service," conflicts with this view. But this clause only provides for the assumption of a legal obligation by the charterer to make wear and tear repairs, which otherwise would be imposed by law upon the owner. In charter parties "the owner usually stipulates that the ship is sound, staunch, and seaworthy; that he will keep her in repair, perils of the sea excepted; \* \* \* but, if these obligations were not expressed, the law would impose them on

the owner." "He is therefore bound, unless prevented by the perils of the sea or unavoidable accident, to keep her in proper repair." 3 Parsons on Contracts (Shipping) p. 302; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012. That this clause was intended to apply to such repairs as were necessary in running the yacht further appears from the provision for "delivery in like good order and condition to the owner, unless lost." If this clause has any bearing on the clause exempting the charterer from liability for loss or damage, the two may be well read together to the effect that, while the charterer "shall assume no responsibility for loss or damage," he agrees to so "maintain the yacht in a thoroughly efficient state, in hull and machinery, during the service," as to keep her in like good order and condition "until her delivery to the owner, unless lost."

The decree of the District Court is affirmed, with interest and costs.

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SCHWARZSCHILD & SULZBERGER CO. v. PHOENIX INS. CO. OF  
HARTFORD.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 155.

1. INSURANCE—CANCELLATION OF POLICY.

Where, by the terms of a policy, the insurer was given the right to cancel the same by giving five days' notice, a telegram from its agent to the authorized agent of the insured positively directing a cancellation, followed by a letter confirming the same in unequivocal language, operated as a cancellation at the end of five days thereafter, during which no further communication was sent; and subsequent correspondence, by which the agent of the insured attempted to secure a reconsideration of such action, did not have the effect of renewing the policy.

2. SAME—EFFECTIVENESS OF NOTICE—RETURN OF PREMIUM.

Under a provision in an insurance policy giving the insurer the right to cancel the same by giving five days' notice, and requiring it to return the unearned premium in case of cancellation "on surrender of the policy," it is not essential to the effectiveness of a notice of cancellation by the insurer that the unearned premium be returned or tendered in advance of the surrender of the policy by the insured.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 115 Fed. 653.

Writ of error from judgment entered for defendant on a trial to the court without a jury of an action removed from the Supreme Court of the state of New York to the United States Circuit Court for the Southern District of New York. The action was brought for the recovery of \$50,000 on a policy of insurance in the defendant company. The facts appearing of record and the grounds of the judgment are fully set forth in the opinion of the court below and in its findings of fact and statement of conclusions of law.

Wheeler H. Peckham, for plaintiff in error.

Wm. Vanamee and Chas. E. Perkins, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.



TOWNSEND, Circuit Judge. The exceptions herein challenge the correctness of the finding of the trial court that the policy in suit had been canceled at the time of the fire which damaged plaintiff's property. The provision of the policy relevant to this inquiry is as follows:

"This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, the company retaining the customary short rate, except that where this policy is canceled by this company giving notice it shall retain only the pro rata premium."

The fire occurred on October 6, 1899. The transactions between the parties were conducted by correspondence, from which the trial court concluded that the policy in suit had ceased to be in force and effect before said date. The facts material to said conclusion are as follows: On September 20, 1899, the defendant's agent, in response to a telegram from plaintiff's agent, telegraphed: "No, our companies won't carry. Cancel Phoenix [the policy in question] \$50,000." On said day defendant's agent also wrote that he had been obliged to reply "that it would be necessary for us to call for the immediate cancellation" of said policy. We are of the opinion that said peremptory, definite, and unqualified language was a sufficient compliance with the requirements of the policy as to notice. During the five days after receipt of said notice by plaintiff's agent he received no communication from defendant's agents qualifying said notice. The rights of the parties, therefore, became fixed at the expiration of said period, and the correspondence between the parties subsequent to said period, by which plaintiff sought to secure a reconsideration of said action, is immaterial to the decision herein. We conclude, furthermore, that said subsequent correspondence and the conduct of the plaintiff's agent indicate that he understood said telegram and letter of September 20th, as a notice of cancellation, and a request for the immediate return of the policy. Plaintiff's agent admitted that thereby defendant had "ordered up the policy," the letter in reply merely asked for a reconsideration of said decision; and, after this had been refused, plaintiff's agent procured a new policy in substitution for the one which had been canceled.

Plaintiff has excepted to the admission in evidence of certain letters and telegrams between the general agent of defendant and its special agent, who alone conducted the correspondence between the parties. Inasmuch, however, as this correspondence has no bearing on the evidence from which we have reached our conclusion herein, its admission is immaterial, and furnishes no ground for reversible error.

Plaintiff contends that tender or payment by the insurer of the unearned premium is a condition precedent to cancellation, and that, as defendant had never tendered to plaintiff the unearned premiums on said policy, it had not been canceled. The findings of the court upon this point are as follows:

"Twenty-Second. That by the course of business carried on during the year 1899 between the said Merriam and his said firm [defendant's agent] and the

said E. C. Anderson & Company [plaintiff's agent] there was an open account kept between them in which the said E. C. Anderson & Company were charged with the premiums on policies obtained by the said Merriam and his firm for the plaintiff, and were credited with the amounts of unearned premiums on canceled policies, and this account was settled by paying the balance in cash at stated intervals.

"Twenty-Third. That the unearned portion of the premium upon the said policy of the defendant upon the cancellation thereof amounted to the sum of about three hundred and twenty dollars (\$320). That from the 20th day of September, 1899, to the 6th day of October, 1899, and thereafter, there remained a balance due upon the said open account between the said Merriam's firm and the said E. C. Anderson & Company in favor of said Merriam's firm and against the said E. C. Anderson & Company of over two thousand dollars (\$2,000). The defendant made no other tender to the plaintiff of said unearned portion of the premium due upon said cancellation."

It would seem that, as an amount sufficient to cover said premiums was in the hands of plaintiff's agent on open account between the parties at the time of the notice of cancellation, no such suggested tender or payment would have been necessary upon any construction of said provision. But, irrespective of these facts, the language of the foregoing provision demands a construction fatal to plaintiff's claim. It provides specifically for the absolute cancellation of the policy at any time by the company by giving five days' notice thereof. It further provides in express terms that, on surrender of the policy after such cancellation, the unearned premium shall be returned. It is difficult to conceive how language more definite could have been employed to show that the right to claim such unearned premium could only accrue after cancellation by the insurer and surrender by the insured.

In support of its contention counsel for plaintiff relies upon the case of *Tisdell v. The New Hampshire Fire Insurance Company*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. It is true that in said case the Court of Appeals of the state of New York, by a divided court, held that such repayment was a condition precedent to cancellation. We are not unmindful of the great weight which should ordinarily be given to the decisions of said court, especially upon a question involving the construction of a form of policy fixed by the statute of said state. But in the *Tisdell* Case we are wholly without any sufficient or satisfactory guide as to the process of reasoning by which a majority of the court reached its conclusion. The opinion states that: "The question presented on this appeal is no longer an open one in this court. It was decided in the case of *Nitsch v. American Central Insurance Company*, 152 N. Y. 635, 46 N. E. 1149, affirmed in this court without an opinion." The memorandum of the decision in the *Nitsch* Case only shows that it affirmed a judgment of the Supreme Court, General Term, reported in 83 Hun, 614, 31 N. Y. Supp. 1131, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court. Reference to 83 Hun, 614, 31 N. Y. Supp. 1131, shows that the General Term wrote no opinion. We are, therefore, without anything in the reports to show what questions were decided, or even what issues were presented. Chief Justice Parker, however, in his dissenting opinion in the *Tisdell* Case, shows that the Court of Appeals was required to

affirm a judgment of the General Term in the Nitsch Case upon another and unquestioned ground of waiver by defendant. In these circumstances we are unable to accept the conclusions of the Court of Appeals in the Tisdell Case.

Upon the facts found herein we must hold that notice of cancellation was duly given by defendant, and acquiesced in by plaintiff, and that no further action on the part of defendant was necessary until after the surrender of the policy.

The judgment is affirmed, with costs.

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EDWARD P. ALLIS CO. v. STANDARD NAT. BANK OF THE CITY OF  
NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 130.

1. EQUITY—SUIT FOR FRAUD—EVIDENCE CONSIDERED.

Evidence *held* insufficient to establish fraud on the part of defendant national bank in the organization or operation of a corporation which was formed by complainant and certain stockholders and officers of the bank to continue the business of two insolvent lumber companies of which both complainant and the bank were creditors, or any action of the bank which rendered it liable in equity to complainant on the contracts of such corporation.

Appeal from the Circuit Court of the United States for the Southern District of New York.

W. E. Carter, for appellant.

H. H. Bowman, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The following excerpt from the opinion of the Circuit Court succinctly sets forth the circumstances under which the controversy arose:

"In the early part of 1896 the complainant was the owner and in possession of a sawmill plant at Chatterton, Florida. This plant had formerly been occupied by the C. T. Snowden Cypress Mill Company, a corporation, which had abandoned it, and conveyed it to the complainant. The Snowden Company had theretofore entered into a contract with a New Jersey corporation, known as the Withlacoochee Lumber Company, by the terms of which the Snowden Company had agreed to remove to its mill and convert the same into marketable lumber the standing trees which the lumber company owned, or represented that it owned, for an agreed price per thousand feet. Both companies became financially embarrassed, and the Snowden Company transferred its property to the complainant, as above stated, in payment for the mill plant and machinery which had been furnished by the complainant. The defendant the Standard National Bank had, prior to this time, become a creditor in the sum of about \$15,000 of the lumber company, for which debt it held no available security. Upon investigation it was discovered that said lumber company was without assets, the title to the lands, which it was supposed to own, being in one Paul, of Philadelphia. The bank was also a creditor of the Snowden Company. In these circumstances

the defendant the New York Lumber Company was organized, with the expectation and hope that by a reorganization of the business, with additional capital, it might prove successful, and thus enable all the creditors, the complainant included, to make themselves whole in the future."

The New York Lumber Company was incorporated November 3, 1896, pursuant to an agreement between complainant and defendants Brown, Mayer, and Lynch. Brown was vice president and a director of the bank, and Mayer was an agent whom the bank had employed to make examination into the situation in Florida, and to collect its claims against its debtors. The stock of the company was to be apportioned among the parties to this agreement, and it was part of the plan that complainant's sawmill and plant was to be leased and used by the new company in carrying on its business by converting into marketable lumber the cypress timber obtained from Paul. The bank from time to time advanced to the New York Lumber Company on its notes sums amounting in the aggregate to more than \$35,000; nevertheless the enterprise turned out disastrously, and the Lumber Company failed, owing complainant for rent, insurance, damages to personal property, etc.

The Circuit Court thus epitomized the relief demanded in the complaint:

"First. That the defendants be adjudged and decreed to reassign to the complainant a judgment obtained by it against the Withlacoochee Lumber Company, and transferred to the defendants Brown, Mayer, and Lynch, September 29, 1896.

"Second. That an accounting be had between the complainant and defendants for rentals, taxes, and insurance due under the lease of the sawmill plant to the New York Lumber Company, and for damages occasioned by the improper care of the said plant.

"Third. That the defendant Brown, who, in consideration of an extension by the complainant of the time of payment of the rent due August 1st and the months following, agreed to pay \$5,000 of the amount so extended on or before January 1, 1898, be adjudged and decreed to pay said amount and interest thereon.

"Fourth. That the defendant the Standard National Bank, 'by and through its said creature, said New York Lumber Company,' may be adjudged and decreed to convey to the complainant all interest which the said bank or lumber company have obtained or will obtain in the 15,000,000 feet of cypress timber agreed to be conveyed by said Paul.

"Fifth. That the defendants Brown, Mayer, and Lynch be 'decreed and directed to cause the said defendant Burrows to forthwith turn over to your orator the said \$60,000 in stock so placed in his hands, as above stated.'"

The decree granted the relief prayed in the first and fifth of these paragraphs. As to the third it held that, assuming all complainant's contentions as to the facts to be true, it had an adequate remedy at law, and therefore refused relief in equity.

By the first three assignments appellant charges error (1) in refusing to find that the New York Lumber Company was in substance and effect the Standard National Bank acting under the disguise of the lumber company, and that complainant in making the agreement under which the new lumber company was organized really contracted with the bank through its authorized officers and agents, and not with the defendants Brown, Mayer, and Lynch as individuals; (2)

in holding the evidence fails to establish any agreement or obligation on the part of the bank which renders it liable to complainant; and (3) in finding that there is no agreement, oral or written, in the name of the bank.

The record is extremely voluminous, and contains a large amount of irrelevant matter. The fundamental question involved is one of fact, and nothing would be gained by a long rehearsal of the evidence. Suffice it to say that we concur with the Circuit Court in the conclusion that the New York Lumber Company was not the "Standard National Bank acting under the name and disguise of the lumber company," and that the bank did not, either directly or as undisclosed principal, enter into any contract to respond to complainant for the defaults of the lumber company. Brown was vice president and a director, Burrows was a director, and as such officers they were the agents of the bank to do what bank officers may properly do. Mayer was a special agent employed to collect the claims of the bank against the Snowden Company. Within the scope of their employment whatever was done by these agents would be binding upon their undisclosed principal, but there is nothing to show that the principal in this case ever employed them or either of them to embark the bank in the business of running a sawmill in Florida. The circumstance that, after the lumber company was started, the bank financed it by discounting its paper and loaning it money, is not persuasive, nor does it make any difference that the vice president promised in advance that he would make loans of the bank's funds for such purpose. Such a promise was highly improper, under all the circumstances, and the funds of the bank were most improvidently handled in the effort its officers made to get back money which their prior improvidence had sunk in a bankrupt enterprise; but the evidence falls far short of establishing any action by the bank which would make it directly responsible for the obligations of an independent corporation engaged in the lumber business.

The fourth assignment of error deals with a finding of the Circuit Court touching the application of the doctrine of ultra vires. That need not be considered; it would be idle to discuss whether a national banking corporation could or could not do something, when the proof fails to show that it did or even tried to do it.

Of the remaining errors assigned it is stated in the brief that, "while they are severally insisted upon, they do not seem to require separate consideration." There is no other reference to them; it will be sufficient therefore to state that, in our opinion, they do not present ground for reversal.

The decree is affirmed, with costs.

## THE HYADES.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 177.

## 1. SHIPPING—INJURY TO CARGO—SEAWORTHINESS OF SHIP.

A new steel steamship, admittedly first-class in construction and equipment in every other respect, cannot be held liable for damage to a cargo of wheat by water, on the ground of unseaworthiness at the beginning of the voyage, because of the insufficiency of the hatch coverings, under section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), where the wooden covers were tight and well fitted, and over them were fastened two canvas covers of No. 1 hard duck—one new, and the other nearly so—such as were usually considered a sufficient covering, and which were specifically approved by the underwriter's surveyor under whose inspection the loading was done, and where shortly after sailing the vessel encountered a three-days hurricane, during which the seas broke over her, dismantling her steering gear and producing a general straining and leakage, resulting in injuries which it cost \$14,000 to repair. Under such evidence, the damage must be attributed to perils of the sea.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal by libelants from a decree of the District Court for the Southern District of New York dismissing libel for damages to cargo of wheat while being carried by the steamship Hyades from Galveston to New York, in September, 1900. The negligence charged against the vessel is her failure to provide suitable hatch coverings for the voyage. Decision below is reported in 118 Fed. 85.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

H. Putnam, for appellants.

Wilhelmus Mynderse, for appellee.

COXE, Circuit Judge. The salient facts are carefully stated in the opinion of the district judge.

The third section of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) provides that if the owner of any vessel transporting merchandise or property shall exercise due diligence to make her in all respects seaworthy and properly manned, equipped, and supplied, she shall not be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel or for losses arising from the dangers of the sea or acts of God.

The Hyades was a new steel steamer of the highest class, having been completed in June, 1900, three months prior to the voyage in question. She was exceptionally strong, contained all the latest improvements and was propelled by triple expansion engines of 2,000 indicated horse power. Indeed, it is practically admitted that she was structurally perfect and seaworthy in all respects, save one; the covering of her hatches. The coamings were three feet in height and so constructed that it was impossible for water to stand on the

¶ 1. Losses by perils of the sea, see note to *The Dunbritton*, 19 C. C. A. 465.

hatches. The covers were of white pine, laid fore and aft in tiers. They were made with straight edges, designed to fit tightly without calking. When the wooden covers were in place two canvasses of "hard No. 1" cotton duck were spread over them and securely battened down. One set of these canvas covers was absolutely new, being used for the first time, and the other set was substantially new, having been supplied in June. The testimony fully sustains the finding that this material is the best known hatch covering in use and that it is not customary to employ oil, tar or any other preparation, in connection with it. It was also proved that it was customary to use but two covers of this hard, heavy, closely woven canvas, although frequently a third covering of old material, called a "chafer," is used to protect the other two. The surveyor of the underwriters, under whose inspection the vessel was loaded, testified: "I considered her as safe when she left Galveston, to go to any part of the world, as any ship I ever saw." In short, we are unable to specify any additional protection which could have been adopted to make the vessel more seaworthy.

Two days after leaving port the Hyades was caught in the very center of the unprecedented hurricane which swept over Galveston with such appalling results. For three days she was buffeted by wind and waves, tremendous seas breaking over her, which dismantled her steering gear, carried away everything movable and produced a general straining and leakage of the ship. It is enough to say she was so severely injured that it cost \$14,000 to repair her. The wonder is not that the cargo was damaged but that the ship survived at all.

We have, then, the case of a strong, new, modern steel ship, seaworthy in every respect and properly manned and equipped, encountering a cyclone of unprecedented fury, which for three days held her in its grasp. That the damage to the cargo was due to the storm cannot be doubted. Indeed, a better illustration of loss by perils of the sea can hardly be imagined.

The decree is affirmed with interest and costs

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## BOKER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 140.

### 1. CUSTOMS DUTIES—CLASSIFICATION—COLD-ROLLED STEEL IN STRIPS.

Steel in strips, varying from  $\frac{1}{2}$  inch to 6 inches in width, and from No. 10 wire gauge to No. 36 in thickness, mostly in coils exceeding 100 feet in length, produced by rolling a billet or bar cold, and not by shearing from commercial sheet steel of greater width, and known commercially as "steel strips," or "cold-rolled steel," is dutiable under Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule C, par. 122 (28 Stat. 516), which provides for "steel in all forms and shapes not specially provided for in this act," and not under section 1, Schedule C, par. 124 (28 Stat. 517), as "sheet steel in strips," regardless of its value.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from decision of the Circuit Court affirming a decision of the board of general appraisers which affirmed a classification of certain imported merchandise as made by the collector.

For opinion below, see 116 Fed. 1015.

Albert Comstock, for appellant.

Chas. D. Baker, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The appellant imported at various times, in 1894 and 1895, cold-rolled steel in strips. The collector assessed that portion of the merchandise valued above 4 cents per pound, under paragraph 124 of the act of 1894 (Act Aug. 27, 1894, c. 349, § 1, Schedule C, 28 Stat. p. 517), which provides, *inter alia*, for an *ad valorem* duty of 40 per centum upon "sheet steel in strips." The importer protested, insisting that it should have been assessed under section 1, Schedule C, par. 122 (28 Stat. 516), which provides for "steel in all forms and shapes not specially provided for in this act." The board of appraisers sustained the action of the collector. Testimony was taken on behalf of the importer in the Circuit Court, which subsequently affirmed the decision of the board. The importer thereupon appealed to this court.

The importer admits that the merchandise in question is steel, and that it is in strips, but he denies that it is sheet steel. This is, therefore, the only controversy. If the merchandise be sheet steel, it is conceded that the action of the collector was correct; if not sheet steel, his assessment should be overruled.

The board finds that the steel in question is cold-rolled steel in strips, valued above 4 cents a pound, varying in width from less than 1 inch to not exceeding 6 inches, and is mostly in coils exceeding 100 feet in length and varying in thickness from No. 10 wire gauge to No. 36, and possibly in some instances thinner than No. 36.

In *United States v. Wetherell*, 65 Fed. 987, 13 C. C. A. 264, where a similar controversy arose, the Circuit Court of Appeals in the First Circuit found that "what is commercially known as 'sheet steel' is rolled hot in mills called 'sheet mills,' especially adapted for the purpose, between rolls running so slowly that the sheets cannot be run over 12 feet in length, and that the sheets are not less than 8 inches wide." And the court, construing paragraph 148 of the tariff act of 1890 (Act Oct. 1, 1890, c. 1244, Schedule C, 26 Stat. 577), held that the words "sheet steel in strips" in said act, if they stood alone, "might be construed as meaning steel prepared in sheets in the ordinary sheet mills, and then in some way cut or sheared into strips." But in view, *inter alia*, of the uncertainty as to whether strips sheared from what is commercially known as "sheet steel" had ever been imported, and of the fact that said act provided for sheet steel in strips, "whether drawn through dies or rolls," and that sheet steel could not be "drawn through dies or rolls," while the strips of steel there in question could be thus drawn, the court reached the conclusion that they were covered by the provisions of said act.



The provisions of the present act as to sheet steel in strips do not contain the words "whether drawn through dies or rolls," and the importer has proved in this case that sheet steel in strips, stripped from commercial sheet steel, were, at and prior to the passage of this act, an important article in the trade and commerce of this country, and were known among dealers generally and uniformly as "sheet steel in strips." Each of the strips here involved is produced by rolling a billet or bar to a width of from one-half an inch to less than six inches; it is not cut or sheared from a piece of greater width; and such strips are known in trade and commerce as "steel strips," or as "cold-rolled steel."

The decision is reversed.

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WHEATON v. DAILY TELEGRAPH CO.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 171.

**1. CORPORATIONS—INSOLVENCY—RECEIVERS—ACTION BY STOCKHOLDER—MARSHALING ASSETS—PARTIES.**

Where a bank to which an insolvent corporation was indebted was not a party to an action by a stockholder for the administration of the corporation's assets, it was error for the court to direct the bank to pay over to the receiver of the corporation the amount of the corporation's deposits with the bank pending a determination of the bank's rights to set off such deposit against the corporation's debt.

**2. SAME—RIGHT OF SET-OFF.**

Where, at the time of the appointment of a receiver for a corporation, it was indebted to a bank in a sum largely exceeding the amount of the corporation's deposit, the bank was entitled to set off such deposit against the corporation's indebtedness to it.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Kneeland Moore, for appellant.

Chas. W. Gould, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the New Amsterdam National Bank from an order made in the above-entitled cause requiring it to pay over to the receiver of the defendant, the Daily Telegraph Company, a sum of money alleged to be the balance of a deposit account. The receiver was appointed in an equity suit brought by a stockholder of the Daily Telegraph Company in behalf of all the stockholders and creditors of the company to administer its assets. The company had kept a bank account with the New Amsterdam National Bank, and at the time when the suit was commenced the account showed a balance in its favor of about \$2,000 arising from the moneys it had deposited over those it had drawn out. The bank alleges that at the time it held and owned a note of the company for \$6,500, which was then due and payable. It refused to pay the balance of the de-

† 2. See Banks and Banking, vol. 6, Cent. Dig. § 353.

posit account to the receiver upon the contention that it was entitled to apply that balance towards the payment of the note. It resisted the application for the order, as well in respect to the nature of the remedy invoked as upon the merits of the receiver's claim. The order requiring it to pay over to the receiver seems to have proceeded upon the theory that primarily the receiver was entitled to the custody of the fund, and if it should ultimately appear that the bank was entitled to retain the amount, either as a payment or as a set-off against its note, the court would make restitution.

We think this an erroneous disposition of the matter. In an action like the present, to marshal and administer the assets of an insolvent corporation, it is optional with the plaintiff to join as parties defendant such persons as claim an adverse interest in assets in their possession alleged to belong to the corporation; and when this has been done, and a receiver has been appointed, the court upon hearing the parties will determine whether the custody of such assets shall, pending final decree, remain unchanged, or whether it shall be transferred to the receiver. Such a determination does not adjudicate or affect the ultimate rights of the parties; it extends only to the conservation of the assets until these rights are finally ascertained. Whether their custody shall be changed rests in the sound discretion of the court. If it should appear that the adverse claimants have a clear title to the assets, it would be an abuse of discretion to direct the custody to be surrendered to the receiver, and especially when because of the paucity of other assets they might become subjected to a lien for the expenses of administration. If, when the receiver is appointed, it is found that property alleged to belong to the corporation is in the possession of third persons who claim adverse title, and who have not been made parties to the action, the receiver cannot interfere with their possession. They are entitled to their day in court, and the receiver must proceed by suit in the ordinary way to try his right to the property, or the plaintiff must bring them in as parties to the action, and apply to have the receivership extended to the property in their hands. The power of a court to proceed summarily against a person who has disturbed the custody of its receiver, and which is usually exercised by an order for restitution upon the application of the receiver or of the plaintiff in the action, and by punishment for contempt upon refusal to comply with the order, is undoubted; but this exercise of the authority of the court to protect its own possession is not to be confounded with the exercise of jurisdiction over persons claiming adverse rights in property which has never been in the custody of the court. As the New Amsterdam National Bank has never had its day in court, the order of the court below was unauthorized, and could not support a proceeding for contempt. *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717; *Albany City Bank v. Schermerhorn*, 9 Paige, 372, 38 Am. Dec. 551; *Searles v. Railway Co.*, 2 Woods, 621, Fed. Cas. No. 12,586; *Thompson v. Smith*, 1 Dill. 458, Fed. Cas. No. 13,977; *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634; *Howard v. Railway Co.*, 101 U. S. 837, 848, 25 L. Ed. 1081.

Even if the bank had been a party to the suit, we think it would have been an erroneous exercise of judicial discretion to require it

to pay over the money to the receiver. The facts alleged by the bank in opposition to the application of the receiver were practically undisputed. If they are true it had a right to retain the money, and the probability of a final decree to the contrary was too remote to justify wresting the fund from the bank pending a final decree, and possibly subjecting it to a lien for expenses.

The order is reversed, with costs.

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Appeal of CAHILL.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 145.

1. TOWAGE—DESERTION OF TOW BY TUG—LIABILITY FOR LOSS.

A tug, which cut loose from a dredge and two scows, which she had in tow, in the night, and deserted them, in disregard of her duty to use all reasonable efforts for their preservation, is liable for their consequent loss or damage, in the absence of clear proof that her efforts to save them would have been ineffectual.

2. ADMIRALTY—APPEAL—REVIEW OF FINDINGS OF FACT.

Findings of fact by a commissioner in admiralty on evidence which is conflicting or doubtful, and which have been reconsidered on exceptions and approved by the court, will not be disturbed on appeal, unless manifestly wrong.

Appeal from the District Court of the United States for the Southern District of New York.

Wm. G. Choate, for appellant.

W. Frothingham, for appellee J. P. Randerson.

Le Roy S. Gove, for appellee Providence Washington Ins. Co.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. According to the testimony of Brainard, the pilot of the tug, he thought the dredge was going to founder, and told Cutter, the master, that he thought the best thing to be done was to "take the men off and let the dredge go on the beach"; and this was before the alleged waving of lights on board the dredge. Cutter, the master of the tug, testifies that he ordered the tug hawser cut solely because of signals from the dredge, and would not otherwise have done so. No signals had been given from the dredge, and we are satisfied the master of the tug ordered the hawser cut, not because of any supposed signals, but solely because he thought, as the pilot did, that the dredge and scows would founder, and thereby imperil his own vessel. After taking the men off the dredge, the tug put to sea and abandoned her tows. This all took place at night, about half past 8 o'clock, when the vessels were about two miles from the coast of Cape Cod. The rough weather and heavy sea may have endangered the scows, but the dredge was not in extreme danger, although some of the men on board her were apprehensive. The circumstance that the men left her

¶ 2. See Admiralty, vol. 1, Cent. Dig. § 770.

in hot haste is explained by the fear and excitement created by the conduct of the navigators of the tug.

Even if the circumstances had been sufficient to justify the master of the tug in cutting loose from the dredge in order to take off the men, they did not justify him in deserting her and her scows, and allowing them to be beached without any effort to save them. We are satisfied there was a reasonable chance that they could have been saved if the tug had resumed charge of them. Their owner was entitled to the benefit of the chance, and as he has been deprived of it by the conduct of the tug, in disregard of her duty to use all reasonable efforts for the preservation of her tow, the tug must respond for the consequences, in the absence of clear proof that her efforts would have been ineffectual. Upon this branch of the case we fully concur in the opinion of the court below, and do not deem it necessary to express ourselves further.

The numerous exceptions to the findings upon the items of damage have required an extended examination of the proofs taken before the commissioner, to whom the cause was referred to report damages. The commissioner's findings were carefully considered and revised by the district judge, and, although a reduced allowance as respects some of the items would have been more satisfactory, we are unable to say that as finally allowed they are not sanctioned by the evidence. The losses in the nature of salvage services, and for removing the vessels and their dredging appliances to a place of repair, for the repairs made, for demurrage, and for depreciation, when repaired, from their former value, were awarded upon correct principles and upon conflicting testimony. No error of law appears. The findings of a master or commissioner will not be disturbed as to matters of fact upon which the evidence is doubtful or the inferences are uncertain; much less when his conclusions are reached upon conflicting testimony, and involve to a greater or less degree the credibility of the witnesses. When, as in this case, they have been reconsidered upon exceptions and approved upon the review, they should not be disturbed by this court, unless manifestly wrong.

The decree is affirmed, with interest and costs.

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WEBBER et al. v. MIHILLS et al.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1903.)

No. 1,850.

**1. ASSIGNMENT OF ERRORS—FILING BEFORE APPEAL INDISPENSABLE.**

The filing of an assignment of errors before the allowance of an appeal is indispensable under the 11th rule of the Circuit Courts of Appeals (91 Fed. vi, 32 C. C. A. lxxxviii), and the appeal will be dismissed if the assignment is not filed before its allowance.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Western District of Arkansas.

This is an appeal from the decree of the District Court sitting in bankruptcy, which dismissed a petition of the appellants, George Webber, trustee

of the Mammoth Pine Lumber Company, the bankrupt, and the South Texas National Bank, a creditor of the bankrupt, to review the allowance of the claim of the trustee and executors of the estate of M. T. Jones for the payment to them of a share of the proceeds of the sale of certain lands of the bankrupt upon which they held vendor's and mortgage liens. The trustee and the executors of the estate of Jones did not present or prove their claim against the estate of the bankrupt, but they filed an intervening petition setting up their claim to the proceeds of the sale of the lands upon which they held the vendor's and mortgage liens. This intervening petition was filed in the proceeding in bankruptcy against the Mammoth Pine Lumber Company on July 20, 1901. The claim which it presented was duly allowed after notice to the creditors and the trustee, and it was paid by the trustee on October 29, 1901. On August 21, 1902, the appellants appeared and filed a petition to review the allowance of this claim. The court denied and dismissed their petition on November 19, 1902, and on that day they prayed and were allowed an appeal to this court. On November 26, 1902, they filed the only assignment of errors which appears in the case.

L. A. Byrne, for appellants.

W. H. Arnold, for appellees.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The decree of allowance of the claim which the appellants sought to review in the District Court was rendered nearly a year before they filed their petition for that purpose, and there is no disclosure in this record of any accident or mistake which prevented an appeal from the order making that allowance or of any diligence in preparing for or prosecuting the petition for its review. The claim was paid, pursuant to the order of allowance, more than nine months before the petition was filed in the District Court, and these facts of themselves would be sufficient to prevent a reversal of the decree dismissing this petition, if that question was here for our consideration.

But the fact is that the merits of this case are not within our reach, because no assignment of errors was filed in the court below until more than six days after the appeal was allowed. Section 997 of the Revised Statutes [U. S. Comp. St. 1901, p. 712] makes an assignment of errors, a prayer for reversal, and a citation to the adverse party essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. When an appeal is prayed and allowed in open court the prayer for reversal and the citation may be waived. But the assignment of errors is indispensable to the perfection of the appeal. Rule 11 of this court provides that "the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed." 91 Fed. vi, 32 C. C. A. lxxxviii. Attention has been sharply called to this rule, and the announcement has been plainly made that it would be enforced, although in the earlier cases the errors assigned were carefully examined, that no injustice might result from

an unexpected application of the rule. *U. S. v. Goodrich*, 4 C. C. A. 160, 161, 54 Fed. 21, 22; *Union Pac. R. Co. v. Colorado Eastern R. Co.*, 4 C. C. A. 161, 54 Fed. 22; *City of Lincoln v. Sun-Vapor Street Light Co. of Canton*, 8 C. C. A. 253, 59 Fed. 756, 759. But in the later cases the rule has been steadily and uniformly enforced. Thus, in *Frame v. Portland Gold Min. Co.*, 47 C. C. A. 664, 665, 108 Fed. 750, 751, a writ of error was dismissed because the assignment of errors was not filed until two days after the issue of the writ. To the same effect are *Flahrity v. Railroad Co.*, 6 C. C. A. 167, 56 Fed. 908; *Crabtree v. McCurtain*, 10 C. C. A. 86, 61 Fed. 808; *Lloyd v. Chapman*, 35 C. C. A. 474, 93 Fed. 599, 601; *Insurance Co. v. Conoley*, 11 C. C. A. 116, 63 Fed. 180; *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891; *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 838; *Railway Co. v. Reeder*, 22 C. C. A. 314, 76 Fed. 550. The assignment of errors in this case was not filed until seven days after the allowance of the appeal, and the appeal must be dismissed under rule 11. It is so ordered.

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#### HURLBUT v. UNITED STATES MAILING TUBE CO.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 187.

##### 1. PATENTS—INVENTION—PAPER TUBES.

The Hurlbut patent, No. 441,846, for tubes especially intended to cover paper tubes, is void, for lack of patentable invention, in view of the prior art.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 119 Fed. 188.

A. Parker Smith, for appellant.

W. C. Hauff, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. This is an appeal by the complainant from a decree dismissing the bill in a suit brought to restrain the infringement of letters patent granted to the complainant December 2, 1890, for a paper tube. The court below dismissed the bill upon the theory that the defendant's tube was not an infringement of the patent, in view of the narrow construction which must be given to the claims. 119 Fed. 188.

The patent describes a tube made of paper, and which is suitable for use as a speaking tube, as a conduit for wires, and for other purposes. The tube has a cylindrical core, or inner tube, which is formed by bending a fillet of paper of the length desired around a mandrel, so that the sides abut or somewhat overlap, and around the core one or more strips or tapes of paper are wound spirally, serving to bind the core firmly in its tube formation. When more than one wrapping is applied, the succeeding ones are wound so as to break

joints. The layers are secured together by paste or cement. The whole forms a composite structure which is light, is sufficiently strong for the uses for which it is intended, can be economically constructed, and can be readily cut into shorter lengths if desired. The patentee states in the specification:

"While I regard the tube when made of paper as the better construction, because more economical, I do not limit myself to a paper tubing, as metal might be used without departing from my invention."

The claims are as follows:

"(1) In a tube, the combination of a cylindrical core, formed from a single thickness of material and having an abutting or slightly overlapped seam, said core being covered throughout by a spirally wound tape, substantially as described.

"(2) In a paper tube, the combination of a cylindrical core, formed from a single thickness of paper and having an abutting or overlapped seam, tapes of the same material spirally wound around said core and breaking joints, and an adhesive material to bind said core and tapes, substantially as described."

The prior state of the art in respect to tubes generally is referred to in the opinion of the court below by the following statement:

"The commonplace expedient for strengthening both rigid and pliable materials, by rolling them in tubular shape and confining them by means of an outer binding, had been developed in a variety of ways and applied to all manner of structures, from paper rolls to rubber hose and metal pipes."

Flexible tubes were old, made of rubber coated with canvass, in which the core was formed and the covering was applied similarly to that of the patent in suit. The prior patent to Stone discloses such a tube. The rigid tubes of the prior art which approach most closely to the tube of the patent are those shown and described in the earlier patents to Stow and to Tainter.

The patent to Stow, granted December 20, 1870, for "improvement in pipes and tubes for water and gas," shows a tube consisting of a sheet metal core with a wrapping of paper. The core is bent around a mandrel into the form of a tube, so that the edges of the metal abut or slightly overlap, and it is then wrapped spirally to any desired thickness with a strip of roofing paper, and the paper is then saturated with hot pitch.

The patent to Tainter, granted in 1887, after pointing out that "paper tubes are ordinarily made by rolling a flat sheet upon a mandrel until the edges meet or overlap, and securing them by glue or other adhesive substance," describes a tube in which the core is a strip of paper wound in a spiral of very low pitch, and the wrapping is a similar strip wound similarly. The edges of the strips abut throughout. The strips are wound in opposite directions, or in the same direction, so as to break joints with each other. The tube may be composed of two or more enwrapping strips wound about the core. The layers of paper are coated with paste to firmly unite them together.

The first claim of the patent in suit is not limited by its terms to a paper tube, and such a limitation cannot be imported into it, in view of the statement inserted in the specification in order to preclude such an interpretation. Construed as it must be, it is completely

met and anticipated by the Stow patent. The tube of that patent is in all details of construction identical with that of the claim, when the core of the latter is made of metal, as the patent contemplates it may be. It is made of a single thickness of material, and has an abutting or slightly overlapping seam, and is enwrapped to any desired thickness over the core by spirally wound strips.

The second claim covers a paper tube in which the core is enwrapped by tape spirally wound and breaking joints; that is, enwrapped by two or more strips successively in such manner that the seams of one shall not be opposite the seams of the other. The tube of this claim is the tube of the Tainter patent, except as respects the core; and the core is the old form of paper tube referred to in the Tainter patent. Tainter preferred a core wound in a spiral of low pitch, but the patentee preferred the form which Tainter desired to dispense with. From another point of view, the patentee substituted for Tainter's core one in form and details of construction like that of the Stow patent, but made of paper, instead of metal. He then enwrapped it, and applied adhesive material to bind the parts together, as Tainter had done. We are unable to discover any invention in this. If the patentee had been the first to discover the superior adaptability of paper for the kind of tube which he desired to construct, there might have been patentable novelty in his improvement. When, however, it appears that this had been disclosed by Tainter, and that it was old to construct cores in the identical form of his and enwrap them spirally with a strip or strips of paper as he did, and to enwrap them so that the strips would break joints, and to cement the layers together by adhesive materials so as to make the tube sufficiently rigid and strong, it is impossible to discover patentable novelty. If his tube is an improvement upon that of Tainter, it is one of that character which was plainly suggested by the prior art, and the improvement exhibits merely good judgment and the exercise of very simple mechanical adaptation.

The judge who heard the cause in the court below, apparently from a kindly desire to save the patent from extinction, contented himself with giving it a construction so narrow that it would not include the defendant's tube. The defendant's tube is constructed like the tube of the Tainter patent, except that the paper strips are wound in a spiral of greater pitch. It is apparent that the difference between the low pitch of the Tainter strips and the greater pitch of the defendant's is a mere matter of degree. In affirming the decree of the court below we are constrained to base our decision upon the invalidity of the patent.

The decree is affirmed, with costs.



## LEVY v. HARRIS et al.

(Circuit Court, E. D. Pennsylvania. June 3, 1903.)

No. 45.

## 1. PATENTS—INFRINGEMENT—EQUIVALENTS.

A patentee is not to be denied the benefit of the doctrine of equivalents, to the extent necessary to protect his actual invention, although it may be a narrow one.

## 2. SAME—CLAIM FOR COMBINATION.

In a claim of a patent for a combination, all the elements which the patentee has specified must be regarded as material, and infringement cannot be found in a device in which one of such elements is omitted, unless an equivalent part is employed.

## 3. SAME—OMISSION OF PARTS—QUILL-GRINDING MACHINE.

The Levy patent, No. 664,564, for a quill-grinding machine, claim 1, held valid, but not infringed by a machine which, while substantially the same in all other respects, omits the "means for adjusting the tension of the said spring," which is made an element of the claim, and employs no equivalent therefor.

In Equity. Suit for infringement of letters patent No. 664,564, for a quill-grinding machine, granted in December, 1900, to Salovitz Levy. On final hearing.

Horace Pettit, for complainant.

Joshua Pusey, for respondents.

J. B. McPHERSON, District Judge. This bill seeks to restrain the infringement of letters patent No. 664,564, which were granted to the complainant in December, 1900, for improvements in machinery for grinding the quills of feathers. The principal object of the invention is thus described in the specifications:

"My invention relates to certain improvements in machines for grinding the quills of feathers; and the principal object of the same is to provide a machine which is simple in construction, and which will rapidly grind the ribs of the quill of the feathers, and remove all pith from the same, leaving only the bone portion of stems, with the web or vanes running from each edge, thus rendering the said quill of the feathers soft and pliable, and capable of withstanding considerable bending without the liability of breaking."

This object is satisfactorily accomplished by the complainant's machine, and I have no doubt the device displays patentable invention. Indeed, the defense of lack of novelty was practically abandoned at the argument.

The first claim, which is the only one involved, is as follows:

"In a quill-grinding machine, the combination, with the supporting-frame, of a grinding-roll journaled in said frame, a presser-roll, C, bearings for said presser-roll suspended in the machine-frame so as to be capable of moving upwardly, means for adjusting said suspended bearings so as to regulate the distance between the presser-roll and the grinding-roll, a spring, H, adapted to bear at each end on the suspended journal-bearings, means for adjusting the tension of the said spring, and a pair of feeding and crushing rolls arranged in front of the grinding and presser rolls, located so as to hold the quills while the grinding-roll is operating to remove the pithy material from the bone of the quill, substantially as described."

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¶ 2. See Patents, vol. 38, Cent. Dig. § 387.

The defendants' machine presents substantially every element thus enumerated, and each element operates to produce the same result as in the complainant's machine, unless there be a substantial difference in the respective springs that bear upon the suspended journal bearings. The specifications describe a bowed or plate spring, and this is also shown in figure 1 of the drawings.

"The spring, H, is bowed, as illustrated, and bears at each end upon the journal-boxes, d, of the presser-roll, C, for the purpose of keeping the said presser-roll in constant contact with the grinding-roll, or, in other words, for the purpose of keeping the quill, during the operation of the machine, in close contact with the grinding-roll, while at the same time allowing the said presser-roll to yield upwardly. Each end of the spring, H, is provided with an elongated opening, through which the bolts, e, pass. The tension of the spring, H, may be increased or diminished by adjusting the screw, h, carried by the bar, G."

Instead of a spring of this description, the defendants use a spiral spring at each end of the presser-roll, and this, as I have already stated, is the only difference between the two machines. In my opinion, it is also an immaterial difference, for the spiral springs perform the same office and reach the same results in the same way as does the bowed spring of the complainant, and are evidently intended as a mere evasion of the patent. I see no difference in principle between the case now under consideration and *Lepper v. Randall*, 113 Fed. 627, 51 C. C. A. 337, in which the Circuit Court of Appeals for this circuit decided that a wrapper for boiling a ham, which was described as formed of a mat, and lacing devices on the back thereof, was infringed by a wrapper in all respects identical with the patented article, except that the fastenings were straps and buckles, instead of the lacing cord used upon the patented article. It may be conceded, for the purposes of this case, that the complainant's patent is to be narrowly construed; but I may say here, as the Court of Appeals said in the case referred to, that "in no case is a patentee to be denied protection commensurate with the scope of his actual and distinctly described and claimed invention, by wholly excluding him from the benefit of the doctrine of equivalents." Applying the doctrine here as it was applied there, since it is obvious that the departure made by the defendants from the patent in suit is merely formal, and of such a character as to suggest that it is a studied evasion of the claim in suit, I have no difficulty in reaching the conclusion that the complainant is entitled to the usual decree for an injunction and an accounting.

#### Upon Reargument.

(August 19, 1903.)

When I came to decide this case, several weeks ago, my recollection of the oral argument was that the particular point now urged was not insisted upon, and that the defendants relied almost wholly upon the substantial difference between their own coiled spring and the plate spring of the patent. Accordingly, I paid little attention to a position that I supposed to be abandoned, and for that reason the opinion does not refer to it. I am ready to believe, however, that the defendants' counsel remembers more accurately, and that my own rec-

ollection concerning the oral argument was mistaken. At all events, there is no doubt that the printed record and the defendants' original brief develop with sufficient distinctness the point that was previously laid aside, but is now pressed upon the court for special consideration. The argument is this: The patent claims as one of the elements in the combination "means for adjusting the tension of the said spring." The specification shows that the particular means described by the inventor was the screw, h. "The tension of the spring, H, may be increased or diminished by adjusting the screw, h, carried by the bar, G." Neither this screw, nor any equivalent device, is to be found in the defendants' machine; but the tension of the springs is adjusted therein by the same means that is used for regulating the distance between the two rollers, namely, by the bolts, e. The defendants have therefore omitted entirely one element of the plaintiff's combination, and accordingly cannot be held to infringe. I think this position is sound, and is supported by the following authorities: *Water Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024; *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; *Pittsburg Meter Co. v. Supply Co.* (C. C. A., 3d Circuit) 109 Fed. 644, 48 C. C. A. 580. As was said in the last-cited case:

"Nothing in the law of patents is better settled than the rule that a claim for a combination is not infringed if any one of the described or specified elements is omitted, without the substitution of any equivalent thereof."

Neither is the argument effectively answered, as the plaintiff seems to suppose, by asserting (what is, no doubt, true) that the screw, h, or any equivalent means for adjusting the tension of the spring, performs a comparatively unimportant function, and might have been left out of the claim without seriously impairing the efficiency of the patent. It is probably the fact that, after the machine has been properly set, it may not be necessary to touch the adjusting screw, h, for months; and it may also be the fact that the tension can be adjusted nearly, if not quite, as readily by proper movements of the bolts, e. Nevertheless it cannot be denied that the patentee chose to make "means for adjusting the tension of the said spring" a separate element of his combination, and under the decisions he cannot now be heard to disclaim its importance. As was said in *Fay v. Cordesman*, 109 U. S., at the foot of page 420, 3 Sup. Ct., at page 244, 27 L. Ed. 979:

"The claims of the patent sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim, and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality. *Water Meter Co. v. Desper*, 101 U. S. 332 [25 L. Ed. 1024]; *Gage v. Herring*, 107 U. S. 640 [2 Sup. Ct. 819, 27 L. Ed. 601]."

Here a part has been omitted altogether, and its place is not supplied by any other device or instrumentality.

I have reached this conclusion with some reluctance, for I have not

changed my belief that the defendants' machine is in all respects, save in this insubstantial difference, a deliberate imitation of the plaintiff's useful device, and I regret to see the success of such an attempt. But the authorities seem to leave no escape, and I obey what appears to be their plain command.

A decree may be entered dismissing the bill at the costs of the plaintiff.

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WILLIAM A. FORCE & CO. v. INDEPENDENT MFG. CO. et al.

(Circuit Court, E. D. New York. May 22, 1903.)

1. PATENTS—INFRINGEMENT—NUMBERING MACHINE.

The Sawyer patent, No. 462,065, for a numbering machine, claim 1, construed, and as limited by the prior art *held* not infringed.

In Equity. Suit for infringement of letters patent No. 462,065, for a numbering machine, granted to Willard W. Sawyer, October 27, 1891. On final hearing.

William E. Warland (Henry Schreiter, of counsel), for complainant.  
H. Albertus West, for defendants.

THOMAS, District Judge. The bill is to enjoin the defendants from infringing certain letters patent, to wit, No. 462,065, issued October 27, 1891, to Sawyer, which patent was adjudicated in the recent case of William A. Force, predecessor of the present complainant, against the defendants, the Sawyer-Boss Manufacturing Company, Robert A. Stewart, George T. Holihan, Willard W. Sawyer, and Thomas H. Boss (C. C.) 111 Fed. 902, affirmed 113 Fed. 1018, 51 C. C. A. 592. The Sawyer-Boss Manufacturing Company was composed of the four individual defendants in the former suit who were privy to the sale of the patent to the complainant in such suit. After the decree therein the Sawyer-Boss Manufacturing Company sold its entire plant, factory, tools, machinery, patents, patterns, and whatever related to the manufacture of the infringing machines at No. 34 South Sixth street, Brooklyn, N. Y., to the Independent Manufacturing Company, one of the defendants in the present suit, and such defendant thereafter manufactured machines, alleged to be infringements of the patent in suit, at such place in Brooklyn, until it removed to Chicago, on May 17, 1902. Robert A. Stewart, defendant in this and the former suit, is the president of the Independent Manufacturing Company, Holihan is a stockholder thereof, while Boss is the superintendent of such company, and it appears that such three persons are the controlling owners of such company.

The inference is justifiable that the defendants enjoined by the former decree, under the form of a corporation, are manufacturing the present alleged infringing machines. Nevertheless, the chief contention involves the question of infringement, for the machine manufactured by the Independent Manufacturing Company, it is claimed, may be differentiated from the former infringing machines. The complainant charges the infringement of claim 1, which is as follows:

"(1) In a stamp, the combination of a main frame, a series of similarly spaced numbering wheels, corresponding ratchet wheels, detents for these numbering wheels and ratchet wheels operating radially within a support, pawls for imparting motion to said ratchet wheels, a movable yoke sustaining the numbering and ratchet wheels, and a frame-like lever carrying the pawls and pivotally connected to said yoke and also to the main frame, and an inking lever fulcrumed to the main frame and pivotally connected between its ends with the said lever which moves the pawls, substantially as specified."

All the parts of this combination are old except the frame-like lever pivotally connected with the yoke and main frame, and an inking lever fulcrumed to the main frame and pivotally connected between its ends with the lever which moves the pawls. In other words, the inventor devised the frame-like lever, which moves the pawls and also the inking pad by the same downward motion of the rod or plunger. When the rod descends, the lever throws the inking pad out, and moves the pawls which actuate the ratchet wheels, and this becomes possible because the frame-like lever is pivotally connected to the yoke and also to the main frame, and the inking lever fulcrumed to the main frame is pivotally connected between its ends with the lever which moves the pawls. This practically conjoint movement of the pawls and inking lever results from such pivotal connections. The vital point of the invention is the pivotal connection; the vital result is this movement of the pawls and inking lever.

The complainant contends that if the pivotal connections exist, as demanded by the claim, it is unimportant whether this double result is obtained, or whether the result is limited only to the movement of the pawls, and in support of this contention quotes the following language of the specification:

"The forward or lower end of the lever, H (frame-like lever), is utilized to form an inking appliance, and for this purpose has a pad of absorbent material saturated with ink applied to that surface, which is moved beneath the numbering wheels."

The complainant urges this contention for the reason that the defendants' alleged infringing device consists of a frame-like lever pivotally connected to the yoke and to the main frame so as to move the pawls, but not directly connected with the link which moves the inking pad. The link which moves the inking pad is attached to the yoke at one end, and at the other end to the inking lever. It does not seem necessary to determine whether the two resultant motions are required, or whether one only satisfies the claim. In any case there must be an inking lever pivotally connected in the manner described in the claim. If the link extending to the inking lever, used in the infringing machine, were connected with the frame-like lever, used in that machine to move the pawls, it would fall within the literal reading of the claim. The end of such link pivotally connected to the inking lever accords with the claim. The other end is fastened to the yoke, and not directly to the frame-like lever, and the vital question is whether that is such a variance as to avoid infringement.

There is no question whatever but that the link thus used to move the inking pad was old, being concededly shown in the letters patent No. 398,624, issued February 26, 1889, to Koch, upon an application

filed November 10, 1887. But such a link is nowhere shown in connection with the frame-like lever used for the purpose of moving the pawls, and pivoted as described in the claim. Nevertheless, the claim demands that the lever shall not only be fulcrumed to the main frame, but that it shall be pivotally connected with the lever which moves the pawls. The complainant urges that the claim does not demand that it shall be immediately pivotally connected, but that it is so pivotally connected, although the yoke be used as an intermediary. It does not seem that such was the purpose of the inventor. It is considered that he intended to provide for a frame-like lever, which should carry the pawls, through a pivotal connection with the yoke and the main frame, and the inking lever through a pivotal connection therewith, that is, by the frame-like lever pivoted to the inking lever.

The entire discussion seems to turn upon the point whether there is a pivotal connection between the inking lever and the frame-like lever, through the intermediary of the yoke. Taking into view the prior art, it is believed that the patent does not cover such a device and was not intended to.

This conclusion must result in a dismissal of the bill.

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#### MARCUS v. SUTTON.

(Circuit Court, E. D. New York. May 22, 1903.)

1. PATENTS—SUIT FOR INFRINGEMENT—MEASURE OF PROOF.

In a suit against the vendor of an article for infringement, the evidence should be convincing.

2. SAME—INFRINGEMENT—STAIR PAD.

The Marcus & Collins patent, No. 541,244, for a stair pad, *held* valid, but the evidence *held* insufficient to show that articles sold, but not manufactured, by defendant were infringements.

In Equity. Suit for infringement of letters patent No. 541,244, for a stair pad, granted to Martin H. Marcus and Walter O. Collins, June 18, 1895. On final hearing.

Amos H. Stephens (Henry Melville, of counsel), for complainant.

Dickerson, Brown, Raegener & Binney (S. L. Moody, of counsel), for defendant.

THOMAS, District Judge. The patent in suit makes an advance in a very simple art. Although the improvement may appear almost trifling, it has proved of genuine value, and has been adopted broadly in the trade. Brunswick-Balke-Collender Company v. Thum, 111 Fed. 904, 50 C. C. A. 61, is authority for sustaining a patent similar in its simplicity and commercial success, although the patent in suit has to a much less degree monopolized the market. It is concluded not only that the patent is valid, but also that the manufacturer, the Lewis Batting Company, at one time infringed it. Such infringement is inferable from the evidence of the complainant respecting his visit to the factory of the Lewis Batting Company, in August, 1901. But it also appears by the complainant's evidence that the defendant did not begin to handle the pads of the Lewis Batting Company until

January, 1902, and there is no sufficient evidence showing that the defendant was a vendor of the pads made at the time of the complainant's visit. In a suit against a vendor of an article for wrongdoing, the evidence should be convincing. The defendant gives evidence tending to show that the Lewis Batting Company does not insert the filling in the completed bag, but through the open ends. A pad so constructed would not be within the complainant's patent, and so it was admitted upon the argument. Gunz, a witness for defendant, states that he visited the factory of the Lewis Batting Company, with every facility for learning how its pad was made, and he differentiates the process from that stated by the complainant, and confirms the contention that the filling is inserted at the ends. This evidence is quite as strong in favor of the defendant as is the evidence of the complainant adverse to him, and with the burden of proof resting upon the complainant it must be concluded that the infringement is not proven as regards the pads sold by the defendant.

SEABOARD STEEL CASTING CO. et al. v. WILLIAM R. TRIGG CO.

FREDERICK POST CO. OF CHICAGO et al. v. SAME.

(District Court, E. D. Virginia. June 20, 1903.)

1. **BANKRUPTCY—ACTS OF BANKRUPTCY—SUFFICIENCY OF ALLEGATION.**

An allegation in a petition in involuntary bankruptcy against a corporation that within four months, while insolvent, it suffered or permitted attachments to be issued against it and levied, which attachments "have not to the present time been vacated," is insufficient to charge an act of bankruptcy.

2. **SAME—APPOINTMENT OF RECEIVER—CONSTRUCTION OF AMENDATORY ACT.**

The amendment of February 5, 1903, 32 Stat. 797, c. 487, § 2 [U. S. Comp. St. Supp. 1903, p. 410], to Bankr. Act July 1, 1898, c. 541, § 3, subd. 4, 30 Stat. 546, 547, making the appointment of a receiver because of insolvency an act of bankruptcy, is not retroactive, and such an appointment, made prior to the passage of the amendatory act, will not support a petition in involuntary bankruptcy filed after that date, although the receivership still continues.

In Bankruptcy. On demurrers to petitions in involuntary bankruptcy and motions to dismiss the same.

Munford, Hunton, Williams & Anderson and Bickford & Stuart, for petitioners Seaboard Steel Casting Co. et al.

Jo. Lane and Cary Ellis Stern, for petitioners Frederick Post Co. of Chicago et al.

Christian & Christian and J. Jordan Leake, for William R. Trigg Co. and sundry creditors.

WADDILL, District Judge. The petitions in the above-entitled causes were filed in the clerk's office of this court on the 21st day of April, 1903, within a few minutes of each other, and in the order named, each praying that the William R. Trigg Company be adjudged an involuntary bankrupt, and for convenience will be considered together.

The act of bankruptcy set forth in the first-named petition is that within four months next preceding the filing of said petition, to wit,

on the 23d day of December, 1902, the said William R. Trigg Company, while insolvent, committed an act of bankruptcy, in that on the said day, because of insolvency, a receiver was put in charge of the plant and property of the said William R. Trigg Company by an order of the chancery court of the city of Richmond, Va. In the last-named cause the same act of bankruptcy is charged, and, in addition, that, subsequently to the appointment of the said receiver, an attachment sued out in the city of New York, by certain creditors of said William R. Trigg Company, and levied on the Standard Oil Company, had not been vacated. The William R. Trigg Company filed its answers to the said petitions, respectively, as did also sundry creditors of the bankrupt, in which the insolvency of the company is admitted; but the defense set up is that the company is not a corporation such as is liable to be adjudged a bankrupt, that the appointment of a receiver mentioned in the petitions is not, in point of fact, an act of bankruptcy, and that the averments in the said last-named petition in reference to the attachments do not constitute an act of bankruptcy. And the said William R. Trigg Company, and the creditors, respectively, joining with them, in opposition to the bankruptcy proceedings, demurred to the sufficiency of said two petitions, and moved the court to dismiss the same, as well because of the insufficiency of the two alleged acts of bankruptcy as because of sundry defects arising upon the face of the petitions relative to the affidavits to the same and the descriptions and characters of the claims set out therein. The proceedings are now before the court upon the demurrers and motions to dismiss, which demurrers and motions have been elaborately argued by counsel, orally and in writing.

In the view taken by the court on the merits, it will not be necessary to determine the questions raised affecting either of said two petitions, and affidavits thereto, in matters of form only, further than, in passing, to say that the objections at the present stage of the proceedings are either without merit or pertain to matters properly the subject of amendment.

The act of bankruptcy in the last-named petition, regarding the company's allowing an attachment to issue against it, will first be considered. The precise averment of the petition in that respect, after setting forth the act of bankruptcy, relative to the receiver, is this: "And that subsequently attachments sued out in the city of New York by certain creditors against the said William R. Trigg Company, and levied on the Standard Oil Company, have not to the present time been vacated." Manifestly this averment is insufficient to constitute an act of bankruptcy.

The third paragraph of section 3 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422]) enumerates the acts of bankruptcy as follows: "Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property, affected by such preference, vacated or discharged such preference." The mere suing out of an attachment and levying the same does not suffice to constitute an act of bankruptcy. A judgment must be rendered thereon which would result in



creating a preference among creditors, and a failure for at least five days to vacate and discharge the preference in terms refers to the five days before a sale or final disposition of any property affected. It is not averred that this attachment will result in creating a preference, nor does it appear what connection the Standard Oil Company has with the William R. Trigg Company; but assuming that it was indebted to the William R. Trigg Company, and the attachment was in the nature of a garnishment, to stop money in the hands of the Standard Oil Company, it would nevertheless be necessary to aver that the Standard Oil Company was indebted to the Trigg Company; that an attachment had been served and judgment rendered thereon, which would result in creating a preference; and that the said Trigg Company had not within five days of the final disposition of the money or property to be affected by the garnishment caused the lien thereby created upon the property to be vacated. *In re Rome Planing Mills* (D. C.) 96 Fed. 812; *Parmenter Mfg. Co. v. Stoeve* et al., 97 Fed. 330, 38 C. C. A. 200; *In re Chapman* (D. C.) 99 Fed. 395; *In re Thomas* (D. C.) 103 Fed. 272.

This brings us to the consideration of the receivership in the chancery court of the city of Richmond, set forth in each petition as an act of bankruptcy, and which is, as a matter of fact, the act most seriously relied on for the adjudication in each petition. The appointment of a receiver for a corporation, such as set forth in each petition, is conceded to be an act of bankruptcy, under the present law; but the controversy in this case arises by reason of the fact of the existence of the receivership prior to the passage of the act of February 5, 1903, amendatory of the bankrupt act of July 1, 1898, and presents the succinct question whether, under the amendatory act, the appointment of a receiver, declared by it to be an act of bankruptcy, applies only to cases arising after the passage of the act, or to cases existing prior to its passage, and within four months therefrom.

That the appointment of a receiver in cases like the one under consideration was not an act of bankruptcy prior to the amendatory act may be conceded, in the light of the current weight of authority on that subject, and the fact that Congress saw fit in the amendatory act to particularly specify such act as an act of bankruptcy. *In re Baker-Ricketson Co.* (D. C.) 97 Fed. 489; *In re Empire Metallic Bedstead Co.*, 98 Fed. 981, 39 C. C. A. 372; *In re Blair* (D. C.) 99 Fed. 76; *In re Harper & Bros.* (D. C.) 100 Fed. 266; *Vaccaro v. Bank*, 103 Fed. 436, 43 C. C. A. 279; *Davis v. Stevens* (D. C.) 104 Fed. 235; *In re Varick Bank of New York* (D. C.) 119 Fed. 991.

Do the receivership proceedings specified in the petitions constitute acts of bankruptcy under the amended act? This depends upon whether the act as amended shall be construed as retroactive in that regard or not. The rule of construction by which it is determined whether a statute is retroactive or not is a wise one, and operates to avoid, as far as possible, consequences that would almost inevitably follow from having laws take effect prior to the time of their enactment. Such statutes are rarely passed, because of the injury likely to result from them, and courts do not incline to the interpretation of a

statute that will cause it to become effective prior to the time of its passage.

This doctrine is definitely accepted by the courts of the United States and of this state. Indeed, the presumption is that statutes are intended to operate prospectively, rather than retroactively; and they should be so interpreted, unless the act itself plainly negatives such a conclusion. *Shreveport v. Cole*, 129 U. S. 36, 43, 9 Sup. Ct. 210, 32 L. Ed. 589; *City Railway Co. v. Citizens' Railway Co.*, 166 U. S. 557, 565, 17 Sup. Ct. 653, 41 L. Ed. 1114. The Supreme Court of the United States aptly states this doctrine in *U. S. v. Heth*, 3 Cranch, 398, 413, 2 L. Ed. 479, as follows: "Words in a statute ought not to have a retroactive operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied." This was followed by the same court in *Chew Heong v. U. S.*, 112 U. S. 536, 559, 5 Sup. Ct. 255, 28 L. Ed. 770, and may now be treated as the settled law on the subject, certainly so far as the federal courts are concerned.

The Supreme Court of Appeals of Virginia, in *Crigler v. Alexander*, 33 Grat. 677, thus stated the doctrine, citing from *Potter's Dwarrior's Notes*, p. 162: "The general principle deduced from these authorities is that no statute is to have a retrospect beyond the time of its commencement, and this principle is one of such obvious convenience and justice that it must always be adhered to, unless in cases where there is something on the face of the statute putting it beyond doubt that the Legislature meant it to operate retroactively. And, although the words of the statute may be broad enough in their liberal extent to comprise existing cases, they must still be construed as applying only to cases that may thereafter arise, unless a contradictory intention is unequivocally expressed therein;" thus showing that this doctrine is as well recognized in the highest courts of this state as in those of the United States.

Counsel for petitioning creditors insist with great earnestness and much force and ingenuity that the act in question is so clear, and that it was so manifestly the purpose of Congress to have the amended act, as to this new ground of bankruptcy, operate retroactively, that the court should give effect to the act according to its plainly expressed terms, and not by judicial construction give to the same a meaning not intended by its authors. It is true that Congress amended subsection 4 of paragraph 3 of the original bankruptcy act (Act Feb. 5, 1903, c. 487, 32 Stat. 797) by making an additional act of bankruptcy, as follows: "Applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property, under the laws of the state, or the territory, or the United States;" and by the original act it is provided (paragraph B of section 3, Act July 1, 1898, c. 541, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422]), that "a petition may be filed against a person who is insolvent, who has committed an act of bankruptcy within four months after the commission of such act."

A literal interpretation of these two provisions gives much color to the contention of counsel for petitioning creditors; and they further re-

ly upon the fact, under the original act (paragraph 2, § 71, Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3452]), Congress in express terms forbade the filing of involuntary petitions for a period of four months after the passage of that act, and also in terms declared that it should not affect proceedings theretofore commenced under state insolvency laws; from which they conclude that as no such limitations were made in the amended act creating this particular ground of bankruptcy, although Congress had its attention called to the character of cases the amendment was intended to apply to, and when the same should become effective, section 19 of the amended act (Act Feb. 5, 1903, c. 487, 32 Stat. 801), in which it provided that the amended act should not apply to cases pending when the act took effect, clearly indicated a purpose on their part to make this act retroactive, as to this cause of bankruptcy; relying upon the familiar maxim applicable to the construction of statutes, "*Expressio unius est exclusio alterius*"—that is to say, that the enumeration on the part of Congress of one class of cases to which the act should not apply indicates the exclusion of the other, and that Congress meant as to the latter class that no limitation should be applicable, and the act became immediately operative.

At first blush this position would appear to be correct; but upon a careful consideration of the original and amended acts, and having in view just what Congress did do in reference to the limitations referred to, contained as well in the original as in the amended act, it becomes quite apparent that a retroactive effect was not intended to be given to this new act of bankruptcy. Clearly, it was not the intention of Congress that the original act should have a retroactive effect, nor that it should apply to insolvency cases then pending under state laws. It in express terms provides against this interpretation, for, although the act became operative from its passage, it forbade the institution of involuntary proceedings for four months; and it should not now be held, when a new ground of bankruptcy is created, that as to that act an interpretation different from what was provided for in the original act should be had, unless the same is positively prescribed, and mere silence on the subject, in the light of the provisions of the original act, will not operate to make the same apply to cases pending at the time of the passage of the act.

The qualifying clause in the amended act (section 19, *supra*), whereby it was made applicable only to pending cases, does not support the theory contended for, but, on the contrary, negatives it, as it will not be supposed that Congress meant to clearly guard against the new act applying, even to cases then pending in the bankruptcy courts, and as to which the amendments in the main pertained to matters of form and practice, and intended, without expressing it plainly, to have it apply retroactively in matters of substance, to the extent of condemning the transactions of persons innocently entered into, and which might then be the subject of the consideration of other courts, state and federal.

Counsel further insist that it is not necessary for the court to treat the amended act as retroactive in order to decree the receivership proceedings mentioned in the petitions an act of bankruptcy, for the

reason that under the language of the act, "because of insolvency a receiver or trustee had been put in charge of his property," contemplates a continuous act, and the fact that the receivership was allowed to continue after the passage of the amended act was of itself sufficient to create the act of bankruptcy. This position is clearly untenable; for, if true, every receivership, regardless of when the receiver was appointed, would constitute an act of bankruptcy, provided the same was continued after the amended act aforesaid. Such an interpretation would clearly not be in accordance with the intention of Congress.

From what is said above, in reference to the sufficiency of the acts of bankruptcy alleged in each petition, it will be unnecessary to determine the questions raised by the defendant's answer, as to whether or not the William R. Trigg Company is such a corporation as can be adjudged an involuntary bankrupt; this ground of bankruptcy involving, as it does, a question of fact as well as of law.

The motion to dismiss the petitions in bankruptcy should be sustained, and a decree will be accordingly so entered.

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#### RAYMOND SYNDICATE v. BROWN.

(Circuit Court, D. New Hampshire. June 26, 1903.)

No. 2,328.

#### 1. SPECIFIC PERFORMANCE—EQUITY JURISDICTION—CONTRACT PARTIALLY EXECUTED.

A bill which alleges the purchase by complainant from defendant of an entire stock of general merchandise for a lump sum of \$20,000, which was paid; that defendant has delivered about two-thirds of the goods, but refuses to deliver the remainder, and has concealed the same so that complainant cannot obtain possession of them by an action of replevin—states, on demurrer, a cause of action, within the jurisdiction of equity to grant relief by a decree for specific performance, on account of the peculiar circumstances of a purchase for a lump sum, a completion of title of the whole purchase in the purchaser, and his inability to replevy the goods not delivered.

In Equity. On demurrer to bill.

Sargent, Niles & Morrill, for complainant.

Eastman & Hollis and H. J. Brown, for defendant.

PUTNAM, Circuit Judge (orally). We think it is for the interest of both parties that this case should be disposed of now at the close of the arguments of counsel. Whatever our action may be, it is subject to review by the Circuit Court of Appeals, and, in view of the peculiar character of the property involved, the sooner the case is advanced so as to come under the hand of the court the better.

This case comes before us on a demurrer to a bill in equity. The substantial question made is that complainant's remedy is at law, and not in equity. The bill alleges a contract made on the 6th day of October, 1902, and it was filed on the 30th day of January, 1903. The intervening period was so short that, although in a controversy of this character a lack of very prompt action amounts to laches in:

equity, yet no specific objection is made on that account. The substance of the case as made by the bill is that the business of the complainant consists in buying entire stocks in trade of persons retiring from mercantile business, and disposing of the same at bargain sales; that the profits derived from such sales are due in large part to the fact that the complainant is able to advertise the placing on sale of an entire stock in trade of an established and reputable mercantile house among people locally acquainted with the facts; that it is essential to the profitable conducting of such sales that the complainant should have possession of the entire stock thus purchased; that in the ordinary course of its business, and for the purposes stated, it purchased of the respondent, as the executor of the will of James S. Butler, the entire stock in trade owned by Butler in his lifetime, consisting of miscellaneous merchandise; that it paid for the same \$20,000, which purchase price was received by the respondent as such executor; that the respondent delivered to the complainant about \$14,000 worth of the stock in question, and refuses to deliver the balance, and has concealed it; that in consequence thereof it is impossible for the complainant to replevy the merchandise not delivered to it, or in any way to obtain possession of it; that under the circumstances it is impossible for the complainant to ascertain such a description thereof, or of the amount of the same, as to furnish a basis of value in an action at law for damages; that it would not on any terms have purchased any part of the stock or less than the whole; that, in substance, the retention by the respondent of a portion thereof defeats entirely the purpose of the complainant in making the purchase; and that consequently it has no efficient remedy except by a bill for specific performance to enable it to complete the purchase, and secure delivery of the merchandise not delivered as above.

This makes a very peculiar case, for which no precedent has been cited by the counsel on either side. We do not regard the allegations with reference to the business of the complainant rendering it desirable that it should have this entire stock of goods, or the allegations with reference to any loss of profits which would come to it if it did not have the entire stock of goods, as furnishing the basis for a proceeding in equity. The matters which those allegations involve are too speculative and too remote for that purpose. Those are not the kind of uses which are referred to in the authorities as justifying the interposition of a court of equity to enforce a contract with reference to the delivery of personal property. The uses thus referred to as peculiar are such as appertain to heirlooms, family portraits, special machinery designed for a special mill, materials of a peculiar character which cannot be otherwise obtained, and other things of a like class. We cannot regard anything in these allegations sufficient to justify equitable interposition.

Of course, it is necessary for the complainant, whatever might be the peculiarity of the personal property involved, to show that it is secreted in such way that it could not be replevined. The bill sufficiently shows that fact. It is also necessary for the complainant to show that damages cannot be estimated in a suit at common law. But the mere fact that there might be a difference of opinion as to

what the damages ought to be, the mere fact that one jury might estimate them one way and another jury another, and the mere fact that the uncertainty exists as to damages which frequently exists in litigation, are not at all within the trend of the authorities on questions of this character. The case of *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580, illustrates what is meant. The court says that the tort there committed, unless restrained, would have resulted in a general breaking up of the complainant's business. For this the law not only furnished no specific rule of damages, but no damages whatsoever. It is in that direction that expressions as to the inadequacy or uncertainty of damages trend, and not towards any question of damages raised on the face of this bill. Ordinarily, there could be no question of damages with reference to the retention of articles of common merchandise, such as this suit relates to, which would bring a case within the expressions to which we have referred. Neither is this case with *Watson v. Sutherland*, because there the injury for which the common law furnished no remedy was direct, while here, as we have said, it is remote and speculative. Therefore there is nothing in the cases which justify us in maintaining this bill in this aspect.

The only thing which appeals to us is the fact that this bill relates to a lump sale of a general stock of miscellaneous merchandise for \$20,000. The entire consideration was paid, but the vendor delivered about two-thirds of the stock, and has refused to deliver the rest. This impresses us in two different ways: First of all, equity exercises a favorite jurisdiction when it compels the completion of what has been partly done. When a transaction has been partly completed, and then arrested in mid-air, the common law fails to give any rule which secures a satisfactory adjustment of the transaction through litigation. It is ordinarily impossible to break off a continuous transaction of importance, and leave parties a reasonable remedy in the mere matter of damages. Therefore it is that equity is prone to compel the completion of what has been partly done. In this case the reason of this rule is very well illustrated. Here is a stock of miscellaneous merchandise of large value, sold in lump. A part has been delivered, and a part withheld and secreted, so that it cannot be replevined. It is impossible to formulate any rule or even conjecture by which it can be told how the parties, as among themselves in making up the lump sum of \$20,000, estimated the part that remains behind. Independently of this, it would be quite impracticable, in the nature of things, to determine justly the proportionate value of a part of a broken stock of goods of this character which had been sold in lump. This fact alone would not justify an equity court in taking jurisdiction, but it illustrates why it is that equity ordinarily takes jurisdiction to compel the completion of what is partly done. Indeed, according to the well-settled maxims of equity, what is agreed to be done and is partly done is regarded as done, and all the court does is to complete in form what in theory is already completed. In *Hart v. Hart*, 18 Ch. D. 670, 685, Mr. Justice Kay said: "When an agreement for valuable consideration between two parties has been partially performed, the court ought to do its utmost to carry out that agreement by a decree for specific performance." In this par-

ticular case this rule is especially emphasized, because, the sale being in lump, full payment having been made, and the chattels purchased partly delivered, the title to the remainder, both legally and in equity, has vested in the complainant. Therefore the complainant is only seeking to assert its title to chattels in the possession of the respondent to which it is legally entitled specifically, and which, the same being secreted, it cannot obtain by any process at common law. Of course, as we have already said in another connection, this fact alone would not justify a chancellor in taking jurisdiction, but it emphasizes the propriety and justice of exercising in this particular case the peculiar equitable jurisdiction of which we have spoken. Therefore, on this ground, and on this ground alone, although no precedent is produced, we deem it just and proper, and within the limitations governing courts in equity, to retain jurisdiction of this bill.

We wish, however, to say that all through this argument there has run an undercurrent of thought which we do not preclude ourselves from pursuing further on a final hearing. It is often quite unsatisfactory to undertake to dispose of a bill on a demurrer, because the court may often see that the probability is that the record does not fully present the case as it really is. Therefore it is impossible for us at the present time to determine whether, under the peculiar circumstances, the remedy in equity will, as a matter of fact in this particular case, prove more efficient than that at law. We can perceive that, if the bill had been defaulted immediately on its being filed, the relief might have been in all respects effective; but, looking at the ordinary course of proceedings in chancery, it is a question, and a serious one, which we cannot dispose of ultimately on this demurrer, whether equity can, in fact, in this particular case, give any relief which is efficient. In this respect we stand somewhat as the Supreme Court stood in *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 921, where it refused on demurrer to consider the most material questions which the bill involved, but overruled the demurrer, and sent the parties to the issues of fact. On the other hand, the ordinary rule is that jurisdiction depends on the status when a bill is filed. *Busch v. Jones*, 184 U. S. 598, 599, 22 Sup. Ct. 511, 46 L. Ed. 707. In any view, so far as the case now stands, we must let it rest unqualifiedly on the demurrer.

Demurrer overruled; bill adjudged sufficient in law; defendant to answer on or before the August rules.

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#### THE ASTRAEA.

(District Court, E. D. New York. June 20, 1903.)

#### 1. SHIPPING—LIABILITY OF VESSEL TO CARGO—BREACH OF CONTRACT MADE BY CHARTERER UNDER AUTHORITY FROM OWNER.

When the owner of a vessel authorizes another, whether he be called a charterer or agent, to engage her cargoes to be carried for hire, what the owner promises the ship shall do in carrying such cargoes that it becomes the ship's duty to do, and it is immaterial, so far as relates to the ship's liability to the cargo for a breach of such duty, that it was imposed by contract rather than by the law.

**2. SAME—RULE APPLIED—LIEN OF SUBCHARTERER.**

The owners in a charter party warranted that the vessel would steam 12 knots, average speed, per hour, under given conditions. The charterer in an authorized subcharter, made with the owners' knowledge and acquiescence, repeated the warranty. Cargoes of fruit shipped by the subcharterer were injured by decay and depreciation of market value through the failure of the vessel to make the warranted speed. The owners at all times operated the vessel. *Held*, that the subcharterer had a lien on the vessel for the damage sustained.

In Admiralty. Suit in rem to recover for damage to cargo. On exceptions to libel.

Wheeler, Cortis & Haight, for libelant.

Butler, Notman, Joline & Mynderse, for claimant.

THOMAS, District Judge. The owners in a charter party to the Tweedie Trading Company warranted that the vessel would steam 12 knots, average speed, per hour, under given conditions. The charterer, in an authorized subcharter, made with the owners' knowledge and acquiescence, repeated the warranty. Cargoes of fruit shipped by the subcharterer were injured by decay and depreciation of market value through the failure of the vessel to make the warranted speed. The owners at all times operated the vessel. Has the subcharterer a lien upon the vessel for damages? The owners' agreement contemplated that the charterer would carry its own goods and contract for the carriage of the goods of others. In such case the charterer would become a carrier for hire as to third persons contracting with it, with knowledge of the charter party, while the owners would remain the actual carriers. The charterer was enabled to bind the vessel by usual stipulations, and the law imposed upon the vessel usual duties, and demanded usual qualifications for the service to which she was devoted. The present warranty of a fixed speed is not shown to be a usual provision, nor did the law impose it. The law required that the vessel should have suitable steaming capacity. The charter party made it definite. The owners measured their liability in this regard, and warranted its continued existence. The owners did this, among other things, to induce the charterer to hire the ship to carry its own goods and those of others. They knew that the charterer, influenced by the warranty, would trust its own goods to the ship. They knew that the charterer would use the warranty to persuade others to trust their goods to the ship. They are presumed to have known that the charterer would incorporate a similar stipulation in bills of lading and subcharters, and in contemplation of law intended that it should do so if it so elected. The owners' representation as to the speed of the ship took the form of a warranty. It gave persons proposing to send goods by the vessel notice of the terms upon which the charterer could contract. It was intended to induce the charterer to trust the ship's specified speed. It was designed to authorize it to induce others to trust that speed, and to use the ship relying upon such speed. It stated to the charterer what it might assure to others; it measured the contract of warranty which it could make to others; it assured the charterer to what extent as a carrier it could safely assume liability; and, being



false, it has subjected the charterer to such liability. In few words, it was a promise made, to be used and relied upon by the charterer in carrying its own goods and those of others, and the owners actually operated the vessel and carried libellant's goods knowing that they had authorized the very stipulation pursuant to which the goods could be received for transportation. This authorized the charterer to fix the duty of the ship as to speed. While the charterer contracted with the libellant for its own liability, the owners authorized the charterer to create a duty for the ship, and attached liability to the ship for breach of the duty. Such breach of duty became as much culpable fault as if the law imposed it. When an owner, sending forth a vessel for the carriage of goods for hire, authorizes another, whether he be called a charterer or agent, to engage her cargoes, what the owner promises the ship shall do in carrying such cargoes that it becomes the ship's duty to do. It is immaterial that the owners, rather than the law, impose the duty. The owners made the original contract. They are deemed to have expected that the charterer would repeat the contract with third persons. That is direct authority to do so. But the claimant objects that the personal liability of the owners, and the lien upon the vessel for its fulfillment, are conjoined, and that the charterer's liability to the libellant is not that of an owner nor of one standing in his place. Where there is not a demise of the vessel, it is certain that the charterer and ship may become personally liable, upon an undertaking for the carriage of goods, while the owner is exempt therefrom, provided, as in the present case, "the whole reach of the steamer's holds, decks, and all places of loading" are "at the charterer's disposal." Power of disposal carries rights of ownership and possession. In *The Centurion* (D. C.) 57 Fed. 412, Judge Brown, with his usual wide and exact learning, stated the law:

"I do not find upon the testimony any evidence of negligence in the management of the ship, for which her owners are responsible, that contributed to this loss. The charterers by the terms of the charter became the owners *pro hac vice* as respects all matters pertaining to the handling and delivery of cargo, but not as regards the navigation of the ship, for which, under the express terms of the charter, the owners remained the responsible principals. As this loss arose from the improper stowage of the molasses and the extraordinary drainage consequent thereon, and not from any fault in the management of the ship, the charterers are primarily answerable for the loss both of the molasses and of the sugar. The bill of lading in this case was not signed by the master, but by the agent of the charterers. It is on that ground contended in behalf of the ship that she is not chargeable, even secondarily, for this loss; that the shipper and the libellants were put upon inquiry, and were therefore chargeable with notice of the charter and of its special provision that 'no claim was to be made against owners for loss of cargo'; and the analogy of various decisions as regards supplies of coal to chartered vessels is cited in support of this view. I cannot sustain this contention. In the first place, the provision that 'no claim is to be made against owners for loss of cargo' is shown by its context to be nothing more than a stipulation between the owners and the charterers, adjusting their liabilities upon the voyage as between themselves. It has no relation to claims of the shippers of cargo against the ship for any negligent performance of the duties which the law imposes on the ship as a common carrier. The analogy to cases of supplies, moreover, wholly fails in this important particular: that here the ship was let to the charterers for the very purpose of carrying cargo, and, for aught that appears, with the usual mutual lien which the law gives as between ship and cargo. The charter makes the

charterers the owners pro hac vice as respects the transportation of cargo, and by necessary implication authorizes freights upon those usual terms. The charter even expressly provides that the owners shall have 'a lien upon all subfreights.' In the case of supplies of coal by charterers, on the other hand, there is no such authority from the owners, express or implied, to purchase coal on the ship's account, but the contrary. The charter contains nothing that even by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she was chartered. The ship is therefore liable for bad stowage, because the duty to stow properly is one of the duties of carriage which the owner has expressly authorized. *The Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341; *Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41. The ship is liable for damage from bad stowage whether the stowage is done by the owners' agent or the charterers', and equally so whether there is any bill of lading or not. It was therefore immaterial whether the bill of lading was signed by the master or by the charterers. *The Euripides* (D. C.) 52 Fed. 161, 163, and cases there cited; *The Keystone* (D. C.) 31 Fed. 412, 416, affirmed on appeal."

But it may be answered that the duty in that case was such as the owner is presumed to contemplate in leasing his vessel, because it is attached by law to the duty of carriage for hire. But in the case at bar the owners actually did make the agreement with the charterer, and actually contemplated that the charterer would, if occasion arose, transmit the agreement to shippers under bills of lading or subcharters, or, to be more technically accurate, that it would reaffirm the agreement in such instruments. But in the case at bar the owners prescribed their own duty and that of the ship. They promised with what speed the carriage should be made. The law demanded diligence. It required some steaming capacity. The owners fixed the limit of their diligence and such capacity. Surely a self-imposed duty is as obligatory as one imposed by law.

The plain case is that the owners, remaining in possession of the vessel, agreed to transport therein, at a certain speed, such cargo as a second party should engage to carry. The second party personally engaged with another that the ship should carry the cargo at such speed, the contract therefor taking the form of a subcharter. The owners carried the cargo, but at such reduced speed as to ruin or impair it. It is palpable that the owners authorized the second party to represent and to obligate itself, as the apparent owner of the vessel, to transport the cargo at the specified speed. Hence the vessel would be bound as if the owners undertook the carriage, or as if there had been a demise of the vessel. The charterer did stand in the place of the owners for the purpose of its contracts of affreightment. It could assign its charter party, or by subcharter transfer all its rights of use or issue bills of lading. Whether the libellant shipped the goods under a bill of lading, a subcharter, each containing the warranty, or under an assignment of the original charter, such lien accrued upon breach of the warranty. If the charter party had been assigned, he would have maintained his action against the owners and the vessel. *The Baracoa* (D. C.) 44 Fed. 102. If bills of lading had been issued, the case would have been similar to *The Centurion* (D. C.) 57 Fed. 412; *The T. A. Goddard* (D. C.) 12 Fed. 174.

The exceptions should be overruled, with leave to answer.

## UNITED STATES v. LEHN.

(Circuit Court, S. D. New York. May 19, 1901.)

No. 2,965.

## 1. CUSTOMS DUTIES—RULE OF CLASSIFICATION—CHIEF USE.

Where a tariff enumeration is descriptive of the use of imported merchandise, the chief or predominant use of an article should control in determining whether or not it comes within that enumeration.

## 2. SAME—CLASSIFICATION—COAL-TAR PREPARATIONS—LYSOL.

Lysol, a liquid substance in which coal tar is the origin of the elements that give it its determining characteristic, the chief use of the article being otherwise than as a medicine, though used as such to a limited and comparatively insignificant extent, is dutiable under the provision in paragraph 15, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627), for "preparations of coal tar, \* \* \* not medicinal," and not under paragraph 3, Schedule A, § 1, c. 11, of said act, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627), covering "chemical compounds."

Appeal by the United States from a decision of the Board of General Appraisers which reversed the decision of the collector of customs at the port of New York in the assessment of duty on the importations in question.

The opinion of the board is as follows:

Wilkinson, General Appraiser. The merchandise is a brown liquid known as "lysol." It was returned by the appraiser as a chemical compound, and was assessed for duty accordingly at 25 per cent. ad valorem under paragraph 3, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1627). It is claimed to be entitled to free admission under paragraph 524, Free List, § 2, c. 11, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682), or paragraph 657, Free List, § 2, c. 11, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687), or to be dutiable as a coal-tar preparation at 20 per cent. under paragraph 15, Schedule A, § 1, c. 11, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627).

Lysol is made by dissolving a fraction of tar oil, which boils between 190 and 200 C., in fat, both materials being saponified. The chemist reports that a sample submitted to the United States laboratory was found "to be composed of saponified cresol and a saponified oil, apparently fish oil; the latter causing a clear solution when mixed with water." Coal tar is the origin of the elements which give lysol its determining characteristic. In *re Roessler & Hasslacher Chemical Company* (C. C.) 49 Fed. 272 (affirmed by the Circuit Court of Appeals, In *re W. J. Matheson & Co.*, 4 C. C. A. 3, 56 Fed. 482, 1 U. S. App. 308) the court said, in regard to the provision for coal-tar preparations: "I do not think it was the intention of Congress to restrict these paragraphs to products or preparations in which the entire constituents of coal tar still remained, simply changed in some way or other by manufacture. Nor is it particularly material that other substances have been added, if the determining characteristic of the product or preparation is something which it has received from coal tar."

Largely, the chief use of lysol is as a disinfectant and germicide. It is employed by physicians for disinfecting their hands and instruments in surgical work, but its use as a medicine is limited and comparatively insignificant.

The Circuit Court of Appeals, in the matter of acetanilid (*United States v. Roessler & Hasslacher Chemical Co.*, 24 C. C. A. 604, 79 Fed. 313, 45 U. S. App. 572), said in part: "The article in question is a chemical compound known as 'acetanilid.' It is prepared from anilin oil, a product of coal tar, by treatment with carbolic acid, and derives its characteristics purely from coal tar, the acetic acid being merely a medium for its manufacture." \* \* \* From the description of acetanilid above set forth, it is manifest that it is a

chemical compound, and also a preparation of coal tar, while both sides concede that it is not a color or dye. It is therefore within the description of both paragraphs 19, 76, Schedule A, § 1, c. 1244, Tariff Act Oct. 1, 1890, 26 Stat. 567, 570. If acetanilid be covered by the provisions of paragraph 19, above quoted, this would settle the question, since manifestly the designation 'all preparations of coal tar not colors or dyes' is more specific than the general descriptions 'all chemical compounds' or 'all chemical salts.' \* \* \* The first question to be determined, then, is whether the article in question is a 'medicinal preparation,' within the meaning of paragraph 75, Schedule A, § 1, c. 1244, Tariff Act Oct. 1, 1890, 26 Stat. 570, and, if that question be answered in the negative, further inquiry will be unnecessary. \* \* \* That the chief or predominant use of acetanilid is in the arts, and not in medicine, is quite clear, upon the proof; and, under familiar principles of construction, such use is controlling of its classification."

We find that lysol is both a chemical compound and a coal-tar preparation, not medicinal, not a color nor a dye, and that it is not one of the articles enumerated in paragraphs 524 and 657. Following the decisions cited, we sustain the claim that it is dutiable at 20 per cent. ad valorem, under paragraph 15, act of July, 1897. Reference is made also to G. A. 3900.

The board has made some former rulings which seem to recognize principles not entirely in harmony with this decision, and which are now on appeal, but they cannot be followed, in view of the fact that they are believed to be contrary to the court decisions above cited, which are binding on this board, as an inferior tribunal.

No application has been made for the suspension of these protests either by the counsel for the government or of the importers, and hence a suspension is not ordered under the provisions of rule 8, governing the procedure of the board, especially as a majority of the board sitting in the cases are of opinion that the court decisions referred to are conclusive of the plain legal principle which settles the controverted issues.

Tichenor, General Appraiser. I am constrained to dissent from the conclusions of the majority of the board in these cases. They appear to be contrary to the doctrine of the board's recent decisions respecting so-called sheep dip, soluble creosote, and carbolineum. G. A. 4124, 4376, and 4426. These articles are unquestionably chemical compounds. They are, to be sure, composed of coal-tar products in combination with other substances, but it does not appear as a fact from the evidence that the coal-tar product was the component material of chief value or the distinguishing constituent of the article in either case. Indeed, it would appear from the chemist's report of analysis, as quoted in the decision, that the saponified fish oil, rather than the fractional distillate of coal tar (cresol), is the distinguishing constituent or component material of chief value in this so-called lysol. It is not, therefore, a product or preparation of coal tar, within the meaning of the tariff act as construed by the courts in the Matheson Case, referred to in the decision. It appears from the evidence that the article is intended for, and is used as, a medicinal preparation, as well as a germicide or disinfectant in surgical operations, and perhaps otherwise. It having been assessed for duty at 25 per cent. ad valorem, and it being undisputed that it is a chemical compound, I am decidedly of the opinion that the protests should be overruled.

Comstock & Brown, for importers.  
Chas. D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question is a brown liquid known as "lysol." It was returned by the appraiser as a chemical compound, and assessed for duty accordingly at 25 per cent. ad valorem, under the provisions of paragraph 3, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]. It was claimed to be free under paragraph 524, Free

List, § 1, of said act, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682), as a product of coal tar, which claim has since been abandoned, or as dutiable at 20 per cent. ad valorem under paragraph 15, Schedule A, § 1, of said act, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627), as a preparation of coal tar, not a color or dye, and not medicinal, not specially provided for. This article fulfills every claim which is made for it, both by the importers and by the government. The only question raised was whether "chemical compounds" or "preparations of coal tar" is more specific. The opinion of the board, citing the decisions of the courts, shows that the term "coal-tar preparations" is more specific than the term "chemical compounds."

The decision of the Board of General Appraisers is therefore affirmed.

### SCHOELLKOPF v. UNITED STATES.

(Circuit Court, S. D. New York. April 29, 1901.)

No. 2,912.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—SOLUBLE CREOSOTE—COAL-TAR PREPARATIONS.

Soluble creosote, an article prepared from coal-tar dead oil, is less specifically provided for as a "chemical compound" than under a provision for "products or preparations of coal tar," and is properly classified for duty under the latter head, in paragraph 443, Free List, § 2, c. 349, Tariff Act Aug. 27, 1894, 28 Stat. 539, or paragraph 15, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627).

Appeal by the importers from a decision of the Board of General Appraisers which affirmed the decision of the collector of customs at the port of New York in the assessment of duty upon the importations in question.

Comstock & Brown, for importers.  
D. F. Lloyd, Asst. U. S. Atty.

TOWNSEND, District Judge. This appeal covers several importations of a substance known as "soluble creosote," produced by various additional processes and ingredients from coal-tar dead oil, which by such additions it has ceased to be. Some was imported under the tariff act of 1894, and thereunder assessed at 25 per cent. ad valorem (paragraph 60), as a chemical compound. Other was imported under the present tariff act, and thereunder assessed at 20 per cent. under the provisions of paragraph 15, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627), for "products or preparations of coal tar, not colors or dyes, and not medicinal, not specially provided for." The decision of the Board of Appraisers speaks only of the latter importations, and, as to those, affirms the assessment of duty by the collector, which the importer now concedes to be correct, in accordance with the recently decided case of *United States v. Lehn*, 124 Fed. 87, on *lysol*. But a provision similarly worded in the act of 1894 as to coal-tar preparations having been in the free list (paragraph 443, Free List, § 2, c. 349, Tariff

Act Aug. 27, 1894, 28 Stat. 539), it follows that, if the assessment at 20 per cent. under this classification is correct in the new law, the goods should have been passed free under paragraph 443 of the act of 1894. To that extent, therefore, the decision of the board is reversed, and as to the importations under the act of 1897 is affirmed.

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ROSNEY v. ERIE R. CO.

(Circuit Court, S. D. New York. July 27, 1903.)

1. DEATH OF SERVANT—NEGLIGENCE—BILL OF PARTICULARS—EXAMINATION BEFORE TRIAL.

Where, in an action for the death of plaintiff's intestate, the complaint contained only general and indefinite charges of acts and omissions alleged to be negligent, and on a demand for bill of particulars plaintiff answered that she had no actual information as to the several allegations in her complaint, but averred the same from the fact that there was a collision between defendant's trains, and that it was inferable from such collision that the causes alleged contributed thereto, and that the information desired was within the personal knowledge of defendant, which plaintiff had no means of obtaining, *held*, that the plaintiff, upon defendant's consent, should obtain the information pursuant to sections 870, 871 et seq., of the Code of Civil Procedure, and thereupon make her complaint more definite and certain or serve a proper bill of particulars.

Hatch & Wickes, for plaintiff.

Stetson, Jennings & Russell (W. T. Denison, of counsel), for defendant.

THOMAS, District Judge. This action is to recover damages on account of the death of the plaintiff's husband by the wrongful act of the defendant, whose servant the decedent was. The defendant moves for a bill of particulars of certain alleged acts and omissions which are charged by the plaintiff to be negligent and to have contributed to the accident. The plaintiff charges, upon information and belief, that all of the following causes contributed to the injury. The allegations are to the following effect:

Complaint, par. 9: The collision was caused by the negligence of the defendant (1) in omitting and neglecting to provide safe, adequate, and proper signals and signaling apparatus; and (2) in negligently supplying signals and signaling apparatus, unsafe, defective, and dangerous; and (3) in causing and permitting such signals and signaling apparatus to be constructed, operated, and maintained in an unsuitable, improper, unsafe, inefficient, defective, and dangerous manner, position, and condition.

Complaint, par. 10: The collision was caused by the negligence of the defendant in failing and omitting to cause proper and adequate signals to be given to the persons on said colliding trains to warn the persons on each train of the proximity of the other train and of the danger of collision.

¶1. Examination of party before trial, see note to O'Connell v. Reed, 5 C. C. A. 602.

Complaint, par. 11: The collision was caused by the negligence of the defendant in failing and omitting to deliver to the conductor and other persons in charge of the movement of the colliding trains instructions and orders correct, explicit, safe, clear, and adequate, but, on the contrary, issuing and delivering to such conductor and persons information, instructions, and orders incorrect, conflicting, vague, ambiguous, unsafe, inadequate, and misleading.

Complaint, par. 12: The collision was caused by the negligence of the defendant (1) in failing and omitting to construct and maintain its track in a reasonably safe and direct course, but, on the contrary, negligently maintaining a sharp curve at or near the place of collision; and (2) in failing and omitting to place its water tank at a reasonably safe and proper place, but, on the contrary, negligently maintaining at the place where said collision occurred a water tank so located that trains stopping for water would not be seen by persons upon a train approaching from Honesdale until the trains were almost together.

Complaint, par. 13: The collision was caused by the negligence of the defendant in failing and omitting to provide and maintain an adequate number of tracks, and in causing and permitting the trains to be run and operated in both directions upon the same track, and without taking reasonable care to prevent their meeting and colliding.

Complaint, par. 14: The collision was caused by the negligence of the defendant in failing and omitting to provide a safe place to work, and in failing and omitting to provide a safe system and method for the handling of trains in its yard, and for the providing and maintaining of its main tracks through its freight yard in a reasonably safe condition and free from other trains at the time of the arrival of trains upon the main line.

Complaint, par. 15: The collision was caused by the negligence of the defendant in failing and omitting to employ competent, fit, careful, and capable persons, the defendant, on the contrary, employing incompetent, unfit, careless, and incapable persons, whose unfitness for their tasks brought about the collision.

Complaint, par. 16: The collision was caused by the negligence of the defendant in failing and omitting to provide and enforce a reasonable and safe system and schedule of work for its employes, so as to guard against improperly taxing and straining their physical and nervous energies, the defendant, on the contrary, permitting and requiring its employes, including the persons responsible for the accident, to perform an improper and excessive amount of severe and long-continued labor, such as to unfit them for the performance of their duties, and as to cause the collision.

Complaint, par. 17: The accident was caused by the negligence of the defendant in failing and omitting to provide safe, adequate, and proper rules and regulations for the maintaining and operating of its railroad, and for the maintaining and operating of its trains in its yard and upon its tracks, at the place where the said accident occurred, and for controlling the movement and operation of its trains thereon, and for procuring, constructing, maintaining, and operating safe, proper, and adequate signal and signaling apparatus, and for the issuance and

delivery of explicit, clear, safe, and adequate information, instructions, and orders to the conductors and other persons in charge of the movement and operation of its trains, and for the securing and employing of fit, competent, and careful persons as employ  s, and for the providing of a reasonable system or schedule of hours and duties of its employ  s, which would not unfit them for the tasks required of them.

The plaintiff answers the demand for the bill of particulars by two contentions: First, that the plaintiff has no actual information as to the several allegations, but infers the same from the fact that there was a collision between the trains, and that it is inferable from such collision that the causes alleged contributed to it; second, that the information desired is within the personal knowledge of the defendant, and that the plaintiff has not the means of obtaining such information. This answer to the motion for the bill of particulars reveals that the plaintiff, under oath, has charged acts and omissions alleged to be negligent, of which she has no personal knowledge and of which she has no information, but which are mere inferences drawn from the fact of the collision itself. Hence the plaintiff asks that the absolutely indefinite charges should not be particularized, because the plaintiff cannot be specific, inasmuch as she has no information that would enable her to be specific. The difficulty of procuring the exact information is understood, but that does not avoid the necessity of framing charges with such reasonable particularity as will enable the defendant to know fairly what the accusations are, so that they may be answered. The plaintiff should have an opportunity to examine into the facts related to the accident, for the purpose of ascertaining as near as may be the causes contributing to the same. Hence, if the defendant desires that the charges in the complaint should be so sufficiently specific that it can prepare to meet them, it should consent to such an examination of the persons who may have probable knowledge of the accident and the conditions that attended it. It may be that such an examination could be had under sections 870, 871, et seq. of the Code of Civil Procedure. In any case, if the defendant desires that the charges be made more specific, it should consent to an examination for the purpose of eliciting the information. If the plaintiff shall take proper steps to secure such examination of witnesses, and the defendant shall consent thereto, the desired information may be obtained. If the plaintiff does not avail herself of the suggested means to obtain the necessary information, the motion for a bill of particulars, to an extent unnecessary now to decide, should be granted. If the plaintiff does move, and the defendant does not consent to such an examination, the motion for a bill of particulars will be denied. Meanwhile, awaiting the action of the parties, the decision of the present motion is reserved. The suggestion that the information is within the knowledge of the defendant cannot be accepted. Such a position proceeds upon the theory that the charge is true, and that the defendant will ascertain its truth by research, while in fact the legal presumption is that the accusations of negligence are untrue, and that the defendant could not find the information true upon research. While the rule contended for by the plaintiff might have application within narrower limits, it is inapplicable to the general and indefinite



charges involving so broad fields of operation upon the defendant's road.

Upon obtaining further evidence from such examination, the complaint may be made definite and certain by amendment, or a proper bill of particulars would give the necessary information.

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INTERNATIONAL NAV. CO. v. SEA INS. CO., Limited.

(District Court, E. D. New York. May 14, 1903.)

**1. MARINE INSURANCE—EXPENSES ARISING FROM STRANDING—LAW GOVERNING APPORTIONMENT.**

A valued English insurance policy on a ship contained a provision that "general average, salvage and special charges, as per foreign custom, payable according to foreign statements, or \* \* \* per rules of port of discharge, \* \* \* at the option of assured." *Held*, that under such provision the law of New York, the port of discharge, governed as to the amount payable by the insurer on account of salvage and other expenses arising from stranding; and statements of the adjusters there fixing the amount of the loss and distributing the same to the several policies, in accordance with the law of the port, which requires the insurer to pay in the ratio of the loss to the stipulated or policy value of the vessel, instead of in the ratio of the loss to the actual value, as by the English law, were conclusive on the insurer.

In Admiralty. Action on marine policy of insurance.

Robinson, Biddle & Ward (H. G. Ward, of counsel), for libellant.

Butler, Notman, Joline & Mynderse (Wilhelmus Mynderse, of counsel), for respondent.

THOMAS, District Judge. The question is whether an English insurance policy on a vessel should bear the expenses arising from stranding in the ratio of the loss to the actual value, which is the English rule (*Balmoral Company, Ltd., v. Marten*, 2 Q. B. [1900] 748, affirmed in Court of Appeals, L. R. 2 K. B. [1901] 896, affirmed in House of Lords, L. R. App. Cases [1902] 511), or in the ratio of the loss to the policy value, according to the rule at New York, the port of discharge (*International Navigation Company v. Atlantic Mutual Ins. Company* [D. C.] 100 Fed. 304, affirmed in 108 Fed. 987, 48 C. C. A. 181). In the last case the loss and expenses of the stranding were found to be: (1) For salvage and interest (salvage found by Judge Brown, 83 Fed. 104, affirmed 86 Fed. 340), \$135,937.22; (2) for legal expenses, \$5,071.64; (3) for repairs and attendant expenses, \$107,368.42—total, \$248,377.28—which the adjusters at the port of New York apportioned to the foreign and domestic insurers according to the law of New York. In charging the American insurers according to the rule in New York, the learned judge decided (*International Navigation Company v. Atlantic Mutual Ins. Company* [D. C.] 100 Fed. 304) that such losses were recoverable in the first instance from the insurers, independently of any general average adjustment, and that the insurers, upon payment, would be enabled by subrogation to

¶ 1. Marine insurance, general average, see note to *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 357.

pursue remedies for contribution, which might exist in favor of the interest insured against other interests. From this it appears that average adjustment in absence of stipulation places no restraint upon the assured, and in no wise affects the contract of insurance. The present policy states that "the said steamship, for so much as concerns the assured and the assurers in this policy, is and shall be valued at £275,000." This stipulation and other provision of the policy plainly state an agreement that of itself necessitates the application of the New York rule above stated. But assuming that the policy is not, by such language, excluded from the English law, there is a further provision that determines the applicability of the law of New York. The policy provides:

"General average, salvage and special charges, as per foreign custom, payable according to foreign statements or per York-Antwerp rules, or York-Antwerp rules of 1890, or per rules of port of discharge, if in accordance with contract of affreightment, at the option of assured; and in the event of salvage, towage, or other assistance being rendered to the vessel hereby insured, by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the vessel) shall be ascertained by arbitration in the manner above provided for under the collision clause, and the amount so awarded, so far as applicable to the interest hereby insured, shall constitute a charge under the policy."

The respondent is understood to admit that under this stipulation the insurer is bound by all acts done by the adjusters within their jurisdiction and pursuant to the law of the locality. It concedes that it may not dispute: (1) The disposition made of the various items of loss by the adjusters. For example, if the adjusters regard a loss as general or particular average, their conclusion is final. (2) That the relative amount of loss that each class of property, ship, freight, or cargo, shall bear, is determinable finally by the adjusters alone. But the respondent disputes the power of the adjusters to determine what proportion of the loss thus imposed upon the ship or cargo shall be paid by the insurer thereof. The respondent's theory is that the adjusters have power to ascertain the loss and the items composing it, and to distribute the loss to the different interests, but not to determine what portion thereof any insurance company shall pay, but that such payment shall be controlled by the terms of the policy interpreted pursuant to the applicable law. It is undoubted that, where the policy contains similar provisions, such as "general average as per foreign statement," the insurer is bound by the statement of the foreign adjusters as to whether losses are general or particular average or neither, and as to the distribution of the losses, however much such statement differ from the custom and law at any other place. *Mavro v. Ocean Ins. Company, L. R. 9, 2 Asp. Mar. Cas. N. S. 361*; *Williams v. Association* (not reported); *De Hart v. Compania Anonima, Reports of Commercial Cases, vol. 8, pt. 1, p. 42*; *Harris v. Scaramanga, 1 Asp. Mar. Cas. p. 344*.

But it is considered that the respondent imposes too narrow limits on the stipulation in the present instance. The provision is that "general average, salvage, and special charges, as per foreign custom" (that is, ascertained pursuant to foreign custom) shall be paid "accord-

ing to foreign statements \* \* \* or per [according to] rules of port of discharge." The provision is not only for adjusting losses according to foreign custom, but also for payment of losses by the insurer according to the rules of the port of discharge. The dominant rule at the port of New York, the port of discharge, is the law, and that law is that the insurer under a valued policy shall pay in the ratio of the loss to the stipulated value. The adjusters in the present instance have not only followed the custom of the port in so stating and distributing the loss to the policies, and appointing the amount that each policy should bear, but have in doing this observed the law of the port to which all custom and rules are amenable. In *International Nav. Company v. Atlantic Marine Ins. Company* (D. C.) 100 Fed. 317, Judge Brown stated:

"By the ordinary rule, general average adjustments are to be made and paid according to the law of the port of discharge; and these policies contain a clause providing that general average shall be payable (at the option of the assured) according to the rules of the port of discharge; so that the New York rule must govern in this case. Any analogy, therefore, based upon the payment of average contributions by insurers at this port, sustains the libelant's contention for full payment, rather than the defendants'."

Inasmuch as the adjustment is made pursuant to the custom, rules, and law of the port, it binds the respondent as to the scope and nature of the losses. Inasmuch as the respondent promised to pay according to the "foreign statements" or the "rules of port of discharge," the statement and the rules and law pursuant to which the statement is made demand that payment shall be in ratio of the loss to the value stated in the policy. The rules are the law, or rest thereon. The statement follows the law. The respondent had agreed to pay pursuant to the statement or the rules. Either require the fulfillment demanded by the libelant, and both concur in such demand.

The libelant should have a decree.

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#### THE GUY G. MAJOR.

(District Court, E. D. New York. May 13, 1903.)

#### 1. COLLISION—VESSEL AT PIER—LIGHTER CAUSING BARGE TO SWING AT MOORINGS.

A steam lighter which cast off some of the lines by which a barge was moored at the end of a pier in order to go between the barge and the pier for the purpose of discharging, allowing the barge to swing with the tide, assumed the responsibility of guarding her movements to prevent her from injuring other vessels, and is solely liable for an injury to another vessel lying at the side of the pier with which the barge came in collision, in the absence of evidence showing that the barge was also in fault.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham (Forrester, of counsel), for libelant.  
Peter S. Carter, for the barge.

Howland, Murray & Prentice (Lancaster, of counsel), for steam lighter.

THOMAS, District Judge. The bark Powelson was lying on the north side of pier 12, East river, and the barge B. & F, No. 8, loaded with dirt, was lying at the end of such pier. The tide was at the last of the ebb. The steam lighter Guy G. Major desired to discharge cargo at the end of the pier, and obtained permission of the master of the barge to go between her and the dock for that purpose, upon the promise of returning the same to the dock, and thereupon did enter with the bow upstream and projecting some feet north-erly of the pier. The barge had been made fast to the pier by a stern line running to the southeasterly corner of the pier. When the Major came in the barge's bowline was made fast to the stern bitts of the Major. While the Major was discharging the tide changed to a moderately strong flood, and when the tug was ready to go out the master of the barge came forward and drew in his bowline, which was thrown off on the tug; whereupon the barge began to swing, and had reached a point so that she was at right angles to the pier when the Major had backed out. In backing out the Major was obliged to throw her stern to starboard, as there were vessels at the pier below. This carried the stern of the Major up the river, and it was her intention to go on the upper side of the barge, make a line fast between the tug and the barge's side, and push the barge up against the dock. Before this was done, however, the barge had been carried by the tide into the slip north of Pier 12, so that her corner came in contact with the bark lying there, and did the damage for which the libel is filed. The Major contends that afterwards she set the barge back at the dock, but the master of the barge states that the Major went away, and did nothing whatever. The Major contends that, after the line was thrown off from the barge to the tug, the master of the barge went astern, and although he was hailed and asked to return and make fast a line from the tug to the barge, so that the latter could push the former up against the pier, he not only refused to return, but used very indecent language to those on the tug. The master of the barge states that when the Major went out she pulled his barge in such a way as to break his breastline, leaving him but one line. Those on the tug claim that this breastline did not part at the time, but was cut against the rudder of the bark. The master of the barge states that as his breastline was broken, and his sternline had been slackened for the purpose of letting the Major in, his place was at his breastline or sternline, and that he did not know that he was called to aid the tug in the matter of adjusting the rope. The fact is that the tug let this scow go about until she was at right angles with the pier before the tug was in a position to go around on the upper side of her, and even then she did not push against her, for fear, as he said, that it would cause the scow to go still more quickly into the bark. It was at some risk that the Major left the barge to the influence of the flood tide, taking the chance of getting around on the upper side of her and making a line fast in time to prevent her from going into the bark. There is no doubt that it could have been done if there had been somebody all ready to take the line. But either the master of the scow did not, or did not want to, understand what was wanted of him. The tug

assumed the duty and risk of detaching the barge's bow mooring line, thereby exposing her to a flood tide, and upon the tug rested the responsibility of guarding her movements lest she injure other vessels. The tug failed in this duty, and is primarily liable. But should the tug be permitted to shift the liability to the barge because of the failure of the master of the barge to co-operate in the tug's intended maneuver? The careful argument of the claimant's advocate is quite logical, provided the premises be accepted that an arrangement was perfected between the tug and the master of the barge with reference to the part that the master should take in the maneuver. The question is not free from very serious doubt. The master of the barge testified that he did not understand that he was summoned to co-operate in adjusting the line at his bow. As the barge swung out her breastline was broken, and this probably disturbed and distracted the attention of the barge's master. The burden seems to be upon the tug to establish that the master of the barge was in fault, and, after careful consideration, it is concluded that the evidence does not show with sufficient clearness that the captain of the tug brought home to the master of the barge the duty which the latter was to perform to insure the safety of the maneuver. The tug backed out, allowed the barge to swing about, and to be carried by the flood tide against the libellant's vessel, her breastline meantime breaking, and the evidence does not show that the tug did anything to arrest the movement of the barge until after the collision. If the answer be that there was not time to do it, such reply indicates the dangerous opportunity that was given by the tug to the barge to do harm.

The decree should proceed against the Guy G. Major alone.

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#### THE MASSASSAGUA.

(District Court, E. D. New York. June 25, 1903.)

1. COLLISION—STEAM AND SAILING VESSELS CROSSING.

A steam vessel passing down East river with tows in the evening *held* in fault for a collision with a sloop which was crossing the river, without changing her course, and whose lights could have readily been seen by proper attention. The sloop also *held* in fault because the master, although warned by his lookout that the steamer was coming directly toward them, gave her no attention, although he might readily have avoided the collision by changing his course after he saw the negligent navigation of the other vessel.

In Admiralty. Suit for collision.

Owen & Sturges, for libellant.

Carpenter, Park & Symmers, for claimant.

THOMAS, District Judge. On December 3, 1903, shortly after 5 o'clock, the steam canal boat Massassagua, with two barges in tow on a hawser, collided with the oyster sloop Pell, which was crossing the East river on the port tack; the wind being about west or west north west. The wind was light, and the sloop was carrying main-sail, jib, and topsail, and side lights. Upon coming out of Buttermilk

Channel, she laid her course diagonally across the river, and maintained it to the time of the collision. The tide was at the end of the ebb, but it was running slightly flood along the New York docks. The master of the sloop was at the helm, and his son, apparently about 18 years of age, was forward acting as lookout, accompanied by a boy whose presence then and evidence in court are unimportant. The son called the master's attention to the canal boat, and the latter then saw her side lights a quarter of a mile away. The sloop at the time was on a course from Governor's Island to Fulton Market, where she intended to make a landing. Later the son called out that the canal boat was heading for the sloop; but the master did not look, and kept on his course. Later the son called again, and the master looked and saw the canal boat's bow a few feet away, and the collision almost immediately occurred; the canal boat striking the sloop just aft of amidships on the starboard side. Previous to the collision, the canal boat gave several toots of her whistle; but the master of the sloop paid no attention, upon the plea that he thought it could not have been intended for the sloop. The collision took place on the New York side of the center of the river. About 100 feet on the starboard hand of the canal boat was a tow going up the river, and it was the purpose of the master of the sloop to cross ahead of the canal boat and the up-going tow, and, if he could not cross the bow of the latter, to go around under her stern. The master of the sloop, although warned by his son, did not look at the canal boat from the time that he saw her, a quarter of a mile away, until she was 10 feet away. The evidence of the master of the sloop that he did not change his course from Governor's Island is sustained by the evidence of his son, and of the pilot of the tug boat and tow going up the river, who, however, places the accident very near to the New York shore.

The evidence on the part of the canal boat is that she was coming straight down the river, and that she saw a sloop in the neighborhood of Governor's Island headed directly upstream, and that she came forward until she was about 200 feet away, when she swung to port; that the canal boat tooted a whistle, whereupon the sloop, when 75 or 100 feet away, swung directly across the bow of the canal boat. The evidence of every person connected with the canal boat and the two boats in tow was to this general effect: That none of such witnesses saw the lights of the sloop, save one witness on one of the boats in tow, who testified that he saw her red light until it shut in as the sloop crossed the canal boat's bow. It is claimed that it was light enough to see the vessel herself; but it is most singular that the sloop's lights were not seen, and it is evident that the pilot of the canal boat did not use the lights for the purpose of determining on what course the sloop was sailing. The destination of the sloop would take her obliquely across the river. The wind was fair for such direction, and the evidence shows that such was her general direction; and the failure of the canal boat to see the lights and be governed thereby indicates that there was lack of attention.

But what shall be said of the master of the sloop, who paid not the slightest attention to his lookout's warnings, and who held his

course, unprepared for the emergency which arose. His action is incomprehensible. He would not be forewarned, and when the collision was at hand he was unprepared to act. The wind was such that he could have avoided the tow when he saw the continuance of her negligent progress toward him. If it were certain that the canal boat was trying to crowd the sloop out of the way, the case might be different. But the probabilities are that the pilot on the canal boat relied upon the loom of the sloop and was misled thereby. The master of the sloop testified that, when the canal boat was first reported, he looked under the beam and saw her, and that he did not look at her again until his son reported the third time, and said, "She is coming into us," and that the vessels were then 10 feet apart. The following illustrates his view of his duty:

"Q. You hadn't seen her during that time? A. I didn't want to see her. Q. If you had seen the boat coming toward you in a way that involved risk of collision, couldn't you have done something to avoid that collision? A. Oh! I could have went out of the river, I suppose. Q. You could have headed so as to avoid collision? A. I could went the other way; but I wasn't going that way. I was going to Fulton Market. \* \* \* The first time when he first spoke to me, then I looked; but the second time I didn't pay any attention. I says: 'You don't want to monkey under a steamer's bow. Let him know where you are going, and they will keep clear.' Q. Did he report her the third time? A. Yes, sir; when she got close to us he said, 'She is coming right into us.' Then I said: 'I can't help myself. If he wants to hit us he will have to hit us, because I can't get out of his way.' Q. How far from you was he then? A. I don't suppose over 10 feet. \* \* \* Q. It is your idea that it is not your duty to keep watch of a steam vessel approaching you after you have warning that that vessel is coming down upon you? A. I did have two forward. He was watching her all the time. Q. But he reported, and you didn't pay attention to it? A. The second time I did not because I put all confidence in the world in the man going clear. I looked and see how he was coming, and thought, 'He will come close to us and sheer off.' Q. You proceeded on the theory that every man would do his duty? A. Yes, sir."

The direct question is raised whether it was the duty of the master of the sloop, after repeated warnings from his son, from which he must have known that the canal boat had changed her course, or at least was coming toward him, to be attentive to her, or whether he could hold his own vessel on her course and be blind to the threatened collision? The view of the master of the sloop is not approved. It is quite evident that he was in a position to avoid the injury that befell him, had he been less obstinate in adhering blindly to his primary right of way.

The damages and costs will be divided.

#### THE CALIFORNIAN.

(District Court, E. D. New York. June 25, 1903.)

#### 1. SHIPPING—LIABILITY OF SHIP FOR INJURY OF SEAMAN—NEGLIGENCE.

Libellant, a seaman, after being ashore on his own business in the evening when the ship was in port, returning about 11 o'clock, while passing in the dark over some coal which had been stowed in a passageway on deck of which he had knowledge, was injured by the slipping of the coal under his feet, which caused him to fall. *Held*, that the ship

was not liable for the injury, being under no duty to keep the deck lighted at that hour of the night for the benefit of members of the crew who were not on duty.

In Admiralty. Suit by seaman to recover damages for personal injury.

Campbell & Hance, for libelant.

Convers & Kirlin, for claimants.

THOMAS, District Judge. On June 12, 1900, the libelant engaged as cook on the steamship Californian, which was taking coal and cargo at her dock in New York. On the evening of that day he went ashore for his own purposes, returned at about 11 o'clock, and went up on the bridge deck. Before the libelant went ashore coal had been stowed in the passageway on the bridge deck, and over this the libelant was obliged to walk. The coal was held in place at either end by two temporary bulkheads, about three feet high, and when the libelant attempted to step from the coal to enter to his quarters the coal slid under his foot, and he was carried forward and down so violently as to produce a rupture. On the following morning he had some pain, but made no complaint until the ship was at sea. Thereafter the captain was advised of his infirmity. The ship went to San Francisco, where the libelant visited a surgeon at the hospital, who advised him to have an operation performed; but the captain dissuaded him from it, and the surgeon later concurred in the captain's wish. He arrived in New York in January. He did his own and sometimes extra work during the voyage, and, after securing several employments, in October submitted to an operation which resulted in a practical cure. The dock was covered, and inside were electric lights, some 20 feet high, which could shine through the large door, if the same were open, and, as the bridge deck was approximately 8 feet above the dock, the tide being low, the light would be sufficient. The libelant states that the light did not reach the coal, and that it was totally dark at that place, and in this he is corroborated by the companion who was with him. The probable fact is that the libelant walked over the coal without serious difficulty, and that when he came to the end the coal yielded under the pressure of his foot, and he was injured as stated. The question is whether the ship was negligent in leaving the only entrance for the libelant in such condition, in view of his opportunity to see, that he might be hurt by the coal giving way at its extreme limit.

The inquiry whether the door on the dock was open so as to allow the electric light to come to the passageway need not be determined. It was not the duty of the master to keep the ship lighted for him at that hour of the night, and had it been so lighted it does not appear that he would have avoided injury from the coal yielding under the pressure of his foot. The evidence plainly shows that the men knew that they were at the point where they were to step off from the coal on to the deck, and some of them did it in safety. The libelant's foot slid on the coal. It is possible that a good light would have enabled him to adjust his foot with reference to the coal so that it would not yield under him. But it is quite questionable. It is pre-



ferred, however, to put the decision distinctly upon the ground that it was not the duty of the master to furnish the libelant, returning at a late hour at night, with a light that would enable him to make a better adjustment of his foot to the condition of the coal. The ship was obliged to furnish a light to the libelant while he was engaged in the performance of his master's duty, but not to light him to his quarters after he had spent the evening, to a late hour, ashore for his own pleasure or convenience. The evidence tends to show that until half past 11 o'clock on that night work was proceeding on the vessel in No. 2 and No. 3 holds. In that case there were electric lights both forward and aft of the place where the accident happened, and it would be inferable also that the door of the dock was open. If, however, such was not the case, if everybody had retired for the night, if the lights upon the vessel used for working were extinguished, and if the door leading into the dock was closed, it was past the time when the master was obliged to illumine passageways for the safe adjustment of the feet of belated sailors to the coal which was necessarily stored upon the deck. In such case, if the libelant found that all work was at an end and lights extinguished, and the door to the dock closed, and that the way was dark and dangerous, he was at liberty to call the watchman to open the door.

It seems that the libelant was called upon to do very hard work through the voyage; that he not only did his own work, but extra work; and that he was constrained to remain with the ship when he desired to go to the hospital as advised by the hospital surgeon; and that the attention that he received upon the vessel was not adapted to his case. It is probable that the captain did as well as the circumstances permitted while the man was on shipboard, but he did not receive necessary treatment, and was induced not to seek it at San Francisco. The claimants are under a strong moral obligation to make compensation for this added suffering of a faithful sailor.

The libel is dismissed, without costs.

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#### IN RE STARIN.

(District Court, E. D. New York. July 23, 1903.)

#### 1. SHIPPING—LIMITATION OF LIABILITY—WAIVER OF RIGHT BY LITIGATION IN STATE COURTS.

A shipowner, by defending an action brought against him in a state court to recover damages for injury to a passenger, and by appealing from the judgment rendered against him therein, does not waive his right to petition a court of admiralty for a limitation of liability; nor is he debarred of the right to invoke such remedy because there is but a single claimant.

#### 2. SAME—EXTENT OF LIMITATION—JUDGMENT FOR INJURY TO PASSENGER.

Where a passenger injured through the negligence of those engaged in the navigation of a tug and barge, without the privity of the owner, recovered judgment therefor and for costs against such owner in the state courts, the owner is entitled to a limitation of his liability to the value

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¶ 1. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. A. 387.

of the two vessels and pending freight, with interest thereon from the time of the injury to the time of payment, as against the judgment for damages, but he cannot limit his liability for the costs taxed against him in the litigation in the state courts.

In Admiralty. Proceeding for limitation of liability.

Richards & Heald and H. Putnam, for petitioner.

Corbin & O'Ryan, for claimant John T. Hill.

THOMAS, District Judge. On the 4th day of July, 1898, the petitioner was the owner of the steam tug Titan and the barge Robert Curry, which vessels were engaged in carrying excursionists; and while passing through Hell Gate the hawser by which the barge was attached to the tug became detached from the cleat to which it was made fast on the barge, and came in such contact with the claimant herein, a passenger on the barge, that his leg was torn off at the knee, and he was thrown to the deck with such force as to cause a compound fracture of the arm and other injuries. On the 3d day of December, 1898, John T. Hill, the injured passenger, began an action against John H. Starin, in the Supreme Court of the state of New York, to recover compensation for such injuries, which were charged to have arisen from the negligent manner in which said tugboat and barge were managed and navigated by the defendant, his agents and servants, and upon other grounds set forth in the complaint in said action. The defendant answered, and the issue so raised was tried on the 18th day of March, 1901, and a verdict rendered for the plaintiff for the sum of \$11,500. On March 19, 1901, judgment was entered on the verdict for said sum of \$11,500, together with the sum of \$492.13, costs and disbursements, amounting in all to the sum of \$11,992.13. From such judgment and order denying the motion for a new trial an appeal was taken to the Appellate Division, whereupon such judgment and order were affirmed, with costs (73 N. Y. Supp. 91), and judgment for such affirmance, and for the sum of \$111.25, costs and disbursements of such appeal, was entered. On November 27, 1901, the defendant appealed from such judgment of affirmance to the Court of Appeals of the state of New York, whereupon such judgment was affirmed by such court (66 N. E. 1110), with the costs of such appeal. On February 27, 1903, defendant filed a petition in the present proceeding to limit his liability, whereupon the barge was appraised at \$3,000, the tug at \$6,000, and the freight or earnings at \$150. The plaintiff in the former action and the claimant in this proceeding interposed the defenses: First, that by the proceedings in the state court the defendant waived the right to seek remedy here; second, that the barge and tug constituted one vessel, or that the accident was due to fault of those upon both vessels; third, that the injury was with petitioner's privity or knowledge; fourth, that the claimant was the only person injured, and that the court cannot exercise its jurisdiction, as the petitioner had a complete remedy in the state court.

It is concluded (1) that the judgment in the state court established that the defendant and his servants were negligent in the management and conduct of both the tug and the barge, and that the injury

resulted from such negligence; (2) that the petitioner has not waived his right to limit his liability in this court; (3) that the injury was without the petitioner's privity or knowledge; (4) that the claimant is entitled to recover the sum of \$11,500, with interest thereon from the time of the verdict in the state court, so far as the appraised values may discharge the same, but to such appraised values should be added the interest thereon from the time of the injury to time of payment; (5) that the petitioner cannot limit his liability for the costs as taxed in the judgment entered upon the verdict, for the costs recoverable in the judgment of affirmance in the Appellate Division, and for the costs upon the appeal to the Court of Appeals. The claimant should be permitted to enforce his judgments for such costs, or the payment thereof should be a condition of permitting the petitioner to limit his liability, but all interest taxed in such costs should be deducted.

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THE ST. PAUL.

THE MUNICIPAL.

(District Court, E. D. New York. June 22, 1903.)

1. SHIPPING—NEGLIGENT NAVIGATION—DAMAGE CAUSED BY SWELL FROM PASSING VESSEL.

The *St. Paul*, a large ocean steamship, with a displacement of some 13,000 tons, when approaching New York Harbor, met and passed a tug having two scows in tow on a hawser, and her swell caused the rear scow to dump her deck load of building stone. She passed the tows at a distance of 150 to 200 feet, and her half speed of 12 knots was slowed; and, according to the testimony of the captain and pilot, her engines were stopped when about opposite the tug, but such testimony was contradicted, and the fact was not established. *Held*, that as such testimony showed that, in the judgment of her officers, it was practicable and proper for her to stop her engines, the fact that she did not do so rendered her in fault, and liable for the damage caused; no fault being shown on the part of the tug.

In Admiralty. Action to recover damages for loss of cargo.

Hyland & Zabriskie, for libelants.

Carpenter & Park, for claimant of the Municipal.

Robinson, Biddle & Ward, for claimant of the *St. Paul*.

THOMAS, District Judge. The steamship *St. Paul* was 550 feet long, her beam was 63 feet, her draft was 26½ feet, and her tonnage displacement was estimated at 13,000 tons. Approaching the harbor of New York, she rounded the Southwest Spit in the Main Channel, and passed the outbound tug *Municipal*, towing two loaded scows singled out on a hawser about 50 fathoms in length. The steamship's swell caused the rear scow to dump her deck load of building stone. It is probable that the easterly set of the tide carried the tail of the tow farther eastward than her navigators appreciated; but the tug was some 100 feet from the Black Buoy Line, as Capt. Jamison, of the *St. Paul*, testified. In such case the tow, about 600 feet in length, could not have obstructed anything of the easterly side of the channel, inasmuch as Capt. Jamison stated that the tow made an angle of 25

or 30 degrees with the center line of the channel. The witnesses for the St. Paul further state that the Municipal was pulling diligently to the westward. What fault, then, can be ascribed to her? Certainly she was at liberty to use the channel. The witnesses for the St. Paul place that vessel, at the time of passing the tow, within 50 feet of the Red Buoy Line, and yet state that she cleared the tow by only 150 or 200 feet. As the channel is 1,200, or at least 1,000, feet wide, the alleged proximity of the steamship to the Red Buoy Line is probably inaccurate. It is more probable that she was near the center of the easterly half of the channel. The captain and pilot recognized the danger of passing the tow before reaching it, and state that the half speed of 12 knots was slowed, and that when about opposite the tug the engines of the steamship were stopped. The deck log does not show that the engines were stopped, and the engineer's log was not produced. The deck log shows, "1:47 slow for tug Municipal with two barges." It is difficult to conceive that an entry of the stopping of the engine would have been omitted, had it occurred, and the single entry made as above. The evidence that the engines were stopped shows that it was practicable to stop, and to keep them stopped, from the time of meeting the tug until the tow cleared, as the pilot testified was done. Capt. Jamison testified: "Q. How far past the tug had you got when you started up the engines ahead? A. 150 feet." The pilot states that they were not started until the tow was past. According to Jamison, the engines were started forward before the steamship had cleared the scows. Here is a discrepancy. The St. Paul did not have much sea room on her starboard side, as she was within 200 or 300 feet of too shoal water; the tide tended strongly to carry her to such shoal; and, in a position so precarious, the court, although assisted by the evidence of the scowmen and tug's crew, should not oppose its judgment to that of the steamship's skilled officers. But the question whether the engines were stopped, and kept in that condition until the tow cleared, is quite different. The occurrence was not recalled to Capt. Jamison until many months afterwards, and presumably the same is true as to the others on the bridge. In such case the omission in the log, and the failure to produce the engineer's log, cannot be overlooked. The deck log has a history of the event, and it must be regarded as the correct and only record of what was done with the engines. This, considered in connection with the opposing evidence on the part of the tow as to the speed of the St. Paul, leads to the conclusion that the steamship's engines were not stopped, or were not kept so, until the tow cleared. Hence, what was feasible, and what Capt. Jamison and others in charge of the St. Paul evidently thought it proper to do under the circumstances, the court may say should have been done. If it was done, the St. Paul should be acquitted of fault, but, in the absence of satisfactory explanation of the omission from the log of the alleged fact, the conclusion is enforced that it did not happen.

The decree will proceed against the St. Paul alone.

## SIBBEL v. UNITED STATES.

(Circuit Court, S. D. New York. May 31, 1900.)

No. 2,987.

## 1. CUSTOMS DUTIES—CLASSIFICATION—STATUARY.

A marble figure, produced in the establishment of a professional sculptor, under whose instructions the original model was made, and who gave such oral instructions and other supervision as were necessary to insure a faithful reproduction of the design, is held to be "statuary," within the meaning of paragraph 454, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), where it is provided that that term, wherever used in the act, "shall be understood to include only such statuary \* \* \* as is the professional production of a statuary or sculptor only."

## 2. SAME—SPECIMEN OF SCULPTURE.

A marble statue is a specimen of sculpture, within the meaning of paragraph 649, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687), covering "specimens or casts of sculpture."

Appeal by the importer, Joseph Sibbel, from the decision (G. A. 4520) of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York.

The question at issue is whether a certain sculptured marble figure is "statuary," within the meaning of that term as defined in paragraph 454, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), which provides: "The term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone or alabaster, or from metal, and as is the professional production of a statuary or sculptor only." The board held that the article was not "statuary" as thus defined, this conclusion being based on the following finding of fact: "The articles are not original productions of a professional statuary or sculptor who conceived the designs and executed the clay models thereof, nor are they replicas or copies produced therefrom by others under his immediate direction or supervision and to which he has given finishing touches and expression; neither are they artistic copies produced by a professional sculptor from a model or original work designed and executed by another professional sculptor, but are copies or reproductions by artisans, or by mechanical means, in industrial establishments, and are of a class so produced in large numbers for sale at list prices, according to design, size, and finish, as shown in illustrated catalogues, and are not the 'professional productions of a professional statuary or sculptor only.'"

Albert Comstock, for importer.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge. The article in question is a marble figure of Christ, imported for the Convent of the Sacred Heart. It was assessed for duty at 50 per cent. ad valorem under paragraph 115, Schedule B, § 1, c. 11, Act July 24, 1897, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636), as "manufactures of \* \* \* marble, \* \* \* not specially provided for," and claimed as free under paragraph 649, Free List, § 2, c. 11, of said act, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687), as "statuary, and specimens or casts of sculpture, where specially imported in good faith for the use and by order of

any society incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes." If this figure be statuary, it is not essential that it should be "the production of a sculptor who conceived the designs and executed the clay models thereof," nor "replicas or copies produced therefrom by others under his immediate supervision, and to which he has given finishing touches and expression." It appears that the original model was made under his written instructions, supplemented by verbal directions given by him at the establishment in France, and that there was such supervision as was necessary to insure a faithful reproduction of the design. In any event, this statue is a specimen of sculpture, and was imported in good faith, under the conditions provided for in said act.

A great deal of testimony has been taken as to the intended uses of the statue, the character of Sibbel's establishment where the statue was cut, the prices at which statues had been sold therein, and as to the standpoint of high art. The evidence shows that this figure should be free within the decision of the United States Circuit Court of Appeals in *U. S. v. Morris European & American Express Company*, 41 C. C. A. 240, 101 Fed. 111.

The decision of the Board of General Appraisers is reversed.

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#### GILLESPIE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 24, 1900.)

No. 2,636.

#### 1. CUSTOMS DUTIES—INVOICE VALUE—CLERICAL ERROR.

The importers of certain sugar in hogsheads made entry on an invoice which included by mistake the value of the hogsheads in that of the sugar, but before the entry was liquidated they produced a corrected invoice, showing the proper deduction for the hogsheads. *Held*, that it was not, under the circumstances, necessary for the importers to make entry on a pro forma invoice, and give a bond for the production of a corrected invoice, in the method prescribed in section 4, customs administrative act of June 10, 1890, 26 Stat. 131 (*U. S. Comp. St.* 1901, p. 1888), and that the collector should have made allowance for the hogsheads.

Appeal by Gillespie Bros., importers, from a decision (*G. A.* 3966) of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs on certain merchandise imported at the port of New York.

The importers filed a protest against the decision of the collector, contending that there was a manifest clerical error in the invoice, which they were entitled to have corrected. The board overruled the protest, stating in the opinion:

"It would seem that the remedy of the importers, if any they had, was to make an entry upon a pro forma invoice, and not on the invoice claimed to be imperfect, and at the same time to offer to give a bond to the collector for the production of a duly certified or corrected invoice, pursuant to the provisions of section 4 of the customs administrative act of June 10, 1890, 26 Stat. 131 (*U. S. Comp. St.* 1901, p. 1888). This they neglected to do, and the results of their negligence must naturally be visited upon them.

"In *Roebling v. U. S.* (*C. C.*) 77 Fed. 601, it was held that where an invoice showed the value of the merchandise, and at the same time that some item,

nondutiable, may have been included in the price, but failed to show the amount of such nondutiable item which could lawfully be deducted, the subsequent production of a corrected invoice would not entitle the importer to relief on the ground that a clerical error had been committed on the original invoice. This case is distinguishable from *U. S. v. Zuricaldy* (C. C.) 71 Fed. 955, which involved the deduction of a nondutiable item of ocean freight, which was stated on the invoice presented to the collector upon the making of the entry, in accordance with the provisions of sections 3 and 5 of the customs administrative act of June 10, 1890, 26 Stat. 131, 132 (U. S. Comp. St. 1901, pp. 1887, 1889), which require that all charges or items, which are proposed to be deducted from the invoice value as nondutiable shall be specified on the invoice. Note *In re Kelly*, G. A. 1198.

"There is, in our opinion, no such manifest clerical error as can be corrected by the board, under the facts of the case, in the manner suggested."

W. Wickham Smith, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, District Judge. The protestants in this case imported a certain quantity of sugar in American hogsheads, and by mistake put in the price of the hogsheads as part of the price of the sugar on which the duty was to be assessed. Immediately upon entry of the goods the agent of the importers made the necessary deduction for the hogsheads, and pointed it out to the collector, who assented to the correction; but the naval office afterward refused to allow the correction to be made. Before the entry was liquidated the importers cabled over and got a new, corrected invoice, and asked the collector to make the proper allowance, which he refused to do, alleging as a reason that section 7 of the customs administrative act of June 10, 1890, 26 Stat. 134 (U. S. Comp. St. 1901, p. 1892), provides that "the duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value." It is admitted in this case that the United States has taken money by mistake to which it was not entitled. It appears that the error was seasonably brought to the attention of the collector while the case was still pending before him. The case is clearly within the rule laid down in *U. S. v. Benjamin* (C. C.) 72 Fed. 51, and *U. S. v. Zuricaldy* (C. C.) 71 Fed. 955.

The decision of the Board of General Appraisers is reversed.

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#### DOWNING v. UNITED STATES.

(Circuit Court, S. D. New York. February 20, 1900.)

No. 2,410.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—AMERICAN FISHERY—TURTLE MEAT.

A corporation consisting of American citizens fitted out a registered American vessel, which was manned with an American crew, and engaged in the business of catching turtles in Central American waters, and canning them aboard the vessel. *Held*, that this constitutes an American fishery, within the meaning of Tariff Act Aug. 27, 1894, c. 349, § 2, Free List, par. 568, 28 Stat. 542, which exempts from duty "all fish and other products" of "American fisheries," and that the canned turtle meat is free of duty, as the product of such fishery.

Appeal by the United States from a decision of the Board of General Appraisers reversing the decision of the collector of customs in the as-

assessment of duty on certain merchandise imported into the port of New York by R. F. Downing & Co.

The merchandise consists of canned turtle meat, which the collector held to be dutiable, and which the importers contend is free of duty under the provision in Tariff Act Aug. 27, 1894, c. 349, § 2, Free List, par. 568, 28 Stat. 542, for "fish oils of American fisheries, and all fish and other products, of such fisheries." The board sustained this contention in an opinion which is as follows (In re Downing, G. A. 3519):

"SHARRETT, General Appraiser. We find the facts in this case to be as follows, viz.: (1) That the appellants, citizens of the United States, trading under the corporate title of 'The Ocean Trading Company,' and engaged in the business of fishing for green or sea turtles, and of canning the same, did, in the conduct of their business, fit out the American vessel Gracie T., which vessel is registered at the port of New York, and sails under the American flag. (2) That the crew of said vessel, citizens of the United States, for several months were engaged in the business of fishing for sea turtles in the waters of Central America, and of canning them on board of the vessel, at the time and place of catch. (3) That the tin cans containing the turtle meat are of American manufacture, and are not involved in the issue presented by this protest, the point in controversy being the proper classification of the turtle meat, which was transferred from the Gracie T. to the steamship Adirondack, to be transported to the port of New York, where it was entered for consumption, August 29, 1894.

"We hold that the said vessel, equipped for the purposes of fishing, duly registered, and sailing under the American flag, manned by American sailors, engaged in the business of fishing, and carrying on such business in the manner heretofore described, constituted an American fishery, within the meaning of the statute, and that the merchandise in question was the product thereof. On these facts, and holding as above, we sustain the claim in the protest that the merchandise is entitled to free entry under Act Aug. 27, 1894, c. 349, § 2, Free List, par. 661, 28 Stat. 545.

"The collector's decision is reversed."

Hess, Townsend & McClelland, for importers.  
Harry P. Disbecker, Asst. U. S. Atty.

LACOMBE, Circuit Judge (orally). There is apparently a clerical error in the printed opinion of the board in referring to paragraph 661 when it apparently means paragraph 568. As to the suggestion that the word "fishery" is used in any narrow or restricted sense in that paragraph, requiring the article captured to be a fish, to be caught with a hook and line, or net, or something of that kind, it is sufficient to refer to the paragraph itself, which provides and contemplates such fisheries as the taking of a whale, which is a mammal, and is shot with a harpoon. There is no reason, therefore, for requiring any narrow technical meaning of the word "fishery." On the facts found by the board—and they seem to be supported by the certificate of the consul—I concur in their conclusion that this is fairly a product of American fisheries, and as such entitled to a free entry.



## CALISE v. THE CAIRNSTRATH.

(District Court, E. D. New York. June 3, 1903.)

**1. SHIPPING—LIABILITY FOR INJURY OF STEVEDORE—EVIDENCE CONSIDERED.**

Evidence considered, and *held* insufficient to sustain the burden resting on the libellant to prove that an injury received by him while engaged in loading a steamship as gangwayman for the stevedores was caused by the disobedience of his orders by the winchman who was employed by the ship.

In Admiralty. Libel to recover for personal injuries.

Rendich & Brennan (Richard A. Rendich, of counsel), for libellant.

Convers & Kirlin (Charles R. Hickox, of counsel), for claimant.

THOMAS, District Judge. The libellant, a gangwayman, was injured under the following circumstances: For the purpose of loading the steamship, a skid extended from the dock to the upper deck, and had its superior end connected with a horizontal skid, whose inboard end rested upon the coaming of the hatch. The method of loading was as follows: The draught raised by a boom on the vessel was drawn up the first skid, and then carried along the second skid, at whose inner end was the hatch through which the draught passed to the hold. At the time of the accident the cargo had reached the square of the hatch, and the libellant's evidence is that for some 15 draughts before the accident each draught had been stopped at the upper end of the first skid, until the gangwayman ascertained whether the men in the hold were ready to receive the draught. Finally a large draught of boxed wheels was hoisted along the dock skid, but before reaching the upper end thereof the libellant claims that he ordered the winchman, by word and gesture, to stop, and that he thereupon, turning his back to the draught, went along the deck skid, and looked down into the hatch, leaning over for the purpose of hailing the foreman of the gang therein, to ascertain whether he was ready for a draught, but that at that instant the winchman again started the winch, which came over the side, and was carried along the inner skid until it struck the libellant, and threw him into the hold, breaking the ulna of his left hand, and producing a dislocation of the fractured bone, contusing the wrist of the right hand and the muscles of the back, necessitating 24 visits on the part of the doctor, the value of which he places at \$58, and detention from work for four months. The winchman belonged to the ship's crew, and the libellant was employed by a firm of stevedores who had a contract for loading the vessel. The claim is that the winchman, after having been ordered to stop, and stopping accordingly, did without orders start his winch and bring the draught against the libellant, while he was necessarily engaged with his back thereto in learning the situation of the hold with regard to the reception of the draught.

The libellant testified in support of his contention, and his evidence received some corroboration from the witness Demaio, who was in the hold, and the witness Napoli, who was on the dock. But his evidence is contradicted in its main features by Wotton, the winchman, Anderson, the chief officer, and Hawick, the second officer. These

three men testify that they stood looking directly at the gangwayman, and that he stood facing the draught as it came on to the skid, that he was not looking down into the hold in the manner stated by him, and that he did not give the orders to stop the draught testified to by him. The burden of proof is upon the libelant, but the evidence of the claimant far outweighs that produced by the libelant, and carries thorough conviction that the libel should be dismissed.

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TOLL et al. v. PRINCE LINE, Limited.

(District Court, E. D. New York. May 5, 1903.)

1. SHIPPING—LIABILITY FOR INJURY OF SEAMAN—UNSAFE PLACE TO WORK.

A ship cannot be held liable for the injury of seamen who were sent into the fore peak to paint it with asphalt paint, using a lamp, caused by an explosion, where the evidence shows that the paint is not explosive and is commonly used to paint inclosed places, and that the men usually work with exposed candles or torches; there being no explanation of the accident unless it was caused by one of the men setting the paint on fire with the lamp.

In Admiralty. Action to recover damages for personal injuries.

Edward M. Stothers, for libelants.

Convers & Kirlin, for claimant.

THOMAS, District Judge. Two sailors, the libelants, went with the boatswain into the lower fore peak of a ship for the purpose of painting the interior with asphalt paint. They had been painting from 10 to 20 minutes, when there was a fire and explosion, and the three men came out, all so badly burned that the boatswain died, and the two men were severely injured. The peak was about 25 feet wide aft, some 12 feet high, and tapered, following the lines of the ship to the bow, and received air from an ordinary manhole at the top. A few days before, these men had been painting in the same place. On several occasions thereafter a lantern had been lowered into the peak, and it went out, until the morning in question; showing the influence upon the air of the paint. But on the morning in question a lamp was lowered before the men went in, and continued to burn. The fact that the lamp went out did not indicate that there was danger of explosion. It appears that the paint is commonly used for painting fore peaks, tanks, and other confined places in ships, and that men usually work with exposed candles or torches. While the light tends to burn low or to be extinguished, there is no evidence of explosion accompanying such extinguishment. The evidence is clear that the paint is not explosive, either in confined places or when applied to hot surfaces. Hence the libelants' contention that the place or material was dangerous, on account of the explosive nature of the material, has no other basis than the fact that there was an explosion in the present instance. But the master had no occasion to suspect its occurrence. There is no explanation of the accident, be-

yond the statement of one of the libelants shortly after the event, which tends to show that his associate, the other libelant, ignited the paint with his lamp.

The libel must be dismissed.

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In re SHAFFER.

(District Court, D. Massachusetts. July 21, 1903.)

No. 7,245.

1. BANKRUPTCY—CLAIMS—LANDLORD AND TENANT—BREACH OF LEASE—COVENANTS.

A lessor is not entitled to prove a claim for damages against the lessee's estate in bankruptcy for breach of a covenant by the lessee that on the latter's bankruptcy the lessor might terminate the lease and re-enter, and that the lessee should be liable for all loss and damage sustained by the lessor on account of the premises remaining unleased or being let for the remainder of the term for a less rent than that reserved in the lease.

In Bankruptcy.

Tower, Talbot & Hiler, for creditor.

Morse, Hickey & Kenney, for trustee.

LOWELL, District Judge. The bankrupt was tenant under a lease which provided that upon his bankruptcy the lessor might terminate the lease and re-enter, and "in case of such termination the lessee shall be liable to the lessor for all losses and damage sustained by the lessor on account of the premises remaining unleased or being let for the remainder of the term for a less rent than that herein reserved." The lessor has duly re-entered, and seeks to "prove for damages sustained on account of breach of condition of a lease." In *In re Ells* (D. C.) 98 Fed. 967, this court held that the lessor could not prove for a breach of a covenant by the lessee that he would after re-entry indemnify the lessor against all the loss of rents and other payments which might occur by reason of the termination of the lease. In effect the covenant in the case at bar is the same. The liability is contingent, not only upon re-entry by the lessor, but upon loss of rent or other damage occurring. "If the lessor permitted the lease to continue, or if the rent subsequently obtained by him equaled or exceeded that provided in the lease, the claim would not arise." 98 Fed. 969. The covenant here is not like that suggested by Judge Lowell in *Ex parte Lake*, 2 Low. 544, 546, Fed. Cas. No. 7,991, "to pay any loss or damage consequent upon the diminished value of the premises." The diminished value would be a fact to be proved as of the date of bankruptcy or re-entry. But in the case at bar damages could not be ascertained until the arrival of the term of the lease as originally limited, or until there had been a reletting at a reduced rent. Judgment affirmed.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 479, 482.

## THE GLADESTRY.

(District Court, E. D. New York. May 13, 1903.)

## 1. SHIPPING—INJURY OF STEVEDORES—LIABILITY OF SHIP.

Stevedores *held* entitled to recover damages from the ship for personal injuries resulting from the disobedience of orders or negligence of the winchmen, who were furnished by the ship, in discharging a cargo of logs.

In Admiralty. Actions for personal injuries.

Frederick B. Bailey, for libelants.

Convers & Kirlin, for claimants.

THOMAS, District Judge. Kramer, foreman of the stevedores, claims that the gangwayman ordered the winchman furnished by the ship to go ahead easy, but that the winchman went ahead rapidly, drawing out a log in the hold with such force as to injure the foreman of the stevedores, whereby he was absent from his work for about four months on account of injury to his foot. The winchman testifies that he was not operating the winch at the time, but was forward thereof looking down into the hatch, and the contention is that the libelant was injured by prying out the log with a bar. Whatever the fact may be, the preponderance of evidence shows that the accident did not happen as the winchman claims, but as the libelant claims. He should recover the sum of \$600.

The accident to Lyons happened the day before, with a different member of the ship's crew at the winch. The evidence of the libelant is to the effect that the winchman was ordered to stop and go back with his winch, and that with the expectation that he would do so the libelant placed himself in such relation to the log that was being drawn out that he was injured by the winchman going ahead in disobedience of orders. This the winchman denies. Here again the evidence preponderates in favor of the libelant. Lyons' third finger was injured seriously and required surgical treatment. It is now bent, and will so remain unless it be subjected to an operation. He should recover the sum of \$1,000.

COLE v. GERMAN SAVINGS & LOAN SOC.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1903.)

No. 1,893.

1. NEGLIGENCE—PROXIMATE CAUSE—TEST.

An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury.

2. SAME—REMOTE CAUSE—TEST.

But an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury.

3. SAME—INTERVENING CAUSE—TEST.

An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that probably would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable, and such an act of negligence is the remote cause, and the independent intervening cause is the proximate cause, of the injury.

4. SAME—CONCURRING NEGLIGENCE—EFFECT.

It is no defense to an action for damages for an injury of which the act or omission of the defendant was the proximate cause that the negligent or wrongful act of another concurred with the recklessness of the defendant to produce the untoward result.

5. SAME.

But the concurring negligence of another cannot transform the remote into the proximate cause of an injury, or create or increase the liability of the defendant. It cannot make an injury which was not the natural and probable result of the negligent acts or omissions of the defendant their natural and probable consequence. No act contributes to an injury, in the legal acceptance of that term, unless it is a proximate cause of that injury, and no one is liable for an injury unless it was the natural and probable result of his act.

6. SAME—EVIDENCE.

The plaintiff entered and passed along a hall in the building of the defendant to take the elevator, the well or shaft of which opened into the hall. A boy, who was a stranger to her and to the defendant, hurried past her in the hall, pushed the sliding door of the well of the elevator, which was open from one to ten inches, back as far as it would go, and stepped back. The plaintiff supposed this boy was the operator of the elevator, and stepped in. The elevator was at an upper floor in charge of its regular operator, and plaintiff fell to the bottom of the well and was injured. The hall was so dark that it was difficult, but not impossible, to see the elevator when it was at the lower floor, and when it was not there nothing but darkness was visible in the well. The strange boy had been seen by witnesses riding and visiting on the elevator a dozen times and endeavoring to operate it once. The door of the shaft or well could be opened from the outside, when it was latched, by lifting and sliding it. It would bound open from one to ten inches when the operator jammed it, and it was often left open to that extent. *Held*, the negligent acts and omissions of the defendant were not, and those of the strange boy were, the proximate cause of the injury. The latter constituted an independent intervening cause, which interrupted the natural sequence of events between the negligence of the defendant and the injury of the plaintiff, insulated the defendant's negligence from

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¶ 4. See Negligence, vol. 37, Cent. Dig. § 75.

the plaintiff's hurt, broke the causal connection between them, and produced her injury.

7. SAME—VIOLATION OF LAW OR DUTY NOT REASONABLY TO BE ANTICIPATED.

The act of the strange boy could not be foreseen or reasonably anticipated as the probable result of the negligent acts or omissions of the defendant. A violation of law or duty by a third party, when not intended by a defendant, is not regarded by the law as the natural consequence of his acts of negligence, and cannot be reasonably anticipated as their probable result.

8. TRIAL—PRACTICE—EXISTENCE OF SUBSTANTIAL EVIDENCE ALWAYS QUESTION FOR COURT.

There is always a preliminary question for the judge at the close of the evidence in every trial to a jury, and that is, not whether or not there is any evidence, but whether or not there is any substantial evidence, upon which a jury can properly render a verdict for the party who relies upon it.

9. SAME—PROXIMATE CAUSE—EXISTENCE OF EVIDENCE—DIRECTING VERDICT.

The question, what is the proximate cause of an injury? is ordinarily a question for the jury. But the burden is always on the plaintiff, in an action for personal injury, to show that the negligence charged was the proximate cause of the injury; and where, at the close of the trial, there is no substantial evidence upon which the jury can properly find that the defendant's negligence was the proximate cause of the injury, it is the duty of the court, as it is in a like condition of the evidence in the trial of other issues of fact, to peremptorily instruct the jury to return a verdict for the defendant.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Utah.

The plaintiff, Viola Cole, sued the German Savings & Loan Society for damages which she alleged were the result of its negligence in the care and operation of its elevator, and at the close of the trial these facts were established: About 4 o'clock in the afternoon of a bright sunshiny day in May, the plaintiff, a lady 32 years of age, entered the hall of a building of the German Savings & Loan Society for the purpose of riding on an elevator to an upper story. The well of this elevator was about 40 feet distant from the entrance to the hall, into which it opened. It was separated from the hall by a door, which at the time was standing open not more than 10 inches. As the plaintiff passed through this hall, a boy who was a stranger to her, and who was not employed by or authorized to act for the defendant, but who had been seen by one of the witnesses prior to that time endeavoring to operate the elevator once, and riding upon it and visiting the boy in charge of it a dozen times, hurriedly passed the plaintiff, seized the sliding door to the elevator shaft, pushed it back as far as it would go, and stepped back. The elevator was at an upper story in charge of its regular operator. The plaintiff supposed that the strange boy was the operator of the elevator, stepped into the shaft, and fell 10½ feet to its bottom, and was seriously injured. The hall was dark and gloomy. It was difficult to see the elevator at the lower floor, but it was not impossible to see it. When it was not at that floor, nothing but darkness was visible in the well below it. There was no artificial light in the hall at the time of the accident, although there were the means to make an electric light, which was often lighted, just in front of the door of the shaft. This door was furnished with a hook, which, when the door was closed, entered a slot and grasped a bar. But the door could be opened from the outside, even when it was latched, by lifting it and pushing it back. When the employé in charge of the elevator jammed the door, it would bound back and slide open from 1 to 10 inches. The court instructed the jury, upon this state of facts, to return a verdict for the defendant, and this charge, together with certain rulings rejecting proffered testimony, is assigned as error.

Herbert R. Macmillan (Hiram H. Henderson, on the brief), for plaintiff in error.

Frederick V. Brown (W. A. Kerr and Edward F. Waite, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The crucial question in this case is whether or not the negligence of the defendant was the proximate cause of the injury of the plaintiff, so that, in the legal acceptance of that term, it contributed to her hurt. "*Causo proxima, non remota, spectatur*," and those damages which are the result of remote causes form a part of that large mass of resulting losses styled "*damnum absque injuria*," for which the law permits no recovery. A clear conception of the test which distinguishes the proximate from the remote cause is, therefore, the first and the indispensable prerequisite to a true answer to the question which this case presents; for by that test alone must the issue here, in all the varying garbs in which the ingenuity of counsel has clothed it, be tried and be ultimately determined. This test is most clearly seen from the standpoint of the injury inflicted, and is well disclosed by these indisputable principles of the law:

An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 952, 5 C. C. A. 347, 350, 20 L. R. A. 582; *Railway Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256; *Hoag v. Railroad Co.*, 85 Pa. 293, 298, 299, 27 Am. Rep. 653.

Let us try the issue in hand by these familiar rules. It goes without saying that the injury of the plaintiff was the natural and probable consequence of the act of the trespasser who preceded the plaintiff to the elevator, opened the door of the well, and stepped back, thus inviting her to pass into the shaft. No one can contemplate this act for a moment without a clear conviction that the fall and the injury were its natural and probable result. This act was, therefore, a proximate cause of the injury—an act of negligence which formed the basis for an action for damages against the strange boy who committed it. It was

not only the nearest cause of the disaster in point of time, but it was the moving and efficient cause—the cause without which, so far as finite vision can see, the accident would never have occurred.

Counsel for the plaintiff do not deny this obvious conclusion, but they insist that the negligence of the strange boy merely concurred with the acts of omission and commission of the defendant; and they invoke the conceded rule that it is no defense to the damages resulting from an act of negligence that the carelessness of another concurred with the negligence of the defendant to produce the injury. Among other authorities they cite the case of *Union Pac. R. Co. v. Callaghan*, 56 Fed. 988, 993, 994, 6 C. C. A. 205, 210, in support of this position. In that case the negligence of a conductor of a train of cars who recklessly directed his engineer to disregard a signal to stop, which was given at a station they were passing, concurred with the succeeding failure of the engineer to observe and heed other signals of danger, and led him to drive the train upon a defective bridge, and this court held that the concurring negligence of the engineer was dependent upon the prior reckless order of the conductor; that the engineer's negligence was a dependent, and not an independent, cause of the disaster, that it did not break and turn aside the natural sequence of events between the recklessness of the conductor and the accident, but simply permitted that act to work out its natural and probable result; and that for this reason it constituted no defense to the action for damages for the negligence of the conductor. In the opinion this court said:

"The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated." 56 Fed. 993, 994, 6 C. C. A. 210.

But it also said:

"No act contributes to an injury, in the legal acceptance of that term, unless it is a proximate cause of that injury—unless it is near to it in the order of causation. *Jacobus v. Railway Co.*, 20 Minn. 125, 134 [(Gil. 110), 18 Am. Rep. 360]." 56 Fed. 990, 6 C. C. A. 207.

The test of the liability, therefore, in cases of concurring negligence is the same that it is in all other actions for negligence. It is the true answer to the questions: Was the injury the natural and probable consequence of the act on which the action is based? Was it reasonably to be anticipated from that act? If it was, the action may be maintained, although the negligence of another concurred to produce the untoward result. If it was not, the act of negligence will not sustain an action, whether the act of another concurred or failed to concur to produce it. A negligent act from which an injury could not have been foreseen or reasonably anticipated is too remote in the line of causation to sustain an action for an injury in every case, and the concurring negligence of another cannot make it less remote, nor charge him who committed it with responsibility for it to which he would not have been liable to answer in the absence of the negligence of the third party.



It is not here asserted that there may not be many cases in which one who has committed a negligent act may be liable for an injury which is the result of his wrongful act and of the concurring negligence of another, but which would not have followed in the absence of the recklessness of the third party. The succeeding or concurring negligence of another and its evil consequences may be the natural and probable result of a defendant's act of negligence, so that the latter may be actionable. But, unless the ultimate injury is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring or succeeding negligence of a stranger. In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence. No act contributes to an injury, in the legal acceptance of that term, unless it is a proximate cause of that injury—unless that injury could and ought to have been foreseen or reasonably anticipated as its probable consequence. The conclusion inevitably follows that the concurring negligence of the trespasser in this case does not answer the primary question which the action presents. It leaves it entirely undetermined, and that question still recurs. Was the injury of the plaintiff the natural and probable result of the acts or omissions of the defendant? Let us see.

That negligence consisted of permitting such a degree of darkness in the hall opposite the door which opened into the well of the elevator that it was difficult to see whether or not the elevator was there; of allowing boys to visit in, ride upon, and sometimes to operate the elevator; of allowing the boy who opened the door to the well to ride and visit in the elevator about a dozen times, and to endeavor to operate it at least once; of neglecting to provide a lock for the door which would prevent any one from opening it from the outside; and of permitting the door to stand open from one to ten inches. The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that her entrance and fall in the well were the natural and probable consequences of these acts of negligence committed by the defendant. If she failed to successfully bear this burden, she was entitled to no damages from the Savings & Loan Society. *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *Union Pac. Ry. Co. v. Callaghan*, 56 Fed. 988, 993, 6 C. C. A. 205, 210. Where is the evidence to sustain such a conclusion? The best evidence upon such an issue is the testimony of experience, because what has been is our best guide to what will be. The challenged acts and omissions of the defendant had been in operation for many months. If they had produced such a consequence as the fall and injury of the plaintiff in the past, that fact would have raised a strong presumption that this was their natural

tendency. If they had produced no such result, the counter presumption was not less strong. It is for this reason that courts frequently speak of the fact that no such injuries as those upon which the actions under their consideration are based have occurred before as persuasive evidence that the disasters could not have been foreseen or reasonably anticipated as the probable result of the acts upon which the suits are based. *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306, 312. There is no evidence in this case that any such accident or injury as that from which the plaintiff suffers ever followed the defendant's acts of negligence before the plaintiff fell into the well. Not only this, but there is no evidence that the accident and injury to the plaintiff resulted from these acts or omissions, but positive and convincing testimony that they were produced by the wrongful act of another.

Another class of evidence sometimes presented in cases of this nature consists of the testimony of witnesses that the negligence of the defendant which forms the basis of the action has at times placed them in imminent danger of like accidents, from which they have hardly escaped without injury. But this record is barren of evidence of this character. Experts sometimes come to say that a piece of machinery was so defective, or the method of its operation of so dangerous a character, that in their opinion the condition or the method of operation naturally tended to an accident or injury of the nature of that upon which the action on trial is based. But no expert gave such testimony in the case at bar. The record is barren of all testimony upon the subject, except proof of the acts and omissions of the defendant which have been recited, and of the fact that a proximate cause of the accident was the act of the trespasser who opened the door and extended to the plaintiff the invitation to step into the darkness and to fall, which she accepted. There is nothing in the evidence to the effect that the defendant's acts or omissions ever had produced, or ever would in the natural sequence of events have produced, any such injury as that from which the plaintiff is suffering, while the proof is plenary that it was the act of the stranger which actually caused it.

But counsel seek to escape from the natural effect of this evidence by the contention that the voluntary act of the strange boy in opening the door of the well when the elevator was at an upper floor could and should have been foreseen and anticipated as the probable result of the unlocked door, of the visits of the boy upon the elevator, and of his previous attempt to operate it. This argument loses sight of the fact that the wrongful act of this trespasser was not committed in operating, or in attempting to operate, the elevator, in riding or visiting upon it, or in the doing of any act which he had ever done before. He had never opened the door into the empty well and invited a patron of the elevator to step into it before this accident occurred. How could any one reasonably anticipate that he would be guilty of such an act? The facts that he had visited upon the elevator and had attempted to operate it with the permission of the employé in charge of it gave no warning of

any such purpose on his part or of the probability of any such act. Mr. Justice Holmes in delivering the opinion of the Supreme Court of Massachusetts in *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 247, 28 N. E. 1, 6, 13 L. R. A. 47, said:

"Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

The act of the strange boy was a violation of the law. It was a trespass upon the property and upon the rights of the defendant. The defendant could not foresee or reasonably anticipate, and it was not required to anticipate or to provide for, violations of the law and trespasses upon its property by its fellow citizens. The legal presumption was that this boy and all boys and men would obey the law, would refrain from committing trespasses upon the defendant's rights or property, and would discharge their moral and social duties. The defendant had the right to indulge in this presumption, and to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon upon no other; for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellows will either violate the laws or disregard their duties. *Little Rock & M. R. Co. v. Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650, 43 L. R. A. 349. The mischievous act of the strange boy which caused the plaintiff's hurt could not have been foreseen nor reasonably anticipated as the probable result of the defendant's acts of negligence, because it was a violation of law and of duty, and because there was nothing in previous experience, observation, or information to lead to such an anticipation. This concludes the discussion of the facts relative to the relations and situation of the parties as disclosed by the record, in view of the arguments of the counsel for the plaintiff.

It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton says:

"Supposing that, had it not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured." Whart. Neg. § 134.

Bishop on Noncontract Law, § 42, says:

"If, after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible."

Judge Cooley and the Supreme Court of North Carolina say in his words:

"If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." *Clark v. Wilmington, etc., R. Co.*, 109 N. C. 430, 449, 14 S. E. 43, 47, 14 L. R. A. 749.

The Supreme Court declares:

"The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" *Railway Company v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256.

And again:

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones." *Insurance Company v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395.

The Circuit Court of Appeals for the Seventh Circuit holds that:

"The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. \* \* \* The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, 'the intervener acts as a non-conductor, and insulates the negligence.' The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition?" *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 405, 11 C. C. A. 253, 258, 459, 27 L. R. A. 583.

And this court has said

"An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and that would not have resulted from it, but for the interposition of some new independent cause that could not have been anticipated." *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 951, 952, 5 C. C. A. 347, 349.

Try this case by any of these tests, and the result is the same. The independent voluntary act of the strange boy who opened the door of the elevator and invited the plaintiff to enter the well was incapable of anticipation. No one could have foreseen it as the probable consequence of the acts or omissions of the defendant. It broke the chain of causation between the prior negligence of the defendant and the injury of the plaintiff, insulated the defendant's acts and omissions from the plaintiff's hurt, and imposed upon the boy who willed and committed the act which produced the injury the sole liability for the damages which resulted from it. The acts and omissions of the defendant were too remote to legally contribute to the injury or to impose liability for it. They were not a proximate cause of the accident, and the mischievous and wrongful act of the strange boy was the sole moving efficient proximate cause that pro-

duced it. *Railroad Co. v. Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650, 43 L. R. A. 349; *Railroad Co. v. Elliott*, 55 Fed. 949, 952, 5 C. C. A. 347, 350; *Finalyson v. Milling Co.*, 67 Fed. 507, 512, 14 C. C. A. 492, 496; *Railway Co. v. Bennett*, 69 Fed. 525, 16 C. C. A. 300; *Railway Co. v. Callaghan*, 56 Fed. 988, 993, 6 C. C. A. 205, 210; *Railway Co. v. Moseley*, 57 Fed. 921, 926, 6 C. C. A. 641, 646; *Insurance Co. v. Melick*, 65 Fed. 178, 184, 12 C. C. A. 544, 550, 27 L. R. A. 629; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253; *Laidlaw v. Sage*, 158 N. Y. 73, 98-102, 52 N. E. 679, 44 L. R. A. 216; *Trewatha v. Milling Co.*, 96 Cal. 494, 500, 28 Pac. 571, 31 Pac. 561; *Ayers v. Rochester Ry. Co.*, 156 N. Y. 104, 108, 50 N. E. 960; *Doherty v. Waltham*, 4 Gray, 596; *Parker v. Cohoes*, 10 Hun, 531.

Our conclusion has not been reached without a careful perusal of the opinions of the courts in the cases cited by counsel for the plaintiff in error, especially those in *Colorado Mortgage & Investment Co. v. Rees* (Colo. Sup.) 42 Pac. 42; *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; and *Lane v. Atlantic Works*, 111 Mass. 136. These opinions have been read with the deference and consideration to which the judgments of learned and conscientious jurists are always entitled, but they are not controlling authority in a federal court; and the views which have already been expressed in this opinion, the reasons which have been given for them, and the authorities which have been cited in support of them commend themselves more forcibly and persuasively to our minds than the opinions and reasoning in the cases upon which the counsel for the plaintiff rely. Jurisdiction over controversies between citizens of different states was conferred upon the national courts for the avowed purpose of securing to the litigants in such cases the benefit of the independent opinions of the judges of those courts. It is the right of these litigants to the independent and conscientious judgment of the judges of the national courts to whom they present their controversies upon the merits of the issues they raise, and a complete and careful discharge of the duties imposed upon them requires of the members of the federal judiciary that they shall carefully form and express their independent judgments upon the questions presented by such controversies. In the case at bar this duty has been discharged, not without some study, deliberation, and care, and the conclusion of this court is that the record before it conclusively shows that the act of the strange boy who opened the door of the well of the elevator was the sole proximate cause of the plaintiff's injury.

Counsel earnestly invoke the rule announced in *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 476, 24 L. Ed. 256, which was followed by this court in *Railway Co. v. Callaghan*, 6 C. C. A. 205, 208, 56 Fed. 988, 991, and *Insurance Co. v. Melick*, 65 Fed. 178, 180, 12 C. C. A. 544, 546, 27 L. R. A. 629, that the question, what is the proximate cause of an injury? is ordinarily a question for the jury, and they strenuously maintain that the Circuit Court erred because it refused to submit the question which has been considered to the jury upon the trial below. There is, however, always a preliminary question for the

judge at the close of the evidence before a case can be submitted to the jury, and that question is, not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict in favor of the party who produced it. *Brady v. Chicago & G. W. Ry. Co.*, 114 Fed. 100, 105, 52 C. C. A. 48, 52, 53, 57 L. R. A. 712; *Railway Co. v. Belliwith*, 83 Fed. 437, 441, 28 C. C. A. 358, 362; *Association v. Wilson*, 100 Fed. 368, 370, 40 C. C. A. 411, 413; *Commissioners v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; *Railway Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 60 Fed. 351, 354, 9 C. C. A. 1, 4; *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190; *Motey v. Granite Co.*, 74 Fed. 155, 157, 20 C. C. A. 366, 368.

The burden of proof is upon the plaintiff in an action for personal injury to establish the fact that the acts of negligence of which he complains were the proximate cause of the injury suffered, and if, at the close of the testimony in a trial for personal injury, there is no substantial evidence upon which a jury can properly find that the negligence charged was the proximate cause of the hurt sustained, it is the duty of the court, as it is in a like condition of the evidence in the trial of every other issue of fact, to instruct the jury to return a verdict for the defendant. *Railroad Co. v. Elliott*, 55 Fed. 949, 954, 5 C. C. A. 347, 352; *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Scheffer v. Railroad Co.*, 105 U. S. 249, 252, 26 L. Ed. 1070; *Jenks v. Inhabitants of Wilbraham*, 11 Gray, 142; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny v. Railroad Co.*, 13 Gray, 481, 74 Am. Dec. 645; *Dubuque Wood & Coal Ass'n v. County of Dubuque*, 30 Iowa, 176; *Hoag v. Railroad Co.*, 85 Pa. 293, 298, 299, 27 Am. Rep. 653; *West Mahanoy Tp. v. Watson*, 112 Pa. 574, 3 Atl. 866; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; *Railway Co. v. Mutch (Ala.)* 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179. This opinion has lamentably failed to accomplish its chief end if it has not clearly shown that this was the condition of the evidence in the case in hand at the close of the trial. The Circuit Court, therefore, committed no error when it refused to submit to the jury a question which, under the evidence before it, could not be lawfully answered in favor of the plaintiff.

We turn to the rulings upon the admission and rejection of evidence which are specified as error. A witness had testified that he frequently used the elevator, and that the name of the boy who was operating it for the defendant at the time of the accident was Jackson. He was then asked this question:

"Now, can you tell the jury what his habits were in running the elevator? Confine yourself to this door and elevator at the ground floor."

The defendant objected to this question "as immaterial and not connected with this transaction," and counsel for the plaintiff stated that they proposed to connect it with the transaction by showing that the habit of the boy was to leave the elevator standing at the ground floor

upon a block of wood, to go to the front of the building, to stand there, to follow or precede patrons into the elevator, to take them up therein and to leave the door of the shaft unlatched and open, so that any one could by touching it open it wide. The court sustained the objection, and complaint is made of this ruling. But the boy who operated the elevator did not open the door or invite the plaintiff to her injury. He did not leave the elevator supported by a block, go to the front of the building, leave the door open while he was there, precede the plaintiff into the elevator, or do any other act at the time she was injured to lead her into her trouble. If he had been in the habit of performing the acts which counsel for plaintiff offered to prove, her injury was not caused by any of them. Those acts were committed and those habits operated at other times, and not at the time of the accident. They had no perceptible connection or relation to the mischievous act of the strange boy, who produced the disaster, and there was no error in excluding the proof of them from the evidence in this case.

For the same reason the court properly refused to permit the same witness to answer this question:

"Have you gone into the elevator from the ground floor and from this hall when the light in the elevator was not burning?"

It was not material, so far as this record discloses, whether this witness went into or stayed out of the elevator when the light was not burning. Neither he nor the elevator nor the light nor the darkness in the elevator had any perceptible relation, causally or otherwise, to the accident and the injury in suit, and no sound reason occurs to us for the introduction in evidence of the answer to this question.

Another witness was asked whether or not he could state to the jury whether the door was kept open or closed about the time of the accident. He answered, "No." An objection was then made to this question, which was sustained, and this ruling is challenged. But, if the ruling was erroneous, it did not constitute reversible error, because it conclusively appears that it did not prejudice and could not have prejudiced the cause of the plaintiff, and error without prejudice is no ground for reversal. The witness answered that he could not tell whether the door was kept open or closed. The ruling which sustained the subsequent objection to this question merely withdrew this answer from the jury. The record shows what the answer would have been. The plaintiff did not offer to prove that the witness could or would tell whether the door was open or closed, and the presumption is conclusive that, if the objection had been overruled, his only testimony would have been that he did not know and could not state whether the door was closed or open. It is obvious that this evidence could have been of no advantage to the plaintiff, and hence its rejection was not fatal to the judgment. There was no reversible error in the trial of this case and the judgment below must be affirmed.

It is so ordered.

## UNITED STATES ex rel. MASSLICH v. SAUNDERS, City Treasurer, et al.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1903.)

No. 1,835.

## 1. MANDAMUS AGAINST MUNICIPALITIES—EXECUTION.

The writ of mandamus to enforce the collection of judgments of the national courts against municipalities is the legal substitute for a writ of execution to enforce judgments against private parties, and the rights of their judgment creditors to their respective writs are equally inviolable.

## 2. OFFICERS—DUTY TO EXERCISE POWERS GRANTED.

The law imposes upon public officers the duty to do for the benefit of private citizens whatever it invests them with the power to perform on their behalf, whenever public interest or individual rights call for the performance of that duty.

## 3. MANDAMUS—LEVY OF TAX—PREVIOUS DEMAND UNNECESSARY.

No demand upon the officers of a municipality to levy a tax is necessary before instituting proceedings for mandamus, where the statute imposes upon them the duty to levy it, or where that duty, under the law, is plain, or where it is manifest that such a demand would be an idle ceremony.

## 4. SAME—TAX—DEMAND OF PAYMENT SUFFICIENT DEMAND TO MAKE LEVY.

A demand upon the officers of a municipality of payment of a judgment or claim against it is a sufficient demand upon them to levy a tax to pay it, where the statute or the general law authorizes them to make provision for its payment by such a levy.

## 5. MUNICIPAL CORPORATIONS—POWER TO LEVY TAX TO PAY BONDS.

The power of the officers of a municipality to levy sufficient general taxes to pay the bonds of their city is a legal inference from the authority to issue the bonds, in the absence of any constitutional or statutory limitation or inhibition of this power.

## 6. MANDAMUS—JUDGMENT AGAINST MUNICIPALITY ON BONDS.

Statutes conferring powers and imposing duties upon municipal officers to levy taxes to pay judgments against their cities supersede statutes and their limitations conferring less extensive powers and duties upon such officers to levy taxes to pay bonds when the bonds have become merged in final judgments. Thenceforth the statutes authorizing taxes to pay judgments become the measure of the authority of the officers.

## 7. MUNICIPAL BONDS—LOCAL IMPROVEMENTS IN NEBRASKA—GENERAL LIABILITY OF CITIES.

District bonds of a city, issued to pay for internal improvements under subdivision 58, § 52, art. 2, c. 14, Comp. St. Neb. 1887 (section 1282c, subd. 55, Comp. St. 1901), which contain no stipulation limiting the recourse of their holders to the special taxes levied for such improvements, create a general liability of the city issuing them; and their officers are authorized and required to levy and collect taxes upon all the taxable property within the limits of the city, under subdivisions 1, 2, and 19 of section 1282c, Comp. St. Neb. 1901, to pay the bonded indebtedness which they evidence.

## 8. SAME—JUDGMENTS—OFFICERS MUST LEVY GENERAL TAXES TO PAY.

When a judgment has been rendered against a city on such bonds, the power is granted to its officers, and the duty is imposed upon them, by sections 4488-4491, Comp. St. Neb. 1901, to levy and collect taxes upon all the taxable property in the city to pay it.

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¶1. Enforcement of judgment against municipality by mandamus, see note to Holt County v. National Life Ins. Co., 25 C. C. A. 475.

¶3. See Mandamus, vol. 33, Cent. Dig. § 44.



**9. PLEADING—DECLARATION—FACTS LIMITING LIABILITY.**

Facts which limit a general liability imposed by statute or by law constitute matter of defense. It is not incumbent on a plaintiff to negative their existence either by pleading or by proof.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

Chester B. Masslich, in pro. per.

Melvin B. Davis, for defendants in error

C. C. Flansburg and R. O. Williams, amici curiæ.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This writ of error was sued out to reverse a judgment of the court below which denied the prayer of the relator, Chester B. Masslich, for a mandamus commanding the mayor and council of the city of Beatrice to levy a tax upon the property in that city to pay that portion of a judgment which he had obtained against it, to the payment of which there were no funds in the city treasury applicable. The case is before us upon a petition, an answer, and a special finding of facts. No ruling upon the admission or rejection of evidence is challenged, and the only question for consideration is whether or not the judgment of the court is sustained by the facts found by the circuit court. That court refused to issue the mandamus for a levy of the tax upon the ground that no demand for such a levy had been made upon the mayor and council of the city before the petition for the writ of mandamus was filed, and this is the ruling of which complaint is here made. The facts which condition the answer to the question thus presented, as they are disclosed by the admissions of the pleadings and the finding of facts, are these: On September 8, 1899, the relator recovered a judgment in the court below against the city of Beatrice for \$9,415.29. On April 22, 1901, his judgment was affirmed by this court. The city has no property subject to execution, and the relator has no adequate remedy in the ordinary course of the law to enforce the collection of his judgment. On June 10, 1901, a motion for a rehearing was denied by this court, and on July 6, 1901, its mandate which recited the affirmance of the judgment was filed in the Circuit Court. This judgment was based upon seven classes of bonds. There was sufficient money in the treasury of the city applicable to the payment of the bonds of the relator belonging to two of these classes to pay them in full, and there was sufficient money in the treasury applicable to the payment of the bonds which belonged to four of the other classes to pay them in part. In this state of the case, the relator, as the court below finds—

"Made due and formal demand for the payment of said judgment upon the said Saunders, as treasurer of the city of Beatrice, and upon the said mayor and council, and such demand was refused; that the demand upon the treasurer was made on June 19, 1901, and the demand upon the mayor and council on June 26, 1901, at a regular meeting thereof; that afterwards, and at the same session, said mayor and council adopted estimate for the expenses of the annual appropriation bill and the annual tax ordinance of said city, and on July 23, 1901, adopted the annual appropriation ordinance of

said city, but that no provision for the appropriation of any money or the levy of any tax for the payment of the said judgment, or any part thereof, was at any time made by said mayor and council."

Upon consideration of these facts the Circuit Court issued a peremptory writ of mandamus to the city treasurer, the mayor, and the council of the city, commanding them to pay over to the relator the money in the treasury applicable to the payment of the bonds upon which his judgment was based, but refused to direct them to levy a tax to pay that portion of the judgment which would remain unpaid after this application of the money, because, in its opinion, the relator had not made a proper demand for the levy of such a tax.

In the enforcement of judgments of the national courts against municipal and quasi municipal corporations, the writ of mandamus is the legal substitute for the writ of execution to enforce judgments against private parties. The plaintiff in a judgment of the former class has the same right to the issue and enforcement of a mandamus commanding the proper officers of the defendant corporation to make suitable provision for its payment that the plaintiff in a judgment of the latter class has to the issue and enforcement of a writ of execution. In *re Nevitt*, 117 Fed. 449, 454, 54 C. C. A. 622, 628; *Lafayette Co. v. Wonderly*, 92 Fed. 313, 316, 34 C. C. A. 360, 363; *Dempsey v. Oswego Tp.*, 51 Fed. 97, 99, 2 C. C. A. 110, 112.

Of course, neither a mandamus nor an execution may require the officer or officers to whom it is addressed to do any act which he or they have not lawful authority to do. But the legal duty is always imposed upon them to exercise all the authority with which they are invested to collect the judgments upon which such writs are issued, and the courts may and should command and enforce the performance of this duty. Whatever public officers are empowered to do for the benefit of private citizens the law makes it their duty to perform whenever public interest or individual rights call for the performance of that duty. *Supervisors v. United States*, 4 Wall. 435, 446, 18 L. Ed. 419; *City of Little Rock v. United States*, 103 Fed. 418, 424, 43 C. C. A. 261, 267.

The statutes of Nebraska provided that, whenever any judgment was obtained against a city of that state, it should be the duty of its council or other corporate officers, as the case might require, to make provision for its prompt payment (Comp. St. 1901, § 4488); that, if the ordinary revenue was insufficient to pay the current expenses of the municipality and any unpaid judgment, it should be the duty of such officers "to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments" (section 4489); that the tax should be levied on all the taxable property in the city bound by the judgment, and should be collected as other taxes were collected (section 4490); that such officers should also be required to levy a special tax for the payment of judgments (section 4491); that if such officers should "fail, refuse or neglect to make provisions for the immediate payment of such judgments after request made by the owner," he might have a writ of mandamus "to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness" (section 4492). These pro-

visions of the statutes imposed upon the respondents, the officers of this city, the duty to provide the ways and means to pay this judgment. When the relator demanded its payment they were informed of their duty. The only purpose of a demand is to give the party upon whom it is made a reasonable opportunity to comply with it, and thus to avoid the expense of proceedings to enforce it. The demand of payment of the judgment did not fail to accomplish this purpose. It was made on June 26, 1901, more than 20 days before the city council passed the annual tax ordinance for that year. It is true that it was not a demand that the officers of this city should levy a tax, but that it consisted only of a formal requirement that they should pay the judgment. But it was neither the privilege nor the duty of the relator to determine or direct in what way these officers should pay his judgment, or by what means they should secure the funds to pay it. They had moneys in the city treasury applicable to its payment, and it was their duty, and not that of the relator, to determine what moneys of the city could be lawfully applied to this judgment, and what amount must be raised by taxation. The statute gave them the power and imposed upon them the duty to determine by what means they would pay the claim of the relator, as completely as it imposed upon them the duty to pay it. It required them to "make provision for its prompt payment," and a fortiori to determine what that provision should be. The demand of payment of this judgment was sufficient to sustain this proceeding for a mandamus to compel a levy of a tax to raise the money to discharge it, and no formal demand to make such a levy was required before the proceeding was instituted, (1) because where the statute imposes the duty to make provision for payment of a judgment against a city upon its officers, and authorizes the issue of a writ of mandamus to compel them to levy a tax in case of their failure to make such provision, a demand of payment is equivalent to a demand of a levy, if such a levy is necessary (*City of Cairo v. Everett*, 107 Ill. 75, 78); (2) because no demand of a levy of a tax is requisite where the duty to levy it is imposed by the statute (*Cherokee County Commissioners v. Wilson*, 109 U. S. 621, 625, 3 Sup. Ct. 352, 27 L. Ed. 1053; *Deuel Co. v. First Nat. Bank*, 86 Fed. 264, 267, 30 C. C. A. 30, 33; *County Commissioners v. King*, 13 Fla. 451, 461), or where the duty is plain (*High's Extraordinary Legal Remedies*, § 377b; *State v. City Council of Racine*, 22 Wis. 258, 260; *Fisher v. City of Charleston*, 17 W. Va. 595); and (3) because no demand is necessary where it is manifest that it would be an idle ceremony (*U. S. v. Auditors of Town of Brooklyn* [C. C.] 8 Fed. 473). The fact that the officers of this city refused, after demand of payment, to use any of the money in the city treasury applicable to the payment of this judgment for that purpose, is a demonstration of the fact that a demand upon them to levy a tax to pay it would have been of no avail. The prayer of the relator for a writ of mandamus to compel the levy of a tax to pay his judgment should not have been denied for lack of a prior demand upon the officers of the city to make it.

There is another branch of this case which has been earnestly called to our attention, and which perhaps deserves consideration.

Counsel for the city contends that, although no demand to make a levy was requisite, the judgment below was right, and that it should not be reversed because the court gave a wrong reason for a right judgment. The prayer of the petition was that the officers of the city be commanded to make a levy upon all the taxable property within it to pay that portion of the judgment which will remain unpaid after the application of the money in the treasury which the court has directed to be paid to the relator. The portion of the judgment which will then remain unsatisfied is founded on "district paving bonds" and "district curbing and guttering bonds" of the city of Beatrice, which its counsel claims were issued under the provisions of subdivision 58 of section 52 of article 2 of chapter 14 of the Compiled Statutes of Nebraska of 1887. Without stopping to consider or decide whether or not the record sustains this claim, or whether or not this claim is in accordance with the fact, the concession will be made, for the purpose of this opinion and decision, that these bonds were issued in this way. Planting himself upon this foundation, counsel for the city maintains (1) that the officers of the city have no power to levy a general tax upon all the taxable property in the city to pay a judgment based upon these bonds, but that their authority is limited to the levy of special taxes upon the property in the respective paving districts to pay the specific bonds issued on account of those districts, respectively; and (2) that the record fails to show that the demanded levy would fall within the limit prescribed by the law. Let us consider these propositions in their order.

It is conceded that the writ of mandamus issues only to compel the discharge of a duty which the officers to whom it is directed are empowered by statute or by law to perform, and that the mere rendition of a judgment against a municipality, in the absence of statutory or legal provisions to the contrary, does not vest the officers of a municipality with power to levy a general tax to pay it. *City of Little Rock v. U. S.*, 103 Fed. 418, 420, 43 C. C. A. 261, 263; *U. S. v. Macon Co.*, 99 U. S. 582, 589, 25 L. Ed. 331; *Supervisors v. U. S.*, 18 Wall. 71, 77, 21 L. Ed. 771; *U. S. v. Clark Co.*, 95 U. S. 769, 24 L. Ed. 545.

But the power of the officers of a municipality to levy sufficient taxes to pay its bonds is a legal inference from the authority of the city to issue the bonds, in the absence of any limitation or inhibition of this authority in the act which grants the power, in the general law, or in the Constitution. *Loan Ass'n v. Topeka*, 20 Wall. 655, 660, 22 L. Ed. 455; *U. S. v. New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225; *Ralls County Court v. U. S.*, 105 U. S. 733, 735, 736, 26 L. Ed. 1220; *U. S. v. Clark Co.*, 96 U. S. 211, 24 L. Ed. 628; *Commonwealth v. Commissioners of Allegheny Co.*, 37 Pa. 277, 290; *Lowell v. Boston*, 111 Mass. 454, 460, 15 Am. Rep. 39; *Hasbrouck v. Milwaukee*, 25 Wis. 122.

The city of Beatrice had the power, under the Constitution and statutes of that state, to issue the district bonds upon which that portion of the judgment now under consideration is founded. The judgment against the city upon them has put that question at rest. The legal presumption therefore arises that the officers of the city

have the power to levy a general tax to pay the bonds which they were authorized to issue. Where is the inhibition or limitation upon this power? Counsel for the city endeavors to spell it out of the act of 1887 under which the bonds were issued. But the bonds have now become merged in a judgment, and there is nothing in the act of 1887 which in any way repeals, restricts, or limits the provisions of the statutes of Nebraska which have already been recited, and which both empower and command the officers of cities in that state to levy general taxes to pay all judgments against them whenever it shall be necessary to make such levies to effect the payments. Those provisions of the statutes of Nebraska were enacted in 1867. They were in force when the act of 1887 was enacted, and they are still in effect. Now, if it be conceded that prior to the rendition of the judgment upon the bonds there was either no authority or some limitation of the authority of the officers of this city to levy a general tax to pay them, yet that power was vested in the respondents and that duty was imposed upon them by the act of 1867 (sections 4488, 4489, 4490, 4491, 4492, Comp. St. Neb. 1901) the moment this judgment against the city became final. The instant that judgment was rendered, the debt it evidenced fell under the operation of the act of 1867. The act of 1887 became functus officio in regard to the levy and collection of the tax to pay the debt, and the powers and duties of the officers of the city respecting this matter were thenceforth measured by the act respecting judgments, and no longer by the statute regarding the issue of the bonds. General statutes which authorize and require officers of municipalities to levy and collect general taxes to pay judgments against them condition the power and duty of such officers in that regard from the time the judgments are rendered, where the Legislature has not provided otherwise, either in express terms or by fair implication. From that time they supersede the effect and the limitations of subsequent statutes granting less extensive powers under which the bonds or other evidences of debt merged in the judgments were issued. *Butz v. City of Muscatine*, 8 Wall. 575, 580, 19 L. Ed. 490.

But this is not all. There is no limitation in the act of 1887 upon the power of the officers of cities to levy general taxes to pay district bonds. It is undoubtedly competent and practicable for a city to agree with the holders of the bonds it issues for internal improvements that it will not be liable for their payment, and that the only recourse of their owners shall be to the moneys raised by special assessments upon the property benefited. The reason why such agreements are not found either in the statutes or the bonds which are used for the purpose of raising money to make these improvements is not far to seek. Cities issue such bonds to raise money, and bonds which contain such stipulations, or which are issued under statutes which contain such agreements, are not as available for the purpose of raising money as the plain promises of the cities to pay. Investors are not so ready to purchase the former as the latter. There was no such stipulation or limitation in the bonds here in issue, nor in the act under which they were sent forth. That act provides, in subdivision 58 of section 52 of article 2, that the mayor and council of the city

may create paving districts, may pave, curb, and gutter the streets in such districts, and may assess the cost of such improvements upon the lots abutting thereon. It requires the total cost of any such improvement to be levied at one time, and provides that one-tenth of the special taxes thus assessed shall become delinquent in each year until they are all paid. It empowers the mayor and council to issue district bonds bearing interest at 7 per cent. per annum, and payable in not exceeding 10 years from their date, for the purpose of paying the cost of the improvement, and requires these officers to provide in such a case that the special taxes and assessments shall constitute a sinking fund for the payment of the bonds and interest. It allows any owner of property assessed for the improvement to pay his share of its cost within 50 days from the levy of the special tax, and provides that thereupon his property shall be exempt from any lien or charge therefor. There is no other provision respecting the payment of the bonds by means of the special taxes, and a critical examination of the terms of this act which have now been recited leads all but inevitably to the conclusion that it was neither the purpose nor the intent of the Legislature of Nebraska in enacting this law, nor was it the legal effect of the act, to limit the liability of the city or the recourse of the bondholders to the special taxes levied for the improvement. The purpose and effect of this legislation go no farther than to enable the city, as between its general taxpayers and those especially benefited by such a local improvement, to reimburse itself in part for the cost of making the improvement by levying and collecting the special taxes upon the property benefited thereby.

If the intent of the legislators had been to limit the remedy of the bondholders to the special taxes, they would surely have provided some way by which the amount of the bonds and the interest upon them could be collected from the specific taxes authorized to be levied. There is no such provision, and the terms of the act are such that the amounts that may be lawfully collected by the special taxes can never be made to correspond with the amount of the principal and interest of the bonds issued for the cost of the improvement. These bonds may be made payable at any time within 10 years from their date, and they may draw interest at 7 per cent. per annum. Suppose they are made payable 9 years after their date. The entire cost of the improvement must be levied upon the abutting property at one time, but collection of only one-tenth of it may be enforced in any single year, and the deferred payments draw but 7 per cent. interest per annum. If all the owners of the property pay their taxes just before they become delinquent, there will be a deficiency of interest, because the entire cost of the improvement draws interest from the city, in the form of the bonds, while the city receives interest only on the deferred payments of the taxes. Again, the statute provides that any property holder may pay his share of the cost of the improvement within 50 days from the levy of the tax. Suppose that all the owners of property elect to pay within the 50 days. Their property is then "exempt from any lien or charge therefor," the statute declares. But the city has received an amount equal

to the principal of the bonds only, and the interest upon them for 9 years, which is equal to 63 per cent. of their principal, is not, and cannot be, provided for by the special taxes. If the time of payment of the bonds is changed from 9 years to 7 years or 6 years, or to any other time, the result is similar. In no case will the amount of the bonds and their interest be the same as the amount required to be collected as special taxes.

Moreover, a city is not required to issue these districts bonds when an internal improvement is made, under the act of 1887. It may pay the cost of the improvement, and subsequently obtain reimbursement from the special taxes, or it may issue the district bonds, use the money to pay for the improvement, and then put the amounts collected from the special taxes in the sinking fund to meet the bonds. If it adopts the former course, it charges itself and all the taxable property within it with a liability to pay the cost of the improvement the moment it makes the contract for it. It pays that cost, and trusts to the collection of the special taxes during the succeeding 9 years for reimbursement. If it pursues the latter course, it charges itself and all the taxable property within it, in the same way, with liability to pay the cost of the improvement when it makes the contract. It issues the district bonds, charges itself and all the taxable property within it with liability to discharge its express promise to pay them, pays the cost of the improvement with the proceeds of their sale, and then seeks to recover a portion of the money to pay the bonds from the collection of the special taxes. In either case the faith and credit of the city are necessarily pledged in the first instance to pay the cost of the improvement, and in the latter case to pay the bonds issued to discharge the primary liability. In neither case can the remedy of the creditors, whether they are contractors to make the improvements or the holders of the district bonds, be limited to the special taxes upon the abutting property, in the absence of an express stipulation to that effect in the contracts or in the bonds, or in the law under which the contracts and bonds are made. *U. S. v. Ft. Scott*, 99 U. S. 152, 159, 161, 25 L. Ed. 348; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

Not only this, but there are other and general provisions of the statutes of Nebraska which grant to the officers of this city plenary power to levy taxes upon all the taxable property within its limits to pay these bonds. Those statutes empower these officers "to levy taxes for general revenue purposes not to exceed fifteen mills on the dollar in any one year on all property within the limits of said city taxable according to the laws of the state of Nebraska" (Comp. St. 1887, c. 14, art. 2, § 52, subd. 1); "to levy any other tax or special assessment authorized by law" (subdivision 2); "to make provision for a sinking fund to pay accruing interest, and to pay at maturity the principal of the bonded indebtedness of the city, and to levy and collect the taxes on all the taxable property in the city, in addition to other taxes, for the purpose of paying the same, and to provide that the said tax shall be paid in cash; and whenever any city has heretofore issued bonds by virtue of any special authority derived from the Legislature of the territory or the state, the council shall have power to levy and

collect taxes for the purpose of paying such bonds as is provided in laws giving such authority" (subdivision 54). Comp. St. 1901, § 1282c, subds. 1, 2, 19. Conceding, but not deciding, that the city council of this city has the power, if it has not already exercised it, under the last clause of subdivision 54, supra, to levy and collect special taxes to pay these bonds, it is perfectly clear that the first part of this article confers upon it full authority to levy and collect taxes on all the taxable property within the city for the purpose of paying its bonded indebtedness, and these bonds evidence a part of that indebtedness. Here is the sum of the whole matter.

District bonds of a city issued under subdivision 58, § 52, art. 2, c. 14, Comp. St. Neb. 1887, section 1282c (subd. 55, Comp. St. 1901), which contain no stipulation limiting the recourse of their holders to special taxes, create a general liability of the city which issues them, and its officers are empowered and required to levy and collect taxes upon all the taxable property within it, under subdivisions 1, 2, and 19 of section 1282c, Comp. St. Neb. 1901, for the purpose of paying the bonded indebtedness they evidence.

When a judgment has been rendered against a city upon such bonds, the power is granted to its officers, and the duty is imposed upon them, to levy and collect general taxes to pay that judgment, by sections 4488, 4489, 4490, 4491, and 4492, Comp. St. Neb. 1901. The bonds here in controversy were lawfully issued by the city of Beatrice under subdivision 58, § 52, art. 2, c. 14, Comp. St. Neb. 1887. They contain no limitation of the liability of the city. Judgment against the city has been rendered upon them, and the respondents, the officers of this city, are vested with the power and charged with the duty to levy and collect sufficient taxes upon all the taxable property within the limits of the city to pay this judgment.

The other objection of counsel for the respondent to the issue of the mandamus is unworthy of serious consideration. It is that the relator did not plead and prove that the tax which he asked the officers of the city to levy was not without some constitutional or statutory limitation which he neither pleaded nor specified. The judgment against the city and the demand for its payment imposed upon its officers the duty of making a levy of a general tax to pay it. The judgment and the demand established a perfect cause of action for a writ of mandamus against the respondents under the statutes which required them to make provision for the payment of the judgment. *Deuel Co. v. First Nat. Bank*, 86 Fed. 264, 267, 30 C. C. A. 30, 33. If there is any limitation upon the powers granted to them by the statutes which have been recited, it arises upon special facts which have not been pleaded or proved, such as the assessed valuation of the property of the city, and the amount of the necessary levy for current expenses. The limitation has no application to the facts admitted and found in the record before us. In this state of the case the facts regarding the assessed valuation of the property and the necessary levy for the current expenses of the city constitute matter of defense, and the silence of the record concerning them is fatal to the respondents. Facts which limit a general liability imposed by statute



are matters of defense, and it is not incumbent upon the complainant to negative their existence either by pleading or by proof.

That portion of the judgment of the Circuit Court which dismissed so much of the petition of the relator as prayed for the levy of a tax is reversed, with costs, and this case is remanded to the court below with instructions to enter judgment for the relator, and to issue a peremptory writ of mandamus commanding the levy and collection of a tax on all the taxable property in the city of Beatrice substantially as directed in the alternative writ.

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**FILES v. BROWN (two cases).**

(Circuit Court of Appeals, Eighth Circuit. July 14, 1903.)

No. 1,870.

**1. APPEALS AND WRITS OF ERROR—FUNCTION IN FEDERAL COURTS.**

In the national courts final decrees and orders in equity cannot be reviewed by writs of error, nor can final judgments or orders at law be successfully challenged by appeals.

**2. SAME—PETITION AND ORDER AVOIDING JUDICIAL SALE.**

A petition to set aside an order of court for the sale of the property of an insolvent bank by a receiver under the national banking act, and to rescind the sale effected under the order, and an order which grants the relief sought by such a petition, constitute proceedings in equity, and they are reviewable by appeal only.

**3. JUDICIAL SALES IN EQUITY—EFFECT BEFORE CONFIRMATION.**

In a sale by a master or receiver under an order or decree in equity which contemplates a subsequent report and an order of confirmation, a bidder becomes a purchaser when the officer announces the sale to him. Thereafter he is liable to be compelled to complete his purchase, and such a sale will not, before confirmation, be opened for bidders in the absence of fraud or of misconduct in the sale. It will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience.

**4. SAME—SUBSEQUENT CONFIRMATION—NECESSITY.**

When the bid of the proposing purchaser is reported to the court by the master or receiver in the first instance, and the price to be paid and the purchaser who is to pay it are specified in the order which empowers the officer to accept the bid, to make the sale and to convey the property, the sale is final, when the officer has exercised the power granted him by the order, received the price, and conveyed the property.

**5. SAME—RESCISSION—WHEN ALLOWED.**

In the absence of fiduciary relations or extraordinary circumstances, courts and their officers are as firmly bound by their executed sales, both in morals and in law, as private citizens, and they ordinarily have no right or privilege to rescind them upon any ground which is not equally available to a private party.

**6. RESCISSION OF CONTRACTS—FACTS WARRANTING MUST CLEARLY APPEAR.**

The complainant must establish the essential facts of his cause of action for rescission of a contract with clearness and certainty.

**7. JUDICIAL SALE—RESCISSION—INADEQUACY OF PRICE.**

The fact that \$3,200 will probably be paid out of an insolvent estate upon certain collaterals pledged to secure a judgment which was sold

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¶ 3. See Judicial Sales, vol. 31, Cent. Dig. § 77.

by a receiver to a purchaser for \$25, pursuant to an order of the court, does not so severely shock the conscience of a chancellor as to warrant a rescission of the sale, under this state of facts: Successive receivers had held the claim evidenced by the judgment for nine years, and had collected nothing upon it. The judgment debtor had no property, and the judgment was worthless unless the collaterals were valuable. One of the receivers proved the collaterals several years before the sale of the judgment, and they were allowed as a claim against the insolvent estate they charged; but no one ever collected anything upon them, and the succeeding receivers were ignorant of their existence. One of these offered the judgment for sale at auction, but could not sell it, for want of bidders. Some two years after this offer the purchaser tendered a bid of \$25 for it to the receiver, and the Comptroller, the court, and the receiver accepted the offer and assigned the judgment. The value of the judgment and the collaterals was too uncertain, and contingent upon future collection from the insolvent estate, to warrant rescission.

**8. SAME—FAILURE OF VENDEE TO COMMUNICATE INFORMATION AS TO PROPERTY PURCHASED.**

No duty is imposed upon a purchaser, by the mere relation of vendee and vendor, to communicate to his seller information of which the latter is ignorant, relative to the character or value of the property the purchaser is buying; and the failure to do so furnishes no ground for rescinding a sale, or for canceling an order of court which authorizes it.

**9. PRACTICE IN EQUITY—ANSWER AFTER DEMURRER TO PETITION OVERRULED.**

After a demurrer to a petition to rescind a sale and to cancel the order which authorized it is overruled, the vendee has a right to answer the petition.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

On October 18, 1902, Edwin F. Brown, the receiver of the First National Bank of Little Rock, Ark., under the national banking act, filed his petition in the Circuit Court for the Eastern District of Arkansas, in which he prayed for an order of that court directing him to accept a bid of \$25 made by A. W. Files, the appellant, for a judgment of \$9,230.09 against J. G. Kelso, which was one of the assets of the bank, and commanding him to make the sale of and to assign the judgment to Files. On the same day the court authorized this receiver, by an order in the usual form, to accept the \$25 bid by Files, and to sell and assign the judgment to him, and the receiver complied with the order. Afterwards, and on November 8, 1902, the receiver of the bank filed a petition in the same court to rescind this sale, which had been consummated on October 18, 1902. On the same day that this petition was filed, Files, the purchaser, demurred to the petition. His demurrer was overruled, he prayed leave to answer the petition, his prayer was denied, and the court entered an order which was, in legal effect, a decree that its order of October 18, 1902, was revoked, set aside, and held for naught, and that the \$25 obtained by the receiver for the sale of the judgment should be returned to Files. In other words, it rendered a complete decree of rescission of an executed sale. This order or decree is assailed by the appellant on the ground that the court erred (1) in overruling the demurrer to the petition upon which it is based; and (2) in refusing the appellant permission to answer the petition after his demurrer was overruled.

In the petition for rescission which conditions the answers to the objections of the appellant to the proceedings below, the receiver alleged the existence of these facts: The First National Bank of Little Rock became insolvent and went into the hands of a receiver, under the act for the establishment of national banks, in the year 1893. For some time prior to July 1, 1899, when

he resigned his position, S. R. Cockrill was the receiver of the property of this bank. He died in the year 1901. When Cockrill resigned, H. F. Auten succeeded him. Auten resigned in August, 1901, and the appellee, Edwin F. Brown, was appointed, and has served in his place since that date. At some time while Cockrill was receiver he held the judgment for \$9,230.00 against J. G. Kelso which is in controversy here. The debt evidenced by this judgment was partially secured by the pledge of certain collateral promissory notes made by Thomas H. Allen & Co., who were insolvent, and whose assets were also in the hands of a receiver. Cockrill proved these notes in the receivership of Allen & Co., and received certificates of their allowance as claims against the estate of Allen & Co., from M. B. Trezevant, the receiver of that estate. But when Cockrill resigned he did not deliver these certificates to his successors in office, and they did not know of the existence of these collaterals until after the judgment was sold and assigned to the appellant. On December 11, 1899, the receiver of the bank offered this judgment and all the remaining property of the insolvent bank for sale at public auction pursuant to a proper order of the Circuit Court, but the judgment was not sold, because it was so worthless that no one made a bid for it. In October, 1902, the appellant, A. W. Files, offered the receiver of the bank \$25 for this judgment. The receiver reported this bid to the Comptroller of the Currency, and the latter referred it back to the receiver, with instructions to him to use his own judgment in the matter, and to sell the judgment against Kelso for the amount offered by Files, if, in his opinion, that was the best disposition that could be made of it. Thereupon, on October 18, 1902, the receiver presented his petition to the court for an order to accept this bid of Files and to consummate the sale. In this petition he set forth the fact that this judgment was not sold, for want of bidders, at the auction sale of the other assets of the bank in 1899; that Files now offered him \$25 for it; that he had reported this bid to the Comptroller, and the latter had instructed him to accept it, if, in his opinion, this was the best that could be done in the premises; and that it was his opinion that it was for the best interests of the creditors of his trust that this offer of Files should be accepted. He prayed for an order authorizing him to sell the judgment to Files for \$25. On the same day the court ordered that the receiver be authorized to sell, assign, and set over the judgment to Files upon the payment by him of the sum of \$25; and the receiver thereupon duly assigned the judgment to the appellant, and accepted from him the \$25 he offered in full payment for the assignment of the judgment. After this sale was completely executed the receiver of the bank learned of the pledge of the promissory notes of Allen & Co. to secure the debt evidenced by the judgment, but, according to his petition, he has been and is unable to learn or to state the exact value of these notes, or the probable amounts which will be distributed thereon; but he has been "led to believe that there are now funds to be distributed amounting to about \$1,200, and that there will be further funds distributed to the probable amount of \$2,000." He alleges that in this state of the case he offered to return the \$25 to Files, and the latter refused to receive it. He also alleges in this petition for rescission that, before and at the time of the sale of the judgment to him, Files knew of the existence of the collateral notes, of the existence of the certificates of allowance, and of their probable value, and that he failed to disclose these facts to the receiver before the sale was effected. He also alleges that "the said certificates, having been received as assets, could not be sold or assigned except by authority of the Comptroller of the Currency, and under a proper order of a court of competent jurisdiction, and that, so far as plaintiff can learn, no such order or authority was had or received."

A. W. Files, in pro. per.

W. F. Hill, H. F. Auten, J. M. Moore, and W. B. Smith, for appellee and defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The main questions in this case are: Did the facts set forth in the petition for avoidance of the order and for rescission of the sale entitle the appellee to that relief? And had the appellant the right to answer the petition after his demurrer to it was overruled? There are, however, one or two preliminary issues, the disposition of which will serve to disclose the real character of the controversy before us, and to facilitate its discussion.

The appellant has taken an appeal, and has also sued out a writ of error to reverse the same order. This is a permissible practice where counsel are in doubt which course to pursue, and the appellate court will judge the proceedings below in accordance with the rules of that method of review applicable to the nature of the case presented. *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 111 Fed. 81, 86, 49 C. C. A. 229, 234; *McFadden v. Milling Co.*, 97 Fed. 670, 672, 38 C. C. A. 355, 357; *Hurt v. Hollingsworth*, 100 U. S. 100, 102, 25 L. Ed. 569. But final decrees and orders in equity cannot be reviewed by writs of error, nor can final judgments or orders at law be successfully assailed by appeals. *Highland Boy Gold Min. Co. v. Strickley*, 116 Fed. 852, 855, 54 C. C. A. 186, 189. Hence it becomes necessary before entering upon the merits of the questions at issue to determine whether this is a proceeding at law or in equity, and whether it may be reviewed by a writ of error or by appeal. The difference between actions at law and suits in equity is matter of substance, not of form. It inheres in the natures of the causes of action, in the principles which control and in the remedies which follow them, and it cannot be eradicated either by a change of form or by the abolition of forms. A legal cause of action cannot be maintained in equity, because there is an adequate remedy for it at law, and it is only where there is no such remedy that relief in equity may be successfully sought. Equitable causes of action are not available at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is prohibited in actions at law by the rule which entitles every party to a trial of all the issues of fact by a jury. *Highland Boy Gold Min. Co. v. Strickley*, 116 Fed. 852, 854, 54 C. C. A. 186, 188, and cases there cited. What, then, is the character of the cause of action set forth in the petition of the appellee, and what the nature of the relief he seeks? Are they legal or equitable? The petition contains a statement of facts upon which the petitioner seeks to obtain from the court the avoidance or cancellation of the order for the sale of the judgment, which is one of the appellant's muniments of title, the rescission of the sale which rests upon that order, and the restoration of the parties to the situation which they occupied before the sale was made, and this was the relief which was granted by the court below. In effect, the petition was a bill in equity to cancel a decree for and an order confirming a sale, and to rescind the executed contract made upon the faith of it. It states no cause of action cognizable by a court of law, and it invokes no remedy which such a court has jurisdiction to administer. Bills, petitions, and proceedings

to cancel or avoid judgments, orders, deeds, or other instruments which form muniments of title, and to rescind sales based upon them, fall within the exclusive jurisdiction of courts of chancery, and are only cognizable in equity in the courts of the United States. Pomeroy's Eq. Jur. §§ 188, 1375, 1377; 2 Story's Eq. Jur. §§ 694-702. The petition for cancellation of the order, and the order of cancellation and rescission which followed it, were proceedings in equity, and they are reviewable by appeal only. The writ of error is therefore without office here. It must be dismissed.

Counsel for the receiver argue that the sale of the judgment never became final, because there was no order of confirmation of it; and they invoke the old rule which once prevailed in England, that, where the court of chancery directs a master to make a sale under a decree or order, it is his duty to report his proceedings and the highest bid he receives to the court, that the court may, in its discretion, then receive other bids, and that the sale is not complete until it is subsequently confirmed by the order of the court. Chief Justice Waite stated the rule in this way:

"A bidder at a sale by a master under a decree of court is not considered a purchaser until the report of sale is confirmed, and he cannot be compelled to complete his purchase until the confirmation of the report—that is, until his bid has been in some form accepted by the court—as the court stands in the place of the vendor, using the master to receive and report the bids." *Mayhew v. West Virginia Oil & Oil Land Co.* (C. C.) 24 Fed. 205, 215.

There are two reasons why the old rule in chancery has no application to the sale under consideration: The first is that this old rule in chancery has never prevailed in this country, and the rule is almost universal that, at a sale by a master or receiver under an order or decree in equity which contemplates a subsequent report and a confirmation of the sale, a bidder becomes a purchaser when the officer announces the sale to him. Thereafter he may be compelled to complete his purchase and pay the price which he offered. Such a sale will not, before confirmation, be opened for bidders, in the absence of proof of fraud or of misconduct at the sale. It will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience. *Graffam v. Burgess*, 117 U. S. 180, 191, 192, 6 Sup. Ct. 686, 29 L. Ed. 839; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 367, 12 Sup. Ct. 887, 36 L. Ed. 732. The old chancery rule has been abolished, even in England, and the practice there has been made to conform to that in this country by an act of Parliament. Act 1867, 30 & 31 Victoria, c. 48, § 7; 1 Sugden on Vendors (14th Ed., by Perkins) 114, note "a." There is another reason why this sale was complete. The reason of the old rule in chancery that sales made by a master under an order or decree of court are not final unless confirmed is that the court is the vendor, and it cannot know what the offers or bids will be at a sale at auction; that the master is its agent to receive and report the bids, without authority to accept any of them. Hence it is not until the best bid has been reported to the court, and it has accepted it, and confirmed the sale by an order directing the master to complete it, that it becomes final. The reason of this rule ceases to be in a case like that at bar, where the bid is reported to the court in

the first instance, and it accepts it and orders the master or receiver to take the price offered and to convey the property to the purchaser. And where the reason of a rule no longer exists, the rule itself ceases to be. So that, even if the old chancery rule were in force, it would have no application to the sale in hand. The order to the receiver to sell and convey the property to a purchaser named, for a price fixed in the order, is itself both an acceptance of the bid and a confirmation of the sale, so that when the order has been executed the court is as firmly bound in law and in morals as any private citizen by his executed sale.

Cases sometimes arise where sales by ignorant or negligent trustees or masters to purchasers who hold fiduciary relations to some of the interested parties, or who have special means of knowledge of the property and its value, are avoided for gross inadequacy of price on slight evidence of fraud or mistake, when such relief would hardly be granted in sales between private citizens. *Turner v. Harvey*, Jacob's Rep. 169, 177. But this is not a case of that character. The books and papers of the bank were in the possession of the receiver, and not of this purchaser. The means of learning the action of the receiver of Allen & Co. were as accessible to him and to the court as to the appellant. It was the predecessor in office of the appellee, and not the appellant, who first moved the court to sell the judgment. He offered it for sale at auction in the year 1899, but there were no bidders to take it. This judgment was apparently continually for sale from that date until October, 1902. Then the appellant offered the receiver \$25 for it, but he filed no petition, made no representation, and took no action to induce either the court or the receiver to effect the sale. It was the receiver of the bank who made every move, who secured the authority of the Comptroller and of the court to accept the bid, and who made the sale; and there is no more reason why he, or the court for which he was acting, should be relieved from the executed contract which they deliberately made, than there would be that a private individual should be relieved from an executed sale made under similar circumstances.

When a bid by a proposing purchaser is reported to the court by a receiver or master, and the court, by its order, authorizes the officer to accept payment of the price offered and to convey the property to the purchaser and he does so, the sale is complete, no further order of confirmation is essential and the court is as firmly bound in law and in morals as any private citizen would be by the executed sale. The result is that when the receiver filed his petition to rescind the sale, and to avoid the order which authorized it, Files was the owner of the judgment, the court was the owner of the \$25 which the purchaser had paid for it, the sale was executed, and the court and its receiver had no higher right than any private vendor to undo their contract, and to take from the vendee the property which he had purchased.

We are now ready to consider the sufficiency of the facts alleged in the petition to warrant the order from which this appeal is taken, and the question is, what facts are here averred which would entitle a private citizen to relief of this nature if he had accepted the offer of

the appellant, and had completed the sale and assignment of the judgment under the circumstances pleaded in the petition? The general grounds for rescission of contracts of sale are fraud, accident, and mistake. What facts are stated in the petition to establish a cause of action upon any of these grounds? Counsel for the receiver seek to sustain the order below on the ground that the petition shows inadequacy of price for the sale of the judgment, and a failure of the appellant to impart to the receiver his knowledge of the existence and value of the collaterals before the sale was effected, and for no other reason. If there is one proposition in the law regarding the rescission of contracts and the cancellation of muniments of title that is established beyond doubt or cavil, it is that the complainant must establish the essential facts of his cause of action with clearness and certainty, to entitle him to any relief. *Chicago, St. Paul, M. & O. Ry. Co. v. Belliwith*, 83 Fed. 437, 440, 28 C. C. A. 358, 361, 362; *Maxwell Land Grant Case*, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; *Colorado Coal Co. v. United States*, 123 U. S. 307, 316, 8 Sup. Ct. 131, 31 L. Ed. 182; *Howland v. Blake*, 97 U. S. 624, 626, 24 L. Ed. 1027; *Pomeroy's Eq. Juris.* § 859.

Does this petition clearly disclose any inadequacy of price? It is conceded that the judgment against Kelso was in itself worthless, and that if it had any value it was by virtue of the collaterals pledged to secure it. Therefore the assignment of the collaterals by means of the assignment of the judgment and the value of the collaterals are indispensable facts to establish the inadequacy of price. But the petition avers that the collaterals were in the form of certificates of the receiver of Allen & Co.; that they were a part of the estate of the bank; that they "could not be sold or assigned except by authority of the Comptroller of the Currency, and under a proper order of a court of competent jurisdiction; and that, so far as plaintiff can learn, no such order or authority was had or received." In other words, the receiver alleged that the collaterals never passed to the appellant by the assignment of the judgment, and, if we take him at his word, Files received nothing but the judgment itself, which was worthless, and there is no ground for avoiding the assignment. It is not probable that this averment of the petition can be ultimately sustained. But the receiver certainly fails to make it clearly appear by his pleading that the certificates passed by the assignment, when he alleges that they failed to pass, and the sale ought not to be rescinded until he concludes to which horn of this dilemma he will cling.

Moreover, conceding that the title to the certificates passed to Files by the assignment of the judgment, the petition fails to show that these certificates, or the notes which they represent, had, or ever will have, any greater value than the \$25 which the appellant paid for them. The only averments upon this subject are that the certificates are evidence of claims based upon the collateral notes allowed against the insolvent estate of Allen & Co., that the receiver does not know their amount, and "that while he is unable to learn or state the exact value of these collateral notes, or of the probable amounts which will be distributed thereon from the estate of Thomas H. Allen & Company, yet he is led to believe that there are now

funds to be distributed amounting to about \$1,200, and that there will be further funds to be distributed to the probable amount of \$2,000." There is no averment of the number or the names of the creditors of the estate of Allen & Co., and nothing to show to whom these funds are to be distributed. Counsel argue the case as though the petition contained an allegation that there would probably be \$3,200 to be paid upon the collateral notes or certificates, but the only statement upon this subject in the petition is quoted above. The allegation is that the petitioner cannot learn or state the probable amount that will be distributed from the estate of Allen & Co. upon the collateral notes, but that the amount of funds now in that estate to be distributed is \$1,200, and that there will probably be \$2,000 more to be distributed. The natural and rational reading and meaning of the averment is that he cannot learn the probable amount to be distributed on the collaterals, but that the probable amount to be distributed to all the creditors of Allen & Co., will be \$3,200. As the petition contains no allegation of the amount of the collaterals or of the amount of the indebtedness of Allen & Co., it furnishes no data from which the value of the collaterals, or the probable amount that will be received thereon, can be deduced. And even if the paragraph of the petition which has been quoted is susceptible of the interpretation that there will probably be \$3,200 for distribution on the collateral notes, that construction is a strained and doubtful one, and the averment is altogether too ambiguous and uncertain upon which to found a decree or an order to deprive a citizen of his property.

Moreover, if the petition clearly stated that \$3,200 would probably be paid upon the collaterals by the estate of Allen & Co., this averment would not have shown any gross inadequacy of price. An averment that an amount will probably be realized from a credit at some future time is not an averment that the credit is or ever was of a value equal to that amount. The indefinite and unlimited future and the chances inhering in the probability must be discounted to learn the present or past value of the security, and as there is no averment in this petition of the time in the future when the \$3,200 will probably be paid, or of the facts which condition the probability of its payment, the statement of its probable payment would be too indefinite and uncertain from which to deduce the conclusion that there was any shocking inadequacy of price in the \$25 which was paid for it. And inadequacy of price, unless it is so great as to shock the conscience, or unless there are additional circumstances of unfairness, furnishes no ground for the rescission of a sale, or for the cancellation of the order upon which it rests. *Graffam v. Burgess*, 117 U. S. 180, 192, 6 Sup. Ct. 686, 29 L. Ed. 839; *Livingston v. Byrne*, 11 Johns. 555, 566; *Eberhardt v. Gilchrist*, 11 N. J. Eq. 167, 170; *Marlatt v. Warwick*, 18 N. J. Eq. 108, 110, 111; *Klopping v. Stellmacher*, 21 N. J. Eq. 328, 329; *Carson's Sale*, 6 Watts, 140, 147; *House v. Walker*, 4 Md. Ch. 62, 63; *White v. Floyd*, *Speer*, Eq. 351, 355; *Hart v. Bleight*, 3 T. B. Mon. 273; *Tripp v. Cook*, 26 Wend. 143, 149; *Collier v. Whipple*, 13 Wend. 224, 235.

Counsel, however, insist that the petitioner was entitled to the rescission because his petition contains allegations that the vendee was



aware of the existence and of the value of the collaterals, and failed to impart his information to the receiver before the sale. There are two answers to this contention:

First. The failure of the petitioner to clearly aver the value of the collaterals deprives his allegations that Files knew and failed to state their existence and value of all effect, for, if the collaterals had no value, or but little value, their existence and their value were immaterial, and a statement of these facts would have been of no benefit to the receiver.

Second. A suppression or concealment of facts forms no ground for rescission or for the cancellation of a muniment of title unless it is a violation of some duty, and hence some kind of a fraud. If any duty to communicate this information had been imposed upon the appellant, either at law or in equity, his silence might have been fatal to his purchase. But he occupied no fiduciary relation to the receiver or to the court. They asked him no questions. He owed them no duty to speak. A vendor is presumed to have special knowledge of his own property, and the duty to inform a purchaser of latent defects in it sometimes rests upon him. But the appellant was a vendee. No such duty rests upon a buyer because he has the right to presume that a vendor knows his own property, its title, its character, and its value, and hence he may safely buy it in silence at any price which the vendor is willing to accept. It is not the duty of a purchaser to communicate to his vendor information of which the vendor is ignorant relative to the character or value of the property which he is buying, and a failure to do so furnishes no ground for rescinding a sale, or for canceling an order of court which authorizes it. *Fox v. Mackreth*, 2 Brown's Ch. Rep. 319, 333, 334; *Turner v. Harvey*, Jacob's Rep. 167, 177; *Laidlaw v. Organ*, 2 Wheat. 178, 194, 4 L. Ed. 214; *Neill v. Shamburg*, 158 Pa. 263, 270, 27 Atl. 992; *Blydenburgh v. Welsh*, Baldw. 331, 337, Fed. Cas. No. 1,583; *Moses v. Katzenberger & Sons*, 84 Ala. 95, 98, 4 South. 237; *Kohl v. Lindley*, 39 Ill. 195, 201, 89 Am. Dec. 294. The illustration and statement of this rule, which has been quoted and approved in the text-books and decisions in England and America for more than a century, was made by Lord Chancellor Thurlow in 1788, in *Fox v. Mackreth*, *supra*, in these words:

"Suppose, for instance, that A., knowing there to be a mine in the estate of B., of which he knew B. was ignorant, should enter into a contract to purchase the estate of B. for the price of the estate, without considering the mine; could the court set it aside? Why not, since B. was not apprised of the mine, and A. was? Because B., as the buyer, was not obliged, from the nature of the contract, to make the discovery. It is therefore essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery. The court will not correct a contract merely because a man of nice honor would not have entered into it. It must fall within some definition of fraud. The rule must be drawn so as not to affect the general transactions of mankind."

The case made by the petition in hand does not fall within any definition of fraud. The purchaser owed the receiver and the court no duty to speak. His silence was no wrong, and it furnishes no basis

for a rescission of the sale, or for the avoidance of the order of the court which directed it. The petition stated no cause of action, and the demurrer to it should have been sustained.

Not only this, but, if the demurrer was properly overruled, the appellant should have been permitted to answer the petition. This is a proceeding in equity. The petition is in effect a bill in equity to rescind a sale and to cancel a muniment of title. The relief which was granted deprived a citizen of his property. If the proceeding did not fall directly under the rules and practice in equity, it was so analogous to a suit in equity that no radical departure from that practice should have been permitted. The thirty-fourth rule in equity provides that:

"Upon the overruling of any plea or demurrer the defendant shall be assigned to answer the bill or so much thereof as is covered by the plea or demurrer on the next succeeding rule day or at such other period as consistently with justice or the rights of the defendants the same can in the judgment of the court be reasonably done."

This is a just and reasonable rule. It gives to a defendant the opportunity and confers upon him the right to answer the averments of his adversary after he has unsuccessfully challenged their legal sufficiency. *Bates on Federal Equity Procedure*, § 215; *United States v. Dalles Military Road Co.*, 140 U. S. 599, 616, 11 Sup. Ct. 988, 35 L. Ed. 560; *Wooster v. Blake* (C. C.) 7 Fed. 816; *McVeagh v. Denver City Waterworks Co.*, 85 Fed. 74, 29 C. C. A. 33; *Zimmerman v. So Relle*, 25 C. C. A. 518, 522, 80 Fed. 417, 421.

The order below is reversed, and the case is remanded to the Circuit Court, with instructions to sustain the demurrer, to allow the receiver to amend his petition in accordance with the provisions of rule 35 in equity, and to take further proceedings not inconsistent with the views expressed in this opinion.

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### CHICAGO & N. W. RY. CO. v. DE CLOW.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1903.)

No. 1,841.

1. CARRIERS—INJURY TO PASSENGER—FUTURE DAMAGES—THEY MUST BE REASONABLY CERTAIN.

The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such pain and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future effects are too remote and speculative to form the basis of legal injury.

2. SAME.

A charge that a plaintiff could recover compensation "for any pain and suffering he may be called upon to undergo in the future—that is, in case you find that he will suffer pain and suffering in the future"—is not error, in the absence of any suggestion or request for a modification or explanation of the instruction before the jury retires.

## 3. EVIDENCE—GENERAL OBJECTIONS.

General objections to a question or to an offer of evidence cannot be sustained if any part of the evidence which counsel seek to elicit by the query, or which they offer to introduce, is admissible.

## 4. TRIAL—QUESTION OF FACT—WITHDRAWAL FROM JURY.

It is only when the evidence is such that all reasonable men in the exercise of an unprejudiced judgment must reach the same conclusion that a court may lawfully withdraw a question of fact from the jury.

## 5. EVIDENCE—INCONSISTENT TESTIMONY—IMPEACHMENT.

Statements of witnesses inconsistent with their testimony upon material issues are competent and material evidence to impeach their credibility.

## 6. APPEAL—OBJECTION NOT RAISED BELOW.

When a complaint states a cause of action upon contract and one in tort arising out of a single wrongful act, and the case is tried, and the court charges the jury on the theory that the action is for breach of a contract, without objection or suggestion by the defendant that the plaintiff has waived his cause of action upon the contract by pleading the tort, it is too late to present that objection in an appellate court for the first time.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Northern District of Iowa.

On September 15, 1899, the plaintiff below, **W. L. De Clow**, was riding as a passenger in the caboose of a freight train of the Chicago & Northwestern Railway Company, which was transporting some horses for him, when the train was so suddenly stopped that he was thrown against the corner of the conductor's desk, and his right kidney was so seriously injured that he continued to suffer from the accident until the trial of the action, more than two years later. His condition was not then improving. He sued the railway company for his injury, and for injury to his horses, on account of this accident, and recovered a verdict and a judgment, which this writ of error challenges.

Frank F. Dawley (N. M. Hubbard, Jr., and C. E. Wheeler, on the brief), for plaintiff in error.

P. W. Tourtellot and E. H. Crocker (Henry Rickel, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident they are but a part of that *damnum absque injuria* which reaches too far into the realm of conjecture to form any part of the basis of an action at law. *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42, 45; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534, 542, 75 Am. Dec. 258; *Fry v. Railway Co.*, 45 Iowa, 416, 417; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 541, 21 N. W. 524, 50 Am. Rep. 154; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371,

380, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 368, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; *Ford v. City of Des Moines*, 106 Iowa, 94, 97, 75 N. W. 630; *Chicago, R. I. & Pac. R. Co. v. McDowell* (Neb.) 92 N. W. 121.

The chief complaint of the trial below is that in its rulings upon testimony and in its charge to the jury the Circuit Court violated this rule. The plaintiff's attending physician testified that his right kidney was seriously affected; that in his opinion its unhealthy condition was caused by the accident; that he thought the disease in it had reached a chronic state; that the tendency was for it to continue in that condition; that if the plaintiff pursued the usual modes of living his condition would get worse; that the disease would tend to acute nephritis, and as that would proceed it would go on to Bright's disease of the right kidney; and that Bright's disease usually proves fatal. After this witness had retired from the stand Dr. Raymer was called by the plaintiff. He testified that he first examined the plaintiff the day before he testified. He then answered questions as an expert, and among other things said that the probable result of the injury the plaintiff had suffered was that he would tend to get worse; that there was some danger in a case of his kind that the high specific gravity of his urine which had been proved would give rise to Bright's disease or pyelitis or cystitis; that he would hardly say that these results were more likely to occur than not to occur, but that they were things to fear. Thereupon his examination proceeded in this way:

"What is the nature of the disorders such as Bright's disease, and the other disorders, pyelitis and cystitis, that you have mentioned, as to their ultimate effect and termination? (Defendant objects because incompetent and immaterial; there is no evidence that plaintiff has Bright's disease or will have or is likely to have. Overruled, and defendant excepts.) A. Some of these diseases, such as pyelitis and inflammation of the kidney, such as Bright's disease, endanger life. An inflammation of the kidney is not necessarily fatal but it will endanger life, and may ultimately cause the death of the patient sooner than he would otherwise die. Q. Is there any known cure for either Bright's disease or pyelitis? (Defendant objects as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.) A. That would be depending on the case and on the stage of the disease. A great many cases of acute Bright's disease get well. Many cases of pyelitis get well, depending on what has been the cause, and whether the cause can be removed at once. But after they have reached a certain stage, and if the cause is such that it cannot be removed, then they are incurable. If it is due to injury, then it depends upon how long that cause has been in existence, and how removable the results of the injury are. The progress of these diseases may be either quick or slow. Q. Under what condition is development slow and under what conditions is it quick? (Defendant objects as being incompetent, immaterial, and vague, calling for a lecture on the subject. Overruled, and defendant excepts.) A. Where the cause is comparatively mild and of long continuance, of course in those cases we would expect the results to come on slowly."

In its instruction to the jury upon the subject of damages the court, while speaking of the plaintiff, said:

"Then he is entitled to compensation for the pain and suffering he had undergone in the past, and for any pain and suffering he may be called upon to undergo in the future—that is, in case you find that he will suffer pain and suffering in the future; he is entitled to receive damages for that."

The criticism of the admission of the testimony challenged is that there was no evidence at the time it was admitted which would warrant a finding by the jury that it was reasonably certain that Bright's disease or pyelitis or cystitis would result from the injury, and therefore evidence relative to the nature of these diseases was immaterial and manifestly prejudicial to the defendant. This conclusion is conceded to be a rational deduction from the premises assumed. But the assumption that there was no testimony from which a jury might lawfully infer that one of these diseases was reasonably certain to be caused by the accident is not sustained by the evidence in this record, and when the premises fall the conclusion follows. The plaintiff's attending physician had testified that he had treated him at times for more than two years after the injury; that his condition was not improving; that his right kidney was in a chronic state of disease; that it would naturally get worse; that the disease would tend to acute nephritis, and as that would proceed it would go on to Bright's disease. The effect of this testimony was that, if the chronic disease of the plaintiff's kidney pursued its natural course, it would go on into Bright's disease. It cannot be truthfully said that no reasonable man would be of the opinion that the natural course of a disease is its reasonably certain course, and in this state of the case it is not the province of a court to declare that a jury could not lawfully reach this conclusion. It is only when the evidence is such that all reasonable men, in the exercise of an unprejudiced judgment, must reach the same conclusion, that a court may lawfully withdraw a question of fact from the jury. There was therefore evidence from which the jury could lawfully find that Bright's disease was reasonably certain to result from the plaintiff's injury. But there was no evidence that pyelitis or cystitis was reasonably certain to follow the accident. Turn, now, to the three questions challenged by the objections of the railway company. Each seeks information relative to the character not only of Bright's disease but of one or both of the other diseases to which reference has been made. These questions were met by the general objections and by a specific objection to the testimony relative to Bright's disease only. The testimony to the character of that disease was competent and material. Either party had the right to prove the nature and effect of the disease which the plaintiff's attending physician had testified would be the natural result of his injury in the usual course of events. The objections to the evidence sought were therefore properly overruled. General objections to a question propounded to a witness cannot be lawfully sustained if any part of the testimony which the examiner seeks to elicit by the query is admissible over the objections. The specific objection to the testimony relative to Bright's disease was properly overruled because the evidence relative to that disease was competent, and the general objections to the testimony relative to the three diseases were properly overruled because the testimony relative to one of them was admissible.

Nor is the exception to the charge of the court more tenable. If the instruction that the plaintiff was entitled to compensation "for any pain and suffering he may be called upon to undergo in the future" stood alone, without qualification by any other part of the court's

directions to the jury, it would undoubtedly be erroneous. The authorities cited for the defendant go no farther. But this sentence did not stand alone. The court was evidently conscious of the inherent error in the unqualified statement it contained the moment it was uttered, and it instantly added: "That is, in case you find that he will suffer pain and suffering in the future." It is clear that the court made this qualification of its first statement for the express purpose of conforming its charge to the established rule which was evidently in its mind, and which stands at the opening of this opinion; and it is also obvious that both the court and the counsel for the railway company supposed that this purpose had been fully accomplished, for, while a formal exception was taken to this paragraph, exceptions were also taken to 23 other paragraphs of this charge, all but 4 of which have been abandoned, and no suggestion was made to the court before the retirement of the jury that it had failed in its attempt to give them the correct rule of law upon the subject under consideration. In our opinion, there was no such failure. The jury has found under this charge that the plaintiff will endure all the future suffering for which they have given him compensation. In order to reach the conclusion that the court was guilty of prejudicial error in this instruction, the presumption must be indulged that the jury has found that the plaintiff will endure future suffering that it was not reasonably certain from the evidence that he would sustain; that they have found that he will suffer what they were not reasonably certain that he would suffer. This presumption is too violent and irrational for us to raise. There is no such legal presumption. An appellate court cannot and ought not to create it, and there was no prejudicial error in this part of the charge.

The conductor of the train upon which the plaintiff was injured was a witness for the defendant. In his direct examination he testified to two conversations which he had with the plaintiff, one at Moingona, where the accident happened, and one shortly after they left that place. He also testified that the stop of the train at the time of the accident was a gradual one, and that there was no sudden jar or noise of the cars coming together outside of the regular jars that are felt when a train is going around a curve. Upon cross-examination counsel for the plaintiff asked him this question: "Q. Shortly after you left Moingona, didn't you use the following language in a conversation with Mr. De Clow, referring to this shock, 'I have had a talk with the engineer about the matter, and hope you won't report it,' or words to that effect, in the waycar on that train?" He answered, over the objection of the defendant that the testimony was immaterial, not cross-examination, and not having any bearing on the character of the shock, "I remember no such talk." On rebuttal the plaintiff testified that after they left Moingona the conductor told him that he had talked with the engineer about the shock of the stop, and that he hoped that the plaintiff would not report it. To this testimony the defendant objected, just after it had been elicited, that it was not proper rebutting evidence, that it was hearsay, that it was not part of the *res gestæ*, and that it was not binding on the defendant. The court overruled these objections, and the defendant excepted. There was

no motion to strike out the last answer, and the objections to it after it had been made came too late to entitle the defendant as a matter of right to a review of the question it presents in an appellate court. But there was no error in either of the rulings, if they had both been subject to review. The question propounded to the conductor was proper cross-examination upon the conversations which he had related in his direct testimony. He had stated a part of two conversations, and opposing counsel had the right to inquire concerning the other parts of those talks which their client related.

Nor was the testimony of the plaintiff of the statement of the conductor that he had conversed with the engineer about the shock and that he hoped that the plaintiff would not report it immaterial or inadmissible. That statement was inconsistent with the conductor's testimony that there was no unusual shock or jar when the train stopped, and the fact, if it was a fact, that he made this statement before the trial, had a direct tendency to impeach the credibility of his testimony upon the crucial issue in the case. Prior statements of witnesses inconsistent with their testimony upon material issues are always competent to impeach their credibility. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 477, 11 Sup. Ct. 569, 35 L. Ed. 213.

Counsel for the railway company assail the charge of the court upon the burden of proof. They concede, however, that the instructions it delivered were correct if the plaintiff was entitled to recover for breaches of contracts of carriage under the averments in his complaint. There were two causes of action and two counts in the complaint in this suit—one for injury to the person of the plaintiff, and the other for injuries to his horses. In stating the first cause of action he alleged that he was a passenger on the freight train, that it was carelessly and negligently stopped, and that by reason of this negligent stop he was injured. In stating his second cause of action he averred that he shipped over the defendant's railroad several carloads of horses and colts; that while they were en route the train which carried them was so carelessly and recklessly operated that they were injured. Now, the attack of counsel for the railway company upon the portion of the charge in hand is founded entirely upon the assumption that the plaintiff waived his causes of action for breaches of the contracts because he alleged in each count of his complaint that the train was negligently stopped, or, in other words, that the contracts were negligently and recklessly broken. The record discloses no suggestion or contention on his part for this construction of the complaint at the trial in the court below, and no objection or exception to the charge in which this theory was either developed or mentioned. Each count of the complaint plainly charged a breach of contract—the first in the averment that the plaintiff was a passenger in one of the defendant's trains, and that he was injured by its movements; the second in the allegations that the plaintiff shipped the stock over the defendant's road, and that they were injured by the operation of the train. The only basis for the contention of counsel for the railway company that the causes of action upon the contracts were waived is that the plaintiff alleged

that the train was so negligently and recklessly operated and stopped that the injuries were inflicted. The truth is that the complaint well states two causes of action upon contract and two causes of action in tort which arose out of the single tortious act which was in itself a violation of both the contracts. Forms of action are abolished by statute in the state of Iowa (McClain's Ann. Code Iowa 1888, § 3712); and the plaintiff is required to insert in his complaint a statement of the facts constituting his cause of action and a demand for the relief to which he considers himself entitled (section 3852, McClain's Ann. Code Iowa 1888). The pleadings and practice in actions at law in the national courts are required to conform as nearly as may be to those in the state courts in like cases. Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]. If a statement of the facts constituting the plaintiff's cause of action discloses two causes of action, or two reasons why he is entitled to the same relief, it is not perceived that he necessarily waives either cause by making the statement of the facts in the manner prescribed by the Code. It is possible that by a proper motion made before the evidence was introduced counsel could have compelled the plaintiff to elect whether he would proceed in this action for breaches of contracts or for torts. But it is certain that it is too late to make that motion now, or to successfully claim in this court for the first time that the plaintiff waived his causes of action for breaches of his contracts when his complaint plainly stated them, and when no such suggestion or objection was made in the court below either during the trial or at the close of the charge to the jury. When a complaint states a cause of action upon contract and one in tort arising out of a single wrongful act, and the case is tried, and the court charges the jury on the theory that the action is for breach of the contract, without objection or suggestion by the defendant that the plaintiff has waived his cause of action upon the contract by pleading the tort, it is too late to present that objection in an appellate court for the first time.

There was no substantial error in the trial of this case, and the judgment below must be affirmed.

It is so ordered.

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#### HIGHLAND BOY GOLD MIN. CO. v. POUCH.

(Circuit Court of Appeals, Eighth Circuit. May 5, 1903.)

No. 1,832.

1. APPEAL—RIGHT TO ALLEGE ERROR—ESTOPPEL.

Where, in an action for injuries to a servant in a mine, defendant permitted him to testify, without objection, on both direct and cross-examination, that defendant had promised to fix the stope in which he was injured by alleged insufficient timbering, it could not object on appeal to a statement on re-examination that on the day preceding the accident he had called the attention of the shift boss to the fact that certain timbers in the stope were "riding or taking weight," and that the boss promised that he would have "the doubling up man come up and fix it."

2. MASTER AND SERVANT—INJURIES TO MINER—INSUFFICIENT TIMBERING—EVIDENCE.

Some time prior to the accident the timbers in a mine stope in which plaintiff, a miner, was injured by caving, showed evidence that they were



bearing an excessive weight and might give way. When that stope was combined with another the result had been to leave an extensive overhanging wall, which pitched at an angle of 45 deg., supported only by square sets and by a pillar of decomposed sulphide ore. Such supports were insufficient, and about a week prior to the accident the pressure on the pillar of ore was so great that it had bulged and pushed out of place a number of poles standing at its base, and the hanging wall in the other stopes of the same mine had previously caved in. *Held*, that whether defendant had exercised reasonable care in timbering the stope in which plaintiff was injured was a question for the jury.

8. SAME—ACTION—INSTRUCTIONS—SAFE PLACE TO WORK.

Where plaintiff, a miner, was injured by the falling of a wall in the mine in a completed chamber, alleged to have resulted from insufficient timbering, and it did not appear that at the time plaintiff was doing any work which would render the place insecure, an instruction that defendant was not bound to keep the stope where plaintiff was working continuously safe, on the theory that the master is not required to keep the place where a servant works at all times safe, where the doing of the work is of such a character as temporarily renders the place insecure, was properly refused as inapplicable.

4. SAME—RES IPSA LOQUITUR.

Where the court charged that plaintiff could not complain or recover because of defendant's negligence in failing to properly secure any other part of the mine than that in which plaintiff was injured as alleged, and that defendant was not an insurer of plaintiff's safety, but was merely bound to exercise ordinary care for plaintiff's safety under the circumstances, it was not error for the court to refuse to specifically charge that the happening of the accident, of itself, was not evidence of negligence.

5. SAME—PROMISE TO REPAIR DEFECT—RELIANCE BY SERVANT.

Where evidence tended to show that the shift boss of a mine, on being notified that certain of the timbers in the stope in which plaintiff was injured were taking weight, not only promised to erect additional supports, but assured plaintiff that it was perfectly safe for him to remain there and continue his work, such evidence justified an instruction that if plaintiff called the attention of the shift boss to the fact that some of the posts were taking weight, and that the boss promised to remedy the defect, and plaintiff continued to work because of such promise, he did not assume the risk from such defect.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Utah.

J. E. McKeighan (M. F. Watts, on the brief), for plaintiff in error.

Charles Dey (C. W. L. Stevens, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. On October 25, 1901, Albert Pouch, the defendant in error, was in the employ of the Highland Boy Gold Mining Company, the plaintiff in error, as a machine man, his duty being to operate a drilling machine at such places within the defendant's mine as he was directed to work. On the day last aforesaid he was ordered to take his drill to the eighth floor of "Little 2 Stope," in the fifth level, and to work at that place. While he was at that point the stope caved in, and in his efforts to escape from the falling rock and timber he was severely injured. He sued the company in consequence of these injuries, alleging that it was negligent in failing to properly secure and timber the stope, and in permitting the timbers therein to become worn and defective. The answer was a general

denial and a plea of contributory negligence and assumption of risk. There was a lengthy trial to a jury, which resulted in a verdict for the plaintiff below in the sum of \$4,100.

Numerous errors were assigned in the trial court to the admission and exclusion of evidence, but only one error of that kind appears to be relied upon in this court for the purpose of obtaining a reversal of the judgment, and the other errors of that class are obviously unimportant and immaterial. The plaintiff testified as a witness, and on his re-examination stated, in substance, that on the day preceding the accident he had called the attention of the shift boss to the fact that certain timbers in Little 2 Stope "were [as he expressed it] riding or taking weight," and that when the attention of the shift boss was thus called to the fact he said he would have "the doubling up men come up and fix it." This last statement was objected to by the defendant company as irrelevant and incompetent, because the plaintiff had not specially pleaded such a promise on the part of the company to fix the stope, but had only pleaded generally that the stope was not properly timbered. We think that this objection, whatever may be its merit (and we deem it unnecessary to express any opinion on that point), cannot avail the defendant on appeal, because the witness had testified to the very same facts, both on his direct and cross-examination, and had done so without objection. He had further testified that, when the attention of the shift boss was called to the fact that the timbers were taking weight, the shift boss assured him that he would have "that fixed," and that it was "perfectly safe to work there." No objection was made to this evidence nor was any motion made to exclude it. Moreover, the witness was cross-examined on the subject by the defendant's attorney, and repeated the statement in substance. It must be held, therefore, that the objection to the evidence in question, even if it would have been tenable if made at the proper time, was waived, and that the repetition of the statement on re-examination cannot be esteemed a material error.

In the elaborate brief which has been filed by the plaintiff in error considerable space is devoted to the proposition that the trial court erred in failing to direct a verdict in favor of the defendant company. In support of this contention it is urged, in substance, that the caving in of Little 2 Stope was one of those unusual, unexpected, and sudden occurrences which could not have been foreseen and guarded against by the exercise of such reasonable care and diligence as the defendant was required to exercise, and that there was in fact no evidence tending to establish culpable negligence. We think, however, that the testimony contained in the bill of exceptions does not sustain this contention, and that there was evidence tending to show, and from which a jury might well conclude, as it did conclude, that by the exercise of that amount of prudence which the mining company was bound to exercise the caving in of the stope and the consequent injury might have been avoided. At all events, the case was not one in which a court could declare, as a matter of law, that the mining company was free from all blame, but was rather a case in which the jury was entitled to determine that issue. There was testimony which tended to show that for some

time prior to the accident the timbers in Little 2 Stope showed evidence that they were bearing an excessive weight and might give way; that when Little 2 Stope was combined with another stope known as "No. 2 Annex" the result had been to leave an extensive overhanging wall, which pitched at an angle of about 45 deg., that was only supported by square sets, as they are termed, and by a pillar of decomposed sulphide ore; that such supports were insufficient to support the hanging wall; and that about a week before the accident the pressure on this pillar of decomposed sulphide ore was so great that it had bulged and pushed out of place a number of posts standing at its base. There was also evidence that the hanging wall in other stopes of the same mine had previously caved in, which fact, as it would seem, ought to have warned the defendant company that considerable care and watchfulness was necessary to prevent other stopes, particularly No. 2, from caving in. Without going more into detail as respects the nature of the evidence, it will suffice to say that after reading it attentively we are satisfied that it was ample to sustain the charge of negligence, and that the decision of this question was properly left to the jury.

It is next urged that the trial court erred in not giving two instructions which were asked to the effect that the defendant was not bound to keep the stope where the plaintiff was working continually safe, and in instructing the jury, as it did, that it was the defendant's duty "to use ordinary care to furnish the plaintiff a reasonably safe place in which to do his work so as not to unreasonably expose him to unnecessary danger in the discharge of his duties." In support of this contention counsel for the plaintiff in error invoke the doctrine, which has been announced by this and by other courts, that the rule of law requiring a master to exercise ordinary care in providing his servants with a reasonably safe place in which to work, does not compel the master to keep the place where the servant works at all times safe when the work being done is of such a character as necessarily renders the place temporarily or from time to time insecure. *Gulf, Colorado & Santa Fé Ry. Co. v. Jackson*, 12 C. C. A. 507, 65 Fed. 48; *Finalyson v. Utica Mining & Milling Co.*, 14 C. C. A. 492, 67 Fed. 507; *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 433, 28 L. Ed. 440. We think, however, that the rule of law thus invoked has no application to the case in hand. Little 2 Stope, which caved in and caused the injury, was in a certain sense a completed chamber, under ground, through which men were expected to pass, and in which they were required to work. Moreover, the plaintiff's injuries were not occasioned by any work which he was doing which made the place insecure. As the stope was a completed chamber in which employes of the mining company were expected to work, it was the company's duty to exercise ordinary care in timbering it so that it would not collapse and that they might work therein with ordinary safety. The complaint made in the present instance is that this duty was not faithfully performed, and that if the proper supports for the hanging wall had been set it would not have caved in as it did. It may be conceded that if the plaintiff below had been injured while drilling and blasting, by the fall of a rock in an unfinished part of the

stope where he was at work, the principle of law invoked would be applicable; but as he was not injured in this manner, but was injured by a general collapse of the entire stope, which might have been guarded against by sufficient timbering, the court was justified in giving the instruction which it did give of its own motion and in refusing those that were asked.

Error is assigned because the trial court did not specially charge the jury, as it was requested to do, that the happening of the accident was not any evidence of negligence on the part of the defendant; also because it did not charge the jury that if the caving in of the stope was sudden and unusual, and could not have been foreseen in the exercise of ordinary care, then the plaintiff could not recover.

With reference to these contentions it is to be observed that the court did instruct the jury, in substance, that the particular negligence of which the plaintiff complained was the failure of the defendant company to place proper supports or timbers in what is known as Little 2 Stope; that it was for the jury to determine whether, in point of fact, the supports in that stope were sufficient or otherwise; that the case as made by plaintiff related only to stope No. 2; that the plaintiff could not complain or recover because of the defendant's negligence in failing to properly secure some other stope; and that the jury should only consider the condition of the other stopes in the mine from their relation to No. 2 stope, and determine, from its position in the mine, what, in the exercise of ordinary care, the defendant company ought to have done to render it reasonably secure. It further instructed the jury that the mining company was not an insurer of the plaintiff's safety, but was merely bound to exercise ordinary care, and that that meant such care as a prudent man would exercise under the same circumstances. The verdict of the jury, under such instructions, plainly negatives the hypothesis of fact in one of the refused instructions, that the caving in of the stope was wholly fortuitous and due to causes that could not have been foreseen, since the jury evidently found that the cause of the collapse was one that might have been discovered by the exercise of ordinary care and guarded against. The refusal of this request, based, as it was, upon an hypothesis of fact which the jury manifestly discarded, cannot be regarded as a material error.

Concerning the other refused instruction this may be said: It is doubtless proper, in some cases, to advise a jury that the mere happening of an accident is no evidence of negligence. An instruction of that kind is in the nature of a commentary upon the evidence. But we doubt the propriety of giving an instruction of that character in such a case as the one in hand, and are of the opinion that the refusal of such an instruction in a case of this kind ought not to be regarded as a material error. Excavations underneath the ground, such as stopes and levels in mines, can be made safe by the exercise of proper care in timbering them, and they are made safe so that men work therein without much danger. They do not fall when the walls thereof are properly supported by timbers or other supports. When, therefore, an excavation, which has been completed and timbered, collapses without any seismic disturbance or an explosion of any sort, men will naturally infer that the collapse was

caused by insufficient supports, there being no other assignable cause. Under such circumstances, if a jury is instructed that the collapse of a stope or level is no evidence of negligence on the part of any one, such an instruction might be understood as meaning that the collapse is no evidence whatever that the supports or timbering were in any respect defective or insufficient. Instead of giving an instruction of that kind, which may mislead, we think it is preferable to leave the jury at liberty to find, in view of all the evidence, whether the defendant failed to take any reasonable precaution which it ought to have taken to prevent the collapse—in other words, whether, in view of all the testimony, the defendant should be esteemed guilty of culpable negligence. Very plain and specific directions on this subject were given by the learned trial judge in the case in hand, and we think that the instructions given were sufficient.

It is finally assigned as error that the trial judge instructed the jury, in substance, that if the plaintiff called the attention of the shift boss to the fact that some of the posts were taking weight, and the shift boss promised to remedy the defect, and the plaintiff continued to work because of this promise, then he could not be said to have assumed the risk resulting from the particular defect which he had pointed out. It is urged that this instruction ought not to have been given, because there was no evidence that the plaintiff did continue to work because the shift boss promised to remedy certain defects in the timbering that were called to his attention. This contention on the part of the plaintiff in error is not supported by the testimony. There was testimony tending to show that the shift boss not only promised to erect additional supports when his attention was called to the fact that certain posts in one part of the stope were taking weight, but that he also assured the plaintiff that it was perfectly safe for him to remain where he was. It is a fair inference, from the testimony on this point, that these assurances had weight with the plaintiff, and induced him to continue at work until the collapse occurred. We think, therefore, that this exception to the charge is without merit.

After an attentive consideration of the record, we conclude that the case was fully and fairly tried below, and that no error was committed which would justify this court in disturbing the judgment. It is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). In my opinion the judgment in this case ought to be reversed because the only cause of action pleaded was that the plaintiff was ignorant of the defects, danger, and risk from which he suffered, and the court charged the jury that he might recover upon proof that he was fully aware of them, and that the shift boss had promised to remove them, although he had pleaded no such cause of action. The error of the court in the trial below lies deeper than the admission of evidence, because complete proof of knowledge by the plaintiff of the defects in the timbering of the mine, of the risks and dangers therefrom, of a promise of the master to remedy them, and of reliance upon that promise by the plaintiff, not

only failed to constitute any cause of action set forth in this case, any ground of recovery, or any exception from the general rule that the servant assumes the risks he knows that was alleged; but, on the contrary, it conclusively negated the existence of the only cause of action which the plaintiff pleaded in his complaint, to wit, that he was ignorant of the defects and dangers which resulted in his injury.

The general rule of law is that a servant assumes the ordinary risks and dangers of his employment which are known to him or which would have been known by the use of reasonable care to a person of ordinary ability in his situation. The plaintiff was drilling in the roof of the stope which collapsed. Under this general rule the legal presumption was that he had assumed the risk of the accident which befell him, and that the master was not liable to him on account of it. To this general rule there are two exceptions which are utterly inconsistent with each other. They can no more exist and apply to the same case at the same time than two solid bodies can occupy the same space at the same time. The existence and application of one of them to a given case is a demonstration that the other does not and cannot apply to it. One of these exceptions is that a servant does not assume the risks of his employment which he does not know, and which a person of ordinary ability would not have known by the exercise of reasonable care, and for injuries resulting from such risks which were caused by the negligence of his master he may recover. The other exception is that for a limited time after the promise an employé does not assume the risks and dangers of his service which he knows, which the master has promised to immediately remove, and the risk of which he takes in reliance upon that promise, provided always that the danger is not so imminent that a person of ordinary capacity in the exercise of ordinary care would not rely upon the promise and continue the work. Ignorance of the risks and dangers is a *sine qua non* of the former, and knowledge of them of the latter, exception. Counsel for the plaintiff knew these things when they drew their complaint and tendered their issue to this defendant. They took their choice of the two exceptions, and alleged that the plaintiff was ignorant of the defects, risks, and dangers from which he suffered, that the defendant was aware of them, and that its negligence caused the plaintiff's injury. They did not allege that the plaintiff was aware of them, that the defendant promised to remove them, or that the plaintiff relied upon any such promise. The defendant interposed a denial to the plaintiff's averments. What, then, was the issue for trial? It was whether or not the plaintiff had escaped from the general rule that he assumed the risks of his employment by virtue of the fact, which he alleged, that the risks and dangers were extraordinary and that he was ignorant of them. Now, concede that evidence crept into the case without objection to the effect that the plaintiff knew of all the defects and risks of the employment, and that the shift boss had promised to remove them before the accident. Such evidence established no cause of action in this case, because the plaintiff had pleaded no such cause of action. A recovery must be had *secundum allegata et probata*, and proofs without allegations are as futile as allegations without proofs. The only effect of evidence of

this character was to demonstrate the fact that the cause of action which the plaintiff had pleaded did not exist, that he was not, as he had alleged, ignorant of the defects, risks, and dangers from which he suffered, but that he was fully aware of, and consequently assumed, them. Nevertheless, the court, over the objection and exception of the defendant, charged the jury that if the plaintiff knew the defects, risks, and dangers, if the shift boss had promised to remove them and if he relied upon that promise, he could recover in this action. This charge is, in my opinion, radically erroneous, because no such cause of action as that founded upon this supposition was pleaded in this case, and no such issue was tendered to the defendant for trial, because the maintenance of this theory by evidence demonstrated the fact that the cause of action which the plaintiff pleaded did not exist, and entitled the defendant to a verdict, and because there is no evidence in this record that the plaintiff ever relied on, or was in any way influenced by, the promise of the shift boss; but the testimony of the plaintiff is that he knew that the timbers were taking weight, that he knew all that any one knew, and that he did not think that the place was dangerous. *Malm v. Thelin*, 47 Neb. 686, 691, 66 N. W. 650; *Becker v. Baumgartner*, 5 Ind. App. 576, 32 N. E. 786; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *International & G. N. R. R. Co. v. Doyle*, 49 Tex. 190; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806; *Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Peerless Stone Co. v. Wray*, 143 Ind. 575, 42 N. E. 927; *Epperson v. Postal Telegraph Co.*, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113, 77 Am. Dec. 212. In *Malm v. Thelin*, 47 Neb. 686, 66 N. W. 650, the Supreme Court of Nebraska said at page 691, 47 Neb., page 651, 66 N. W.:

"The presumption is that a servant employing machinery obviously defective has assumed the risk occasioned by the use of such machinery, and in order to recover he must rebut that presumption, and in order to rebut it he must not only prove, but he must plead, the facts which create an exception to the rule—as, for instance, that on complaint to the master a promise was made to remove the defect and the machinery was used relying upon that promise. In *Missouri P. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044, a judgment was reversed because the petition did not plead such exceptions; and in *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556, 65 N. W. 186, an amendment had been required in a similar case before the plaintiff was permitted to introduce evidence of such exceptions."

In *Becker v. Baumgartner*, 5 Ind. App. 576, 32 N. E. 786, the complaint was predicated upon ignorance of the danger on the part of the plaintiff, and the proof was of knowledge, a promise, and reliance thereon. The court said:

"A recovery can only be upheld *secundum allegata et probata*. The complaint is predicated, though imperfectly, upon the theory that appellee was ignorant of the danger, and this will not be supported by proof that he did know all about it, but remained in the service upon appellant's promise to provide a remedy. Such facts would constitute a special contract, creating an exception to the general rule, and can only be proved when specially pleaded."

This judgment should be reversed because it rests upon a cause of action that was never pleaded, and upon the determination of an issue that was never tendered to the defendant. Even after verdict a judgment upon a cause of action which was not pleaded in the complaint should be reversed. But in the case at bar ample objections and exceptions were taken when the court gave its charge to the jury.

2. Again, it was error for the court to refuse to charge, as it did, that the mere happening of the accident raised no presumption that the defendant was guilty of negligence which caused the injury to the plaintiff. The rule is well settled that the breakage or fall of machinery, platforms, buildings, stopes, caves, and structures of every kind in the use of employes raises no presumption that the injury resulting to the latter was caused by the negligence of their employers; but the burden of proof is upon the servants to show, by evidence outside the break or fall, not only that it was caused by a fault or defect of construction, but also that the employer knew of the fault or defect, or that a person of reasonable care, skill, and prudence would have known of it, and would have anticipated the fatal result which followed. The rule *res ipsa loquitur* has no application to such a case, and that fact ought to have been stated to the jury. *Peirce v. Kile*, 80 Fed. 865, 26 C. C. A. 201; *Railroad Co. v. Stewart*, 13 Lea, 432, 438; *Dobbins v. Brown*, 119 N. Y. 188, 194, 23 N. E. 537; *Breen v. Cooperage Co.*, 50 Mo. App. 202, 213, 214; *Blanchette v. Mfg. Co.*, 143 Mass. 21, 22, 8 N. E. 430; *Jones v. Yeager*, 2 Dill. 64, Fed. Cas. No. 7,510; *Mining Co. v. Kitts*, 42 Mich. 34, 37, 39, 41, 3 N. W. 240; *Early v. Railway Co.*, 66 Mich. 349, 352, 33 N. W. 813; *Sorenson v. Pulp Co.*, 56 Wis. 338, 341, 344, 14 N. W. 446; *Huff v. Austin*, 46 Ohio St. 386, 387, 390, 21 N. E. 864, 15 Am. St. Rep. 613; *Epperson v. Cable Co. (Mo.)* 50 S. W. 795, 807; *Searles v. Railway Co.*, 101 N. Y. 661, 662, 5 N. E. 66; *Smith v. Bank*, 99 Mass. 605, 612, 97 Am. Dec. 59.

For these reasons it seems to me that the judgment below ought to be reversed, and a new trial granted.

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**DENVER & R. G. R. CO. et al. v. UNITED STATES.**  
(Circuit Court of Appeals, Eighth Circuit. July 7, 1903.)

No. 1,874.

**1. PRELIMINARY INJUNCTION—PURPOSE.**

The purpose of a preliminary injunction is to protect and preserve the rights of all the litigants with the least injury to each until the controversies between them can be tried and finally decided.

**2. SAME—WHEN GRANTED—STATUS QUO.**

A preliminary injunction to maintain the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted.

**3. SAME—WHEN MODIFIED.**

A preliminary injunction may be modified when by such a modification the injury or inconvenience of one or more of the litigants may be de-

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¶ 2. See Injunction, vol. 27, Cent. Dig. §§ 86, 305, 306.



creased without thereby increasing the danger of loss or injury to their opponent.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

The opinion of the Circuit Court, delivered orally by Hallett, District Judge, was as follows:

In the pending suit of the government against the Denver & Rio Grande Railroad Company et al., I have reached the conclusion that the injunction ought to be allowed. I do not doubt that the respondent has in some measure and degree exceeded the authority conferred upon it by the acts of Congress under which it has acted. I shall not at this time undertake to set down the particulars upon which that judgment rests, leaving those matters for consideration at the final hearing of the cause. I do not doubt, also, that there may be a remedy in equity for such matters as are charged in the bill of complaint. The doctrine as to the remedy in equity for cutting timber trees, despoiling lands of their timber, which prevailed in the early days of New York and New Jersey and other Eastern states, has, in my judgment, no application to an arid country, such as this is. I think, furthermore, that it has no application whatever to government lands, and to a proceeding on the part of the government to preserve any part of its lands for the use of citizens in the way in which they are ordinarily granted. I need not go upon that subject any further.

But there is another ground of jurisdiction which seems to me to be entirely satisfactory, if there were no other. These depredations upon the government land are ordinarily committed by what are known as "sawmill men," and they are of a fugacious and predaceous disposition, which renders the action of trespass at law entirely useless in any effort to collect the value of the timber. This consideration controls very largely as to what shall be done with the timber which is now upon the ground, which has been put into logs or into lumber, and is held by several of the defendants who are sawmill companies or corporations. I think that it is not reasonable or prudent to deliver this lumber, in the amount and value as stated, over to these parties, to be disposed of as they shall think fit. At the same time, I am not quite able to assent to the proposition made by counsel for the government, that the lumber may well enough stand until the determination of the suit. These suits must last a long time. They must go through this court and through courts of review, and this takes considerable time. There is great danger of fire and other destruction meanwhile. So that I think some steps ought to be taken towards disposing of this property. Counsel has disclaimed the idea of a receiver, and wisely so, I think, because I do not believe that the case stands for a receiver—at least not as yet. I think that we may wisely enough take steps towards getting an inventory of the property where it is now, and when that shall be completed we may give these companies who have possession of it an opportunity to dispose of it in some way, and under some rules to be prescribed at that time, if they shall desire to do so. This inventory may be taken by an officer of the court, by and with the aid and assistance of these parties, or otherwise, as they may prefer. If they do not care to participate in the inventory, we can go on without their assistance; but if they wish to make such an application to the court hereafter, as they will be allowed to make, to take steps towards selling the property or disposing of it otherwise under the act of Congress, perhaps we may be inclined to allow the Rio Grande Company to take such parts of it as have been manufactured for its use. But however that may be, those matters stand over for consideration. At present I am inclined only to appoint an officer to proceed with this inventory, and to report to the court hereafter when he shall be able to complete it. For that purpose Mr. Marshall Johnson will be appointed, who, I am advised, is proficient in figures, and knows how to do such work. Otherwise the injunction may stand until the further order of the court in the terms in which it has been

heretofore allowed. The government cannot in any case give bond, and cannot be required to do so here.

Joel F. Vaile and E. F. Richardson (Edward O. Wolcott and Charles W. Waterman, on the brief), for appellants.

Marsden C. Burch and John H. Knaebel, for appellee.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from an order granting a preliminary injunction restraining the Denver & Rio Grande Railroad Company and the other defendants, who are its agents, from cutting and removing timber from certain lands of the United States under the act of June 8, 1872 (17 Stat. 339, c. 354), which granted to the predecessor of this railroad company the right to take from the public lands adjacent to its right of way stone, timber, earth, water, and other material required for the construction and repair of its line of railway and telegraph line, and under the act of March 3, 1875, 18 Stat. 482, c. 152, § 1 [U. S. Comp. St. 1901, p. 1568], which granted a similar right to this and other railway companies to take timber required for the construction of their railroads.

The Denver & Rio Grande Railway Company, the predecessor of this defendant, by its articles of incorporation secured the franchise to construct and operate eight lines of railway, which were numbered and specified in the articles. The first and sixth of these lines were the Denver & Rio Grande Railway and the San Juan Railway. The San Juan Railway connects with the Denver & Rio Grande Railway, and these and other railways named in the articles now form the railway system of the appellant the Denver & Rio Grande Railroad Company. The agents of this company who are named with it as defendants are logging railroad companies, which constructed and are operating railroads extending from the San Juan Railway to places distant from 10 to 30 miles from it, sawmill companies, and officers of these various corporations, who were all together engaged in cutting timber from the land of the government distant from 10 to 20 miles from the San Juan Railway, under orders of the railroad company, and in manufacturing this timber into the ties and bridge timbers required by the railroad company for the construction and repair of its railroads. In the manufacture of the logs thus taken from the government land into ties and timber, the mill companies were appropriating to their own use, manufacturing into shingles, laths, boards, and other lumber, the side cuts taken from the logs in making the ties and bridge timbers, and those logs which after they arrived at the mills proved, on account of rot or other defects, inapplicable to the uses of the railroad company. The railroad company was using the ties and timber it obtained in this way upon parts of its system other than the San Juan Railway, and the government insisted that it had no right to take timber from lands adjacent to one of the lines specified in the original charter to construct or repair any other of those lines.

The railroad company had the admitted right to take timber from lands adjacent to its railroad to repair that portion of it which was

constructed on or before June 8, 1882 (19 Stat. 405, c. 126). But the portion of its railway thus constructed was a narrow-gauge railroad, and the company was taking the ties and timber from lands which it claimed were adjacent to make this narrow-gauge railroad a broad-gauge railway. The United States insisted that this was the taking of timber to construct a new railroad, and not to repair an old one.

The application for the injunction was heard upon the bill, answer, and opposing affidavits, and it presented these questions:

(1) Were the lands from which the defendants were taking the timber adjacent to the right of way of the Denver & Rio Grande Railroad Company?

(2) Had the railroad company the right to take timber from government lands adjacent to its right of way to make the narrow-gauge railroad which was built prior to June 8, 1882, over into a broad-gauge railroad, or to repair a broad-gauge railroad after such a change had been made?

(3) Had the railroad company the right to take timber from lands adjacent to one of the lines of railway numbered and specified in the original grant of its franchise to its predecessor, and use this timber to repair another of those lines?

(4) Had the railroad company or its agents the right to the surplus lumber arising from logs found inapplicable, on account of rot or other latent defects, to the uses of the railroad company, after they arrived at the mills, and from the side cuts of the logs that were used for railroad purposes?

(5) Conceding that the railroad company had the right to take timber from lands adjacent to its right of way for the purposes for which it was obtaining the timber in controversy, that the lands from which it was removing this timber were adjacent, and that the railroad company was entitled to the surplus lumber after extracting from the logs the timber it needed, was it abusing this right, wasting the timber, and recklessly or designedly creating an unnecessary excess for its own benefit or that of its agents, to the manifest injury of the government?

The first four of these questions are grave and difficult. They must in any event be considered and decided at the final hearing of the case, after the ex parte affidavits now before us have performed their function, and the truth has been extracted by the more satisfactory process of the examination and cross-examination of the witnesses for the respective parties. In this state of the case, it is neither requisite nor fitting that these questions should be determined upon this hearing, and no opinion upon them is either formed or expressed. The limit of the endeavor of this court upon this appeal will be to so protect the rights of all the parties to this suit that, whatever may be the ultimate decision of these issues, the injury to each may be reduced to the minimum. The record before us presents indisputable evidence that this was the controlling purpose of the court below. It granted an injunction against the abuse of the right of the railroad company, but it did not prohibit the exercise of that right. It prohibited the company from taking timber from lands more than

three miles distant laterally from its railroad, but it permitted it to take trees within that limit.

The granting or withholding of a preliminary injunction always rests in the sound judicial discretion of the court. The question presented on an appeal from an order granting such an injunction always is whether or not, under the established legal principles which should have guided the court below, it erred in the exercise of its discretion. While counsel for the railroad company insist that the surplus lumber arising from the defective logs and from side cuts was the property of the company, they concede that it was the duty of that corporation to use economically and advantageously the timber which it took, so that the excess would be as small as possible, and the loss to the government as slight as it could be made. While they insist that the timber was not taken from lands more than 12 miles distant from the right of way of the Denver and Rio Grande Railroad Company, and that these lands were adjacent to that right of way, they concede that no definite limit to lands adjacent to a railroad under these acts of Congress has ever been fixed, and that the most rational and generally accepted definition of "adjacent lands" under these acts is that originally given by the learned judge who granted this injunction—that they are lands upon which the timber is within reasonable hauling distance of the railroad by wagon. *U. S. v. Denver & R. G. Ry. Co.* (D. C.) 31 Fed. 886, 889; *Bachelder v. U. S.*, 83 Fed. 986, 987, 28 C. C. A. 246, 247; *U. S. v. St. Anthony R. Co.*, 114 Fed. 722, 725, 52 C. C. A. 354, 357.

A careful examination of the pleadings and affidavits in this record has failed to convince us that the Circuit Court erred in granting an injunction in this case, or that the appellants were not abusing the privilege granted to the railroad company by the acts of Congress. A review of the affidavits filed upon the hearing below would finally determine nothing, and would serve no useful purpose in this or any future litigation. It is enough to say that the evidence which the pleadings and affidavits present falls short of overcoming the legal presumption that the finding and conclusion of the court below were right. It discloses no such mistake of fact or error of law as would warrant a reversal of the action of that court. But on the other hand it is strongly persuasive that the appellants were either recklessly or designedly abusing the privilege of the railroad company, and making an unnecessary and valuable surplus of lumber for their own use, to the serious injury of the government. A striking illustration of the course which they pursued is disclosed by one of the specifications for ties which the railroad company directed its agents to manufacture and to furnish for its use. This specification required that they "must be full 7" thick and 8 in. face and 8 ft. long. They will not vary more than one inch from specified length. They must be cut from perfectly sound timber and sawed free from warts. At least 80 per cent. of the ties shall be of all heart yellow pine and show no sap on either end. The balance of the ties shall not show to exceed one-fifth the area of sap at either end." The taking of trees of the United States to make ties of this character, so that all the remainder of the trees taken should become merchantable

lumber of the railroad company or of its agents, goes far to show a settled purpose to create an unnecessarily large excess of merchantable lumber, which was not to be used by the railroad company for the purposes specified in the acts of Congress, and to negative the claim of the appellants that they were either carefully or economically exercising the privilege of the company. The case falls well within the established rule that a preliminary injunction maintaining the status quo may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted. *City of Newton v. Lewis*, 79 Fed. 715, 718, 25 C. C. A. 161, 163; *Great Western Ry. Co. v. Birmingham & O. J. Ry. Co.*, 2 Phil. Ch. 597, 602; *Glascott v. Lang*, 3 Mylne & C. 451, 455; *Shrewsbury & C. Ry. Co. v. Shrewsbury & B. Ry. Co.*, 1 Sim. (N. S.) 410, 426; *Georgia v. Brailsford*, 2 Dall. 402, 1 L. Ed. 433, 438; *Blount v. Societe Anonyme du Filtre*, 3 C. C. A. 455, 53 Fed. 98; *Hadden v. Dooley*, 20 C. C. A. 494, 74 Fed. 429; *Jensen v. Norton*, 12 C. C. A. 608, 64 Fed. 662. The order granting the injunction may not be reversed.

Counsel for the appellants insist, however, that this injunction may safely be modified in some respects, so as to relieve their clients of much inconvenience and loss, and at the same time so as to adequately protect the property and the rights of the United States. If this contention is well founded, the modification should be made. The office of a preliminary injunction is not to punish for violations of the law, but merely to protect and preserve the rights of the parties until the controversies between them can be finally heard and determined.

The railroad company is solvent—liable and able to pay for any timber which the court shall ultimately find that it has wrongfully taken. The order granting the injunction requires it to report once in two months the timber it takes, and the places whence it obtains it and in which it places it. This order prohibits the railroad company from cutting or removing any timber from the lands of the government more than three miles distant laterally from the line of the railroad of the Denver & Rio Grande Railroad Company in 13 counties in the state of Colorado. It is probable that there are some places in this vast area where reasonable hauling distance of timber by wagon is more than three miles, and that no serious injury will result to the government if the limit within which the railroad company may take the timber is extended to six miles.

The railroad company is forbidden by this order to make use of any sawmill or sawmilling process in the manufacture of the timber it is permitted to take. This prohibition should be removed. The injury to the government, if any, arises from the taking of the timber, not from the process by which it is subsequently prepared for use. The United States could derive no benefit from compelling the railroad company to adopt more tedious and expensive methods of manufacturing, while such a course would entail an unnecessary burden upon that corporation.

The order provides that, in case the court shall ultimately decide that any of the trees which the railroad company takes under it are obtained without the sanction of the acts of Congress, the company shall be charged with the manufactured value of the ties, or of the wooden materials made therefrom. The railroad company must ultimately be charged with the value of the property it wrongfully takes, but whether that value shall be the stumpage value or the manufactured value should be left for determination at the final hearing, after the evidence and the arguments have been presented to the court.

The order forbids the railroad company to cut, use, or apply any timber upon or from any of the lands for the purpose of repairing or reconstructing with standard-gauge ties any line of its railroad originally constructed upon the narrow-gauge plan. This inhibition may be safely removed. The question whether or not the railroad company has the right to take timber for such ties is a serious one, which must not be determined without grave consideration; nor before all the evidence and the arguments of counsel upon the final hearing are before the court. Meanwhile no serious injury will be inflicted upon the government if the railroad company is permitted to take and to report the timber and ties which it needs for this purpose, subject to the other restrictions which are contained in the order.

The order seems to forbid the railroad company from taking timber from lands adjacent to any one of the eight lines of railway numbered and specified in the original articles of incorporation for use in repairing any other of those eight lines. The question suggested by this statement is at least a debatable one, and this embargo may well be removed until the final hearing of the case. The act of Congress takes no note of the eight lines of railway, but grants the right to take the timber from lands adjacent to the right of way of the Denver & Rio Grande Railway Company, as though it had but one right of way and but one line, and it has been held that timber may be taken anywhere along the line of this railroad to construct any part of it. *Denver & Rio Grande R. Co. v. U. S. (C. C.)* 34 Fed. 838, 842; *U. S. v. Denver, etc., Railway*, 150 U. S. 1, 12, 14 Sup. Ct. 11, 37 L. Ed. 975.

The order and injunction appear to prohibit the railroad company and its agents from transporting the timber from the places of taking to the railroad by rail. The United States can derive no benefit from compelling the railroad company to transport logs or lumber by the use of teams, and the use of railroads for this purpose cannot inflict any injury upon the government. This embargo may therefore be raised.

It is accordingly ordered that the injunction and the order granting the injunction herein made by the Circuit Court on December 18, 1902, be, and the same are, so modified that the Denver & Rio Grande Railroad Company, until the further order of the Circuit Court, may within a distance of six miles laterally from any of its lines of railroad fell trees sufficient to furnish such ties or other wooden materials as may be lawfully appropriated and applied in

the repair of its lines of railroad, and out of such trees may cause such ties and other wooden materials to be properly manufactured or prepared either with or without the use of sawmills and sawmill processes; that within the same lateral distance of any line of its railroad not yet constructed it may, until the further order of the Circuit Court, fell trees upon the public lands sufficient in quantity to furnish such ties, or other wooden materials as may be lawfully appropriated and applied to the construction of such line, and may manufacture them by sawmill or other processes for the purpose of such construction; that it may transport such timber from the place of its taking by rail or otherwise; that for all timber, ties, and other wooden materials secured under this order to which it is not lawfully entitled the railroad company shall pay the value which shall be determined at the final hearing; that the railroad company may take timber under the terms of the original order, as hereby modified, to repair or reconstruct with standard-gauge ties any line of its railroad originally constructed upon the narrow-gauge plan prior to June 8, 1882; that all the restrictions and terms of the original injunction and order not expressly removed hereby remain in force; that the reports of the railroad company of the timber taken and the manufactured product shall include and separately state the surplus lumber not used for railroad purposes, the character, value, and disposition of the product manufactured therefrom; that the commissioner, Johnson, shall inspect the cutting, removal, and use of the timber taken under the order and injunction, as modified hereby, to the end that a careful compliance therewith may be secured, and shall report to the court from time to time; and that the railroad company shall seasonably notify the commissioner when and where it intends to cut and take timber in any considerable amount, so as to enable him to inspect it and report to the court before it is felled, if he should be so advised; and the injunction and order as thus modified are hereby affirmed, without costs.

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POLLOCK v. JONES.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1903.)

No. 480.

1. PARTNERSHIP—POWER OF PARTNER TO BIND FIRM—SEALED INSTRUMENTS.

Under the law of South Carolina, a partner cannot bind his firm by a sealed obligation or conveyance without the authority or ratification of his copartner.

2. BANKRUPTCY—PREFERENCE—MORTGAGE.

A mere promise by a debtor at the time the debt was contracted to give a mortgage to secure it, without specifying the nature of the mortgage or the property on which it was to be given, does not create a mortgage, and the giving of one on a subsequent renewal of the debt, at a time when the debtor is insolvent, and within four months prior to his bankruptcy, constitutes a transfer of property to secure an antecedent debt, and creates a preference.

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¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 263.

**8. SAME—VALIDITY OF MORTGAGE—INTENTION TO HINDER OR DELAY OTHER CREDITORS.**

A chattel mortgage given by a partner while the firm was insolvent, and within four months prior to its bankruptcy, to secure a single creditor, and covering all of the property of the firm, the fact not being disclosed at the time or afterward to his partner, must be held to have been given on his part with the intent to hinder, delay, or defraud his other creditors, and is void, under Bankr. Act July 1, 1898, § 67e, 30 Stat. 564, 565, c. 541 [U. S. Comp. St. 1901, p. 3449].

**4. ASSIGNMENT FOR BENEFIT OF CREDITORS—MORTGAGE COVERING ALL DEBTOR'S PROPERTY—VALIDITY.**

Under the law of South Carolina, such a mortgage also amounts to a general assignment, and is void under Civ. Code, § 2647, because preferential.

**Appeal from the District Court of the United States for the District of South Carolina, in Bankruptcy.**

This case comes up on appeal from the District Court of the United States for the district of South Carolina, sitting in bankruptcy. J. D. Jones and J. W. Duff were copartners in a general business of merchandising at Blacksburg, S. C., under the firm name of Jones & Duff. Jones, the senior partner, lived at Gaffney's, some distance from Blacksburg, and the active management of the business was in the hands of Duff, a resident of Blacksburg. Jones visited Blacksburg from time to time, and examined into the affairs of the firm, as shown to him by his partner. One of these visits was shortly before the 15th July, 1902. At this time the accounts of the firm, as exhibited and explained by Duff, showed an apparent surplus of from \$3,000 to \$3,500. Duff died suddenly on the 14th July, 1902. Upon his death it was at once discovered that the firm was utterly insolvent. Many claims unknown to and never disclosed to Jones appeared in existence, among them the claim of A. H. Pollock, the subject-matter of this appeal. Jones, the surviving partner, thereupon, on the 21st July, 1902, filed his petition in voluntary bankruptcy, making up the schedules as best he could. He was duly adjudicated a bankrupt on that day. The case was referred to G. W. Speer as referee, and J. R. Healen was subsequently made trustee. He possessed himself of all the stock in trade and assets of the firm, and under an order of the court has disposed of the stock, obtaining \$3,588. Other assets brought about \$200. The open accounts are of the face value of \$2,000 or \$3,000. At the time of the hearing of this case below the debts proved against the estate were over \$12,000 in the aggregate. Mr. Jones says in his testimony that his examination of the books of the firm showed that the great volume of this indebtedness was created between 1st February and 1st May, 1902. The record does not show that the books were produced in evidence. On the day of the death of Duff, A. H. Pollock placed upon record a chattel mortgage, dated 28th May, 1902, covering the entire stock, dry goods, groceries, notions, hats, shoes, furniture, fixtures, safe, and everything connected with the business of Jones & Duff; all the stock of goods then in the storehouse belonging to R. R. Brown, in Blacksburg, S. C., and all goods, both dry goods and groceries, that may have to be added to said stock and in said storehouse; one bay horse and one one-horse wagon; also all crop, buggies, wagons, and household goods; two shares stock in the Blacksburg Spinning & Knitting Mill; 100 cords wood, more or less, situated on lands of Mariah Young, in said county and state; also all open accounts at that date on the books of Jones & Duff; all notes, liens, and mortgages payable to Jones & Duff, a list of which was intended to be attached to the mortgage, which list is made part of the mortgage, the same appearing in ledger No. 5 of the said firm—the mortgagor, Duff, agreeing to pay Pollock all expenses that he may incur in the collection of the note and mortgage. Default in payment of any notes secured by the mortgage renders the whole sum due, with full power of sale in the mortgagee in case of default. This mortgage was given to secure a note in the aggregate sum of \$2,000, dated 28th May, 1902, in installments payable June 25, 1902, \$500; July 25, 1902, \$500; September 25, 1902, \$500;



October 25, 1902, \$500—which note to bear interest at 8 per cent. per annum after maturity, and 10 per cent. attorney's fee in addition thereto if collected by suit. The mortgage was signed in the firm name, with the seal attached, and the note secured by the mortgage is also a sealed note, the seal following the name of the firm. All the description of the property mortgaged was either written or typewritten, except the words: "Also all my crop, buggies, wagons, and household goods," etc. A statute of South Carolina passed in 1901 (Civ. Code S. C. § 3002) requires property mortgaged in a chattel mortgage to be described in writing or typewriting, but not printing on the face of the mortgage; otherwise the mortgage shall be invalid. On the 29th July, 1902, A. H. Pollock proved before the referee a debt of \$2,000, and 10 per cent. attorney's fees, consideration of which is stated to be cash loaned. There is no set-off or counterclaim to the same, the proof of debt stating that the only securities held for it was this mortgage, and declaring that the lien of the mortgage is neither waived nor released by proving the same, but the same is asserted. The history of this mortgage as detailed by Mr. Pollock is that he sold to the firm of Jones & Duff about the 1st February, 1902, cotton for the price of \$1,040; that he took no security, as he trusted the firm. On the 29th April thereafter Duff told him that he had the money to pay him, but that he wanted more money, and then proposed that Pollock would add \$960 to the debt, making in all \$2,000, and at the same time promised to give him the mortgage. The character of the mortgage was not specified. Pollock consented, and deposited \$960 to the credit of Jones & Duff in bank, and took four notes, bearing date 29th April, 1902, for the amounts and for the periods subsequently specified in the note of the 28th May. No mortgage was executed at the time, Pollock considering the firm perfectly good, but on the 28th of May, 1902, the mortgage was executed and delivered to Pollock, who did not put it upon record until the death of Duff. The statute law of South Carolina requires a mortgage to be recorded within 40 days from the date of execution, in which case it constitutes lien from the day of execution. If recorded after 40 days, it creates a lien only after the date of recording. As has been seen, the notes and mortgage were signed and sealed by Duff in the name of the firm; Jones, the other partner, never having authorized a transaction of this character, knowing nothing of the transaction, and never having been informed of the transaction either by Duff or Pollock, until the mortgage was recorded upon the death of Duff. The court below finds that there is no ground to believe Pollock knew that the firm was insolvent at the time the mortgage was executed, but the judge also finds that at that date, and at the date of the loan, on April 19th, the firm was insolvent. Pollock having presented his claim, it was resisted by the general creditors and the trustee acting in their behalf. The case was referred to the referee, who found that Duff had no authority to sign and seal the notes or to seal the mortgage. He also found that this transaction with Pollock was unlawful preference under the bankrupt act, and a claim for a lien invalid. When the case came before the court below the conclusion of the referee as to the invalidity of the claim was sustained. An appeal was allowed, and the case is here on assignment of error.

Hill Montague and N. W. Hardin, for appellant.

W. S. Hall, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and KELLER, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). There can be no doubt that under the law of South Carolina a sealed note given by one member of a firm creates no obligation against the firm, unless the partner so signing and sealing has authority from his copartner at the time to do the act, or unless when the act is brought to the knowledge of the other partner he acknowledges it or ratifies and confirms it. The evidence in this case shows that Jones never

knew of the execution of the note or of mortgage until after the death of Duff, and that he never acknowledged, assented to, or ratified it, although both Duff and Pollock had frequent opportunity of informing him of the transaction. This act of Duff, being unauthorized, did not bind the firm. *Sibley v. Young & Napier*, 26 S. C. 415, 2 S. E. 314; *Hull v. Young*, 30 S. C. 121, 8 S. E. 695, 3 L. R. A. 521. In the case first quoted the Supreme Court of South Carolina says: "Here the instrument sued upon is a single bill, which the law requires shall be executed under seal, and hence the proposition contended for by the appellants cannot be sustained." That was that the seal being unnecessary it did not affect the transaction. "It is very true that the plaintiffs might have taken a promissory note to secure the payment of the amount due them by defendants, which Napier would have had authority to give in the name of the firm, but they chose to take a different security, one of such a character as Napier had no authority to give, and when they come to enforce such security they cannot avail themselves of the protection which the law would have afforded them if they had seen fit to take a different security. Indeed, if the proposition contended for by appellants should be admitted, we do not see how the question whether a partner could be made liable on a sealed note, the execution of which he had not authorized or ratified, could ever arise, for it might always be said in such a case that the debt secured by the sealed note might have been evidenced by a promissory note, and therefore all the partners should be held liable. The question turns upon what has been done, and not upon what might have been done. The plaintiffs elected to secure their claim by an instrument of such a character as required a seal, and, under the well-settled law, when they bring their action on such a paper they cannot recover except upon the proof that it was executed by proper authority or has been subsequently ratified." In South Carolina a sealed note is synonymous with a single bill. In the same case it had been argued that placing the seal on the note was surplusage, and might be disregarded. This the court emphatically denied.

This consideration alone would sustain the conclusion reached below. But it is a case made under the bankrupt law, and the court below based its conclusion entirely upon the provisions of that law, and this point will now be discussed.

When the notes for \$2,000 were made, subsequently consolidated into one note, they covered a pre-existing indebtedness of \$1,040, and a cash loan of \$960, as of the 29th April, 1902. At that time no security was given for the \$2,000. Pollock says that a mortgage was promised. He is the only witness to this point. Apart from the fact that he is detailing occurrences between himself and a party then deceased, in a suit between himself and the assignee in bankruptcy of the party deceased, and so his evidence was incompetent under the statute law of South Carolina in such case made and provided (Code Civ. Proc. S. C. § 400), we are of the opinion that the bare promise to give security, not expressing in terms the character and subject-matter of the security, could not create either an equitable or a legal mortgage. So the loan of \$2,000 at the date of the mortgage of the 28th of May was for unsecured antecedent debt, both as to the \$1,040

and the \$960. So the validity of the transaction must be determined as of that date. The referee has found, and his finding is sustained by the court, that at that date Jones and Duff, the mortgagors, were insolvent. There is no obvious error in the application of the law to this fact, and no important mistake in the evidence. This conclusion, coincided in by the referee and the judge, must be accepted. *Fisher v. Shropshire*, 147 U. S. 146, 13 Sup. Ct. 201, 37 L. Ed. 109; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649.

It is true that it is said that no good reason existed for supposing that Mr. Pollock knew of this insolvency. It is to be remarked, however, that in getting security Pollock obtained and accepted a mortgage of the entire assets of the firm. It was said at bar that the words, "all my crop, buggies, wagons, and household goods," were printed in the mortgage, and that under the act of the Legislature above quoted no chattel mortgage can convey any valid interest in property unless such property mortgaged shall be described in writing or typewriting and not printing. This is true. But this property was included by the mortgagor, accepted by the mortgagee, with knowledge of and in spite of the act. It is no unfair inference to draw that both of them supposed that the circumstances surrounding them required the largest concession in the way of security. Beside this, Mr. Pollock must have known, and the record seems to show that he did know, that Jones & Duff had other creditors. Yet, by taking this mortgage, covering and controlling their entire stock of goods of every description in their possession, present and future, he practically made the firm at that instant insolvent to the extent, at least, of appropriating all the assets of the firm to the payment of one favored creditor, and if these be required to pay him in full, leaving nothing for other creditors. Be this as it may, is this mortgage given by an insolvent to one not knowing the insolvency void under the bankrupt law? It goes without saying that it was a preference, and that it was intended as a preference. Under section 6ca, a person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, and if the effect of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. "Transfer includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Act 1898, c. 1, subd. 25 (Act July 1, 1898, c. 541, 30 Stat. 544, § 1 [U. S. Comp. St. 1901, p. 3430]). A chattel mortgage transfers property and affords the most efficient mode of obtaining and reducing it into possession. Section 67e provides "that all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor."

In this case, without the knowledge or authority of his partner, carefully concealing the fact from his partner, and never, although having

full opportunity afterwards, disclosing it, Duff executed a mortgage of all the property of the firm, and of its future stock, to Pollock for this debt. He could devise no better mode of hindering, delaying, and defrauding his creditors, nor could he better disclose intent to prefer Pollock to their disadvantage. Counsel for appellant lay great stress upon the finding of the court below that there is no good reason to believe that Mr. Pollock was aware of the insolvency of the firm when he took the mortgage. He argues that Pollock thus comes within the provisions of section 60b, in which it would appear that the party obtaining a preference must have reasonable cause to believe that it was thereby intended. For this position he relies upon *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. This case simply decides that when a creditor, in the course of business, receives payments on account from his debtor, not knowing that they were intended as a preference, he cannot prove for the remainder of his claim without surrendering the payments he has received. If he does not prove his claim, he may retain that which he has received innocently. Preferences are abhorrent to the bankrupt law, and contrary to its entire spirit and purposes. Yet if a creditor, in the course of business, receives payments in money, not knowing that they, in fact, constituted a preference, he may retain them, provided that he seek nothing further from the bankrupt's estate. In other words, he retains his preference at the cost of the rest of his claim. If he seeks further aid from the bankrupt's estate, he must surrender his preference.

It would seem that there is a great difference in the attitude of a creditor who has actually received in possession, without knowledge of a preference, money or property of his debtor who is afterwards adjudicated a bankrupt, and that of a creditor who has received such a preference which only can be secured to him upon application to the court of bankruptcy, and who applies to that court to put him in possession. In the first case he may retain what he has received, losing all claim for any balance of his debt; in the latter case he can get no relief without surrendering his preference. In the *Pirie* Case it was found as a matter of fact that when the payments were made *Pirie* did not have reasonable cause to believe that the bankrupt, by said payments, intended thereby to give a preference. Nor did the bankrupt, by such payments, intend thereby to give a preference. In the case at bar, when Pollock received this chattel mortgage covering all the property of the mortgagee, and when Duff gave the mortgage practically clothing Pollock with a legal title to all the property of the firm, it is impossible to say that the one did not know that he got a preference and that the other was unaware that he gave a preference. The appellant also relies upon the case of *McIntyre v. McNair* (C. C. A.) 113 Fed. 113, as applicable to this case. The facts found in that case were that when the mortgage of Sanderlin, who afterwards became a bankrupt, was executed it was intended in good faith, neither Sanderlin nor his mortgagee having any knowledge that he was insolvent. Nor is there anything in the record showing that Sanderlin was then insolvent. Section 67d. Concluding the discussion of this branch of the case, the language of the Circuit Court of Appeals by

Sanborn, Circuit Judge, in *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 54 C. C. A. 389, is not without force:

"The two dominant purposes of the framers of that act were: (1) The protection and discharge of the bankrupt; and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors. All the earlier sections of the act are devoted to the security and relief of the bankrupt, and when the distribution of his property is reached the provisions relating to it are all drawn from the standpoint of the insolvent, and not from that of his creditors. The rights and privileges of the bankrupt, and the equal distribution of his property, dominate every provision, while the rights, wrongs, benefits, and injuries of his creditors are always incidental and secondary to these controlling purposes. Section 60a contains the legal and controlling definition of the preference specified in section 57g and the other parts of the bankrupt act. But this definition of a preference was not written from the station of the creditor, but from that of the debtor. It is not the act of the creditor, but the act of the debtor, which gives it—which produces it. The controlling thought is not the benefit or injury to the creditor, but the equal distribution of the property of the bankrupt among the holders of the provable claims against him."

There is yet another point of view from which we can test the validity of this claim. The bankrupt when insolvent gave to A. H. Pollock a mortgage of his entire stock in trade and other property to secure this debt of \$2,000. In South Carolina it is declared that assignments by an insolvent debtor, giving priority or preference, are null and void. Civ. Code S. C., § 2647. Construing this act, the Supreme Court of the state has held that an instrument, although in form of a mortgage, if it disposes of the whole of the grantor's estate for the purpose of securing a creditor, is in fact an assignment for creditors, to be construed and controlled as such. *Stewart v. Kerrison*, 3 S. C. 266. In *Wilks v. Walker*, 22 S. C. 180, 53 Am. Rep. 706, the debtor gave a chattel mortgage to his grantor covering nearly all of his property to secure his debt. It was held that this was an assignment for the benefit of creditors under the statute on that subject, and void under that statute. In *Austin v. Morris*, 23 S. C. 393, a merchant gave certain of his creditors a chattel mortgage of all his stock in trade to secure certain notes, with the usual power of sale. It was held that this was, in contemplation of law, an assignment for the benefit of creditors and void. In *Wilks v. Walker*, supra, the court says:

"The manifest object of the act is to prevent an insolvent debtor from transferring or assigning his property for the benefit of one or more of his creditors to the exclusion of all others, and whether this object is sought to be effected by a formal deed of assignment or in any other mode can make no difference. Any other view, it seems to us, would sacrifice substance to mere form, and enable insolvent debtors, by evasion, to effect a purpose declared by statute to be unlawful."

We are of the opinion that, both under the statute law of South Carolina and the provisions of the bankrupt law, A. H. Pollock cannot claim under this mortgage against the estate of the bankrupt.

The decree of the court below is affirmed.

GUARANTEE CO. OF NORTH AMERICA v. PHENIX INS. CO.  
OF BROOKLYN, N. Y.

(Circuit Court of Appeals, Eighth Circuit. July 27, 1903.)

No. 1,857.

1. APPEAL—PRACTICE—PARTY NOT AGGRIEVED.

One who secures by a judgment or decree all the relief he seeks cannot maintain a writ of error or an appeal to reverse or modify it or to review the proceedings on which it is founded.

2. CROSS-ERRORS NOT COGNIZABLE IN FEDERAL APPELLATE COURTS.

A defendant in error or appellee who does not sue out a writ of error or take an appeal cannot by assigning cross-errors confer jurisdiction upon a national appellate court to hear or determine any questions not otherwise presented. Cross-errors are not assignable in the federal courts.

3. SAME—AFTER REVERSAL BY APPELLATE COURT DEFEATED PARTY MAY REVIEW ISSUES NOT COGNIZABLE ON FIRST APPEAL.

After a reversal by an appellate court of a judgment or decree in his favor a defendant in error or appellee may maintain a writ of error or an appeal to review the questions of law arising at the trial in the court below, which were not, and could not have been, litigated upon the first writ or appeal, and to reverse, on account of the errors in the determination of those questions, the judgment or decree directed by the appellate court.

4. SAME—FACTS.

The Circuit Court rendered a judgment in favor of the defendant upon a general verdict and special findings of fact. The plaintiff brought a writ of error to reverse the judgment, on the ground that upon the verdict and findings the judgment should have been in its favor. The appellate court reversed the judgment, and on its mandate the Circuit Court rendered a judgment for the plaintiff. The defendant then sued out a writ of error to reverse this judgment on the ground that the rulings of the court upon the trial were erroneous. *Held*, the writ was maintainable, because the defendant could not have maintained a writ to challenge the former judgment in its favor, and it could not have assigned the rulings of which it complained as cross-errors under the first writ.

5. SAME—LAW OF THE CASE.

Legal propositions once considered and decided in a given case by the appellate court cannot be again questioned in that court on a subsequent writ or appeal in the same case, whether they are right or wrong. They are res judicata between the parties to that suit and their privies, and constitute the law of the case.

6. EVIDENCE—ADMISSIONS OF PRINCIPAL—CONCLUSIVENESS AS TO SURETY.

The admission of a servant, the principal in an employe's bond, with respect to matters pertaining to the performance of his guarantied duties, made while he is engaged in their discharge, is competent evidence against the surety on his bond.

7. SAME—GENERAL OBJECTIONS—SUFFICIENCY.

The general objections that offered testimony is incompetent and immaterial are sufficient where the ground of the objections is discernible. But they are futile to present a ground of objection that is not perceptible without a statement of it. In a case of the latter class they conceal rather than present the real objection, and hence form no basis for a reversal.

8. SAME—REVIEW OF PEREMPTORY INSTRUCTION.

A ruling granting or refusing a peremptory instruction to the jury at the close of the evidence cannot be reviewed in an appellate court

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¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 949.

in the absence of a bill of exceptions which contains all the evidence which conditioned the ruling.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

L. C. Cooper and Clency St. Clair (Warren Switzler, on the brief), for plaintiff in error.

H. C. Brome (A. H. Burnett, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is the second appearance of this case in this court. It is an action brought by the Phenix Insurance Company of Brooklyn, N. Y., against the Guarantee Company of North America, the surety on a bond of Fred S. Kelly, an employé and the cashier of the plaintiff, conditioned to reimburse the latter for all losses, not exceeding \$5,000, which it should sustain by reason of any fraudulent act committed by Kelly during the currency of the bond. The case was tried by a jury, which found a general verdict for the plaintiff, and also returned special findings, which consisted of answers to a large number of questions that had been submitted to them. The Circuit Court rendered a judgment in favor of the defendant upon the special findings notwithstanding the general verdict. Thereupon the plaintiff sued out a writ of error to this court, and assigned as error the action of the court in rendering judgment against it upon the verdict and the special findings. The defendant sued out no writ and assigned no cross-errors, but in its brief it called attention to certain rulings of the court upon the trial, which it insisted entitled it to a new trial if the judgment in its favor should not be sustained. After argument this court, without treating or mentioning in its opinion the rulings during the trial to which the defendant had called attention in its brief, reversed the judgment of the Circuit Court upon the ground that the special findings were not inconsistent with the general verdict, and directed the court below to render a judgment for the plaintiff. *Phenix Ins. Co. v. Guarantee Co. of North America*, 115 Fed. 964, 53 C. C. A. 360. After the Circuit Court entered a judgment for the plaintiff pursuant to this reversal, the defendant sued out the writ of error now before us, and assigned as error the rulings of the court during the trial before the verdict and the special findings were made.

This condition of the record suggests the query whether the questions raised by the rulings of the court during the trial were not rendered *res judicata* by the former judgment of this court upon the writ of error sued out by the plaintiff. That judgment, like the final decision of every court which has jurisdiction of the matters and parties it judges, rendered every question which was litigated and every question which might have been raised and determined in this court at the time of the hearing of the former writ of error *res judicata* between the parties to it. *James v. Germania Iron Co.*, 107 Fed. 597, 617, 46 C. C. A. 476, 496.

But the first judgment of the Circuit Court granted to the defendant all the relief it sought. It dismissed the action on its merits, and it is only those aggrieved by a judgment or decree that can maintain a writ of error or an appeal to reverse it or to review any of the proceedings upon which it is based. *Kinealy v. Macklin*, 67 Mo. 95, 99; *Crawshay v. Soutter and Knapp*, 6 Wall. 739, 741, 18 L. Ed. 845; *Hayden v. Stone*, 112 Mass. 346, 352; *Ringgold v. Barley*, 5 Md. 186, 59 Am. Dec. 107; *Holton v. Ruggles*, 1 Root, 318; *Raymond v. Barker*, 2 Root, 370.

The conclusion is therefore irresistible that the defendant could not have maintained a writ of error to reverse the first judgment of the Circuit Court because it was not aggrieved thereby. And the question for our consideration becomes: Can a defendant in error who cannot maintain a writ of error to reverse a judgment in his favor confer jurisdiction upon a federal appellate court to hear and determine issues of law raised during the trial in the court below, and which are not presented by the assignment of errors of the plaintiff in error by an assignment of cross-errors or otherwise?

In *The Maria Martin*, 12 Wall. 31, 40, 20 L. Ed. 251, the Supreme Court said:

"Appeals under the additional act 'to amend the judicial system' are subject to the same rules, regulations, and restrictions as are prescribed in case of writs of error. Both parties in a civil action may sue out a writ of error to a final judgment, but where one party exercises the right the other cannot assign error in the appellate court. \* \* \* Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

In obedience to the rule thus announced, that court held that a defendant in error who had not prosecuted a writ could not be heard upon cross-errors assigned in *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 614, 10 Sup. Ct. 223, 33 L. Ed. 473, and in *Bolles v. Outing Co.*, 175 U. S. 262, 268, 20 Sup. Ct. 94, 96, 44 L. Ed. 156, in which the opinion closed with these words:

"It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below. *Canter v. American, etc., Ins. Co.*, 3 Pet. 307, 318 [7 L. Ed. 688]; *Chittenden v. Brewster*, 2 Wall. 191 [17 L. Ed. 839]."

To the same effect is the decision of the Circuit Court of Appeals of the Fifth Circuit in *Pauly Jail Bldg. & Mfg. Co. v. Hemphill Co.*, 10 C. C. A. 595, 600, 62 Fed. 698, 703.

This rule has also been uniformly observed in cases of appeals in equity (*Building & Loan Ass'n v. Logan*, 14 C. C. A. 133, 134, 66 Fed. 827, 828; *Clark v. Killian*, 103 U. S. 766, 769, 26 L. Ed. 607; *U. S. v. Blackfeather*, 155 U. S. 180, 186, 15 Sup. Ct. 64, 39 L. Ed. 114); and in cases of appeals in admiralty (*The Stephen Morgan*, 94 U. S. 599, 24 L. Ed. 266). No decisions in the federal courts in which this rule has been disregarded or doubted have been called to our attention, and none have rewarded a diligent search. The rule has been in force so many years that it is not now a matter of reason, but a question of practice. It is to be determined not by an



independent consideration and decision of what the rule ought to be, but by a view of the precedents in the national courts which disclose the practice that has been and is prevailing in those courts. The decisions and opinions to which reference has been made disclose the fact that this uniform practice has been and is in accordance with the following rules:

One may not maintain a writ of error or an appeal from a judgment or decree which is so favorable to him that it secures him all the relief he seeks.

A defendant in error who does not sue out a writ of error, or an appellee who does not take an appeal, cannot confer jurisdiction upon an appellate court to consider or decide questions suggested by an assignment or an argument of cross-errors, nor can he be heard upon such questions.

As the defendant in this action did not maintain, and could not maintain, a writ of error to reverse the first judgment of the Circuit Court, the issues of law presented by the errors in the trial of the action below which it now assigns were not, and could not have been, litigated on the former hearing in this court, and hence they are not rendered *res judicata* by the judgment thereon.

In the examination of this question the fact that in many of the state courts the practice upon this subject is regulated by statutes, while in others it is established by decisions of the courts, and that it does not always conform to the rules and practice which prevail in the national courts, has not escaped attention. Thus, in Illinois, a defendant in error was not permitted to assign cross-errors originally. *Smith v. Sackett*, 15 Ill. 528, 536. But in 1869 a statute was enacted to the effect that the defendant in error "may assign cross-errors and the court shall dispose of the same as in other cases of assignment of error." Rev. St. 1874, p. 784, § 79. Notwithstanding this provision of the statute, the Supreme Court of Illinois held that a defendant in error was thereby merely granted the option of assigning cross-errors if he wished to take advantage of it, but that his failure to do so did not foreclose his right to an adjudication upon the errors of which he complained, and that if he was aggrieved by the judgment he could still prosecute his writ of error and secure a consideration and decision upon the merits of the questions he desired to present. *Page v. People*, 99 Ill. 418, 425.

In Kentucky the same rule prevailed originally, and this rule was modified by a subsequent statute which permitted the defendant in error to assign cross-errors. Under this statute the Court of Appeals of Kentucky held that a defendant in error had his option to assign cross-errors or to prosecute his writ. It also held that after the writ of error of the first plaintiff in error had been heard and determined the defendant in error might subsequently prosecute his writ of error and obtain a decision of the issues of law it presented. *Wickliffe v. Buckman*, 12 B. Mon. 424, 425. In *Smith v. Bogenschultz* (Ky.) 20 S. W. 390, 391, Smith obtained a favorable judgment. Bogenschultz appealed, and reversed it. Smith then appealed, and assigned as error rulings upon questions which were not presented by the former appeal of his opponent. The court held that

those questions were not *res judicata*, and proceeded to review them upon the merits.

A more extended examination of the general practice or of the variant rules upon this subject in the courts of the states would be neither instructive nor persuasive, and it is avoided because that practice and those rules are ineffective in the national courts where the practice is established by the decisions of those courts which have been cited, and the rules which govern it have been repeatedly affirmed and uniformly followed for half a century.

The result is that the questions presented by the defendant below by its writ of error in this case, which were not and could not have been litigated in this court under the former writ sued out by the plaintiff, were not rendered *res judicata* by the judgment upon that writ, and they are now open for our consideration. We proceed to their determination.

The writer of this opinion adheres to the views expressed in his dissent from the opinion and decision of the majority upon the questions presented by the former writ of error. *Phenix Ins. Co. v. Guarantee Co. of North America*, 115 Fed. 964, 968, 53 C. C. A. 360, 364. But the questions there decided by the majority of the court are not open for reconsideration under this second writ of error. Propositions of law which are considered and decided upon a first writ of error are *res judicata* upon the return of a subsequent writ in the same case, whether those propositions are right or wrong. They constitute the law of the case, and cannot be again questioned by the parties to the suit or their privies. *Tyler v. Magwire*, 17 Wall. 253, 21 L. Ed. 576; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; *Balch v. Haas*, 73 Fed. 974, 20 C. C. A. 151; *Thatcher v. Gottlieb*, 8 C. C. A. 334, 59 Fed. 872. Hence every question decided at the former hearing and every question which was rendered immaterial by that decision must be disregarded now. In the examination of the case as it now stands those questions have been eliminated. No statement or enumeration of them will be made. They will be left to be inferred from the opinion on the former hearing and the silence of this opinion regarding them. The only questions remaining for our consideration here are those which are treated below.

Kelly, the principal in the bond, was the cashier of the plaintiff, and the defendant was the surety upon his bond. Upon the last day of his employment, but before that employment had ceased, he admitted to the agent of the plaintiff that he was guilty of the embezzlement of the proceeds of four checks which belonged to the plaintiff, and which formed a part of the basis of the latter's cause of action. The agent to whom this admission was made was allowed to testify to it over the objection of the defendant that the evidence was incompetent, immaterial, and hearsay, and the court subsequently denied a motion to strike this testimony from the record. But the admission of a servant, the principal in an employé's bond, with respect to matters pertaining to the performance of his guaranteed duties, made while he is engaged in their discharge, is always competent evidence against the surety upon his bond. *U. S. v. Gaussen*, 19

Wall, 198, 213, 22 L. Ed. 41; Hall v. United States Fidelity & Guaranty Co., 77 Minn. 24, 79 N. W. 590; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 280, 71 N. W. 261, 64 Am. St. Rep. 475; Guarantee Co. of North America v. Mutual Building & Loan Ass'n, 57 Ill. App. 254; Pendleton v. Bank of Kentucky, 17 Ky. 171; McShane v. Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552; Union Sav. Ass'n v. Edwards, 47 Mo. 445.

It is assigned as error that the four checks were received in evidence. But the bill of exceptions contains no account of their reception, or of any objections to or rulings concerning them.

The bond upon which the action is founded was dated May 27, 1895, and it covered a period between 12 o'clock noon on that day and 12 o'clock noon on May 27, 1896. It was subsequently extended and continued in force on May 1, 1896, from May 27, 1896, to May 27, 1897, and on May 29, 1897, it was extended and continued in force from May 27, 1897, until May 27, 1898. It is specified as error that the court instructed the jury that the bond covered a period from May 27, 1895, to April 2, 1898, when Kelly was discharged. But no reason is presented, nor is any perceived, why this was not a correct statement of the time of the currency of the bond.

Another specification of error is that a witness was permitted to testify, over the objection that his testimony was incompetent and immaterial, to a statement which he had prepared from the books of account in evidence of the amounts which according to those books had been received and paid out in the office of which Kelly had charge between April 24, 1895, and April 2, 1898. The objection now urged is that this computation covered 33 days prior to the commencement of the term of the bond, and it is contended that the ruling is erroneous upon that ground. But the general objection that the testimony was incompetent and immaterial did not fairly apprise the court or the counsel of this reason for the rejection of the evidence. A general objection of this character is undoubtedly sufficient when the ground upon which it is founded is discernible. But when the reason for the rejection is not perceptible, it is the duty of the counsel who relies upon it to clearly call the attention of the court to the ground of the objection. Otherwise the general objection serves rather to conceal than to present the real reason for the rejection of the evidence. A general objection which has this effect must be disregarded in the appellate court. It cannot be permitted to form the basis for a reversal of a judgment when the reason for the objection was not called to the attention of court and counsel at the trial.

Complaint is made that the court erred because it refused to instruct the jury to return a verdict for the defendant. But this objection cannot be considered, because the evidence produced upon the trial has not been included in the bill of exceptions, and there is no criterion by which to try the ruling which is challenged. The granting or refusing of a peremptory instruction to a jury at the close of the evidence cannot be reviewed in the absence of a bill of exceptions which contains all the evidence which conditioned the ruling.

The errors of the court, if any, in its charge to the jury upon the subject of the waiver by the defendant of its defense that the plaintiff failed to comply with its agreement that Kelly should indorse upon the checks the words "For deposit," and its errors, if any, in the ruling which it made permitting the filing of an amended reply pleading this waiver, became immaterial and without prejudice to the cause of the defendant, when the former decision of this court in this case held that the plaintiff had fully performed its covenants. Every other question presented under this second writ has either been determined or rendered immaterial by that decision, and the judgment of the court below must accordingly be affirmed.

It is so ordered.

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FRIZZELL v. OMAHA ST. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 27, 1903.)

No. 1,879.

1. TRIAL—INSTRUCTIONS—RULES APPLICABLE TO FACTS OF CASE.

Instructions to the jury should be limited to the facts of the case on trial, and to the rules of law which apply to those facts, and which govern the real issues they present, and neither theories which there is no evidence to sustain, nor rules of law which are inapplicable to the evidence actually presented, should be embodied in the charge.

2. SAME—EXCEPTION TO CORRECT CHARGE—REQUESTS REQUISITE.

Where there is no error in the charge given, the omission to give other rules of law or to state other facts is not effectively challenged by a mere objection or exception to the instructions. An effective presentation of the question can be made only by a suitable request to the trial court to embody the rules or facts omitted in its instructions, and a failure to make such a request is a waiver of any error inherent in the omission.

3. SAME—CHARGE WHICH APPLIES LAW TO FACTS ESTABLISHED PREFERABLE TO ABSTRACT RULES OR SOUND THEORIES.

A charge which applies to the facts of the case in hand the rules of law which govern the issues, and clearly states to the jury the crucial questions which they must answer, is much more helpful to them, and conduces far more to a just administration of the law, than abstract propositions of law or dissertations on sound theories, concerning the application of which to the issues they are to decide the jury is left in doubt.

4. CARRIERS—NEGLIGENCE—EVIDENCE—COMPETENCY OF RULE.

On the trial of a charge of negligence in the operation of a street car, a rule of the company which directs the method of operation in respect of which complaint is made is competent evidence.

5. ERROR WITHOUT PREJUDICE—FACTS.

Error without prejudice is no ground for reversal. The court erroneously rejected two rules of the defendant company, which were offered by the plaintiff, to the effect that after a car is stopped it should not be started when any passenger is alighting or attempting to do so, and that it should be only sent forward on a signal from the conductor. *Held*, that this error did not prejudice, and could not have prejudiced, the cause of the plaintiff, in view of the fact that the court peremptorily instructed the jury, as a matter of law, that if the car was started after it had stopped, and while the plaintiff was alighting, she was entitled to their verdict.

(Syllabus by the Court.)

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¶ 4. See Carriers, vol. 9, Cent. Dig. § 1305.

In Error to the Circuit Court of the United States for the District of Nebraska.

C. J. Smyth (Ed. P. Smith, on the brief), for plaintiff in error.  
John L. Webster, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff, Agnes Frizzell, brought an action against the defendant, the Omaha Street Railway Company, for \$25,300 damages for negligence in the operation of one of its cars upon which she was a passenger, which she alleged inflicted serious injury upon her person. She averred in her petition that while she was riding upon this car it came to a complete stop; that she then arose from her seat and stepped upon the running board, which extended along the side of the car, and was in the act of alighting; that the conductor of the car saw her thus alighting, and that while she was doing so the defendant suddenly started the car, and brought her violently to the ground. The defendant answered that the car did not stop at the time the plaintiff arose from her seat to alight or at the time she alighted, and that it did not start suddenly forward during these times, but that it was moving slowly over the near cross-walk of a street crossing to enable the motorman to turn a switch over which it was about to pass, that the plaintiff stepped off the car when it was thus moving, and that a rule of the company required its employés to pass to the farther cross-walk of a street crossing before permitting the car to stop to allow passengers to enter it or to withdraw from it. The witnesses for the respective parties testified to the facts set forth in the pleadings of the parties who called them, and at the close of the testimony the evidence was uncontradicted (1) that the conductor had charge of the car; (2) that he saw the plaintiff as she arose from her seat and as she alighted; (3) that he knew she was doing so; (4) that the car was passing, or about to pass, over a switch which the motorman was required to turn at the near cross-walk of a street crossing when the plaintiff alighted; and (5) that a rule of the company required the employés to take their car to the farther cross-walk of a street crossing before stopping it to permit passengers to alight. The witnesses for the plaintiff generally testified that the car stopped, and that it was its sudden start from its stationary position that caused the accident. The witnesses for the defendant gave evidence that the car did not stop, that there was no sudden increase of speed, movement, or jolt of the car, but that the plaintiff stepped off while it was slowly moving upon or over the switch. There was no evidence that there was any sudden increase of speed, jolt, or movement of the car while it was moving. The only evidence of a violent movement was the testimony of the witnesses who said that it came to a stop, and that it suddenly started forward from this stationary position.

The court instructed the jury (a) that the burden of proof was upon the plaintiff to establish that the car stopped, and that it was suddenly started while the plaintiff was alighting; (b) that if it was

thus stopped, and, while she was getting off, the car started up, and the conductor or party in charge of the car knew that she was in the act of getting off when the car started, she was entitled to their verdict; but (c) that if, at the time she attempted to get off and while she was getting off, the car had not stopped, but was still moving forward, then their verdict must be for the defendant; and that "your first inquiry naturally when you retire to your jury room is, what was the fact as to whether the car was in motion at the time she attempted to get off and while she was attempting to alight from the car? If it was not in motion, had come to a stop, and the conductor knew that she was in the act of getting off, and the car started up again while she was in the act of getting off, and she was exercising due care in getting off, in the manner of getting off, and by the reason of the car thus starting she was thrown to the pavement and sustained injuries, I say she is entitled to recover."

These instructions are challenged by counsel for plaintiff upon various grounds. They insist that it was error for the court to tell the jury that the plaintiff was only entitled to recover if the car first stopped, and was then started forward while she was alighting. They cite many instances where persons injured by sudden changes in the speed of moving cars from which they were debarking have been permitted to recover, and they earnestly urge that the court below should have charged the jury that, even if the car was moving when the plaintiff alighted, she was entitled to recover if she was thrown to the ground and injured by a sudden and violent increase of speed, movement, or jolt of the car. It is conceded that cases may and do arise in which it is permissible to submit to the jury the question whether or not a railroad company is negligent in suddenly increasing the speed of a moving car while a passenger is in the act of alighting from it. But that rule of law had no relevancy to this case, and any attempt to have applied it to the facts which this record presents would have been palpable error, because the plaintiff made no such charge in her complaint, because no such issue was presented or tried, and because there was no substantial evidence to sustain such an averment at the trial.

Instructions to the jury should be limited to the facts of the case on trial, and to the rules of law which apply to those facts and govern the actual issues which they present, and neither theories which there is no evidence to sustain, nor principles of law which are inapplicable to the evidence actually presented, should be embodied in the charge of the court. There is no evidence in this record which would sustain a finding of a jury that the plaintiff was injured by the sudden increase of the speed, the sudden jolt or movement of a moving car while she was alighting from it, and the refusal of the court to permit the jury to find a verdict for the plaintiff on that theory was right, and was the only course that could have been sustained upon the evidence in hand.

The next criticism of the instructions is that in one place in the charge the court told the jury that if the car was suddenly started from a stationary position while the plaintiff was getting off, "and the conductor or party in charge of the car knew that she was in the act of getting off when the car started," she was entitled to a

verdict against the defendant as a matter of law. It is contended that this instruction submitted to the jury the question whether the conductor or some other party was in charge of the car when the evidence was uncontradicted that the conductor alone was in charge, and that the result of this submission was that the jury were permitted to defeat the plaintiff by finding that some other person was in charge of the car who did not know that the plaintiff was alighting at the time she received her injury. This objection is certainly ingenious and subtle, but it is neither cogent nor convincing. It is plain that the words, "or other party in charge of the car," fell from the lips of the judge through abundance of caution, and for the purpose of making it clear beyond question to the jury that if the party in charge of the car knew, whoever he was, that this plaintiff was alighting from the car when it was started, the defendant was liable for her injury. If the court had omitted to mention the conductor, and had simply informed the jury that if the party in charge of the car knew that the plaintiff was alighting she could recover, there would have been no color or pretense of reason for this complaint, because the jury must have found, in accordance with the uncontradicted evidence, that the conductor was the party in charge of the car, and that he knew that the plaintiff was alighting. In a later part of the instructions, the court repeated this portion of the charge with the words, "or other party in charge of the car," omitted. He there directed the jury to return a verdict for the plaintiff if the car was started when she was alighting, "and the conductor knew that she was in the act of getting off." In view of this part of the charge, and of the fact that the evidence was uncontradicted that the conductor alone was in charge of the car, it is clear beyond doubt that the earlier part of the instructions upon this subject at which this criticism is leveled did not result, and could not have resulted, in any prejudice to the cause of the plaintiff. The conclusion that the plaintiff's cause could have been injured by this portion of the charge can be reached only by presuming that the jury found in contradiction of the undisputed evidence in the case and in violation of their oaths that some other party than the conductor had charge of the car, and that they also disregarded the positive direction of the court upon the subject under consideration in the later portion of its charge, to which attention has been directed. Such a presumption is too violent and irrational for any appellate court to indulge, and this objection to the instructions cannot be sustained.

Finally, grave complaint is made of the fact that the court charged the jury that the plaintiff was entitled to a verdict if after the car was stopped, and while she was alighting, it was suddenly started, and if the conductor knew that she was alighting when the car started. The objection here urged is that the company was liable in the case stated by the court not only if the conductor knew that the plaintiff was alighting when the car was started, but also if by the exercise of reasonable care he could have known that fact. But this question is not here for our consideration. There was no error in the instructions which the court gave. It is beyond doubt that the company was liable to the plaintiff in the case which the court stated to the jury if

the conductor knew that she was getting off the car when it was started. Conceding that the defendant was also liable if by the exercise of reasonable diligence the conductor, or any other employé of the company, could have known that fact, counsel for the plaintiff did not request the court at the trial to give to the jury this latter rule, nor did he in any way call the attention of the court to it. Nor is the reason for their silence past finding out. They had alleged in their petition that the conductor saw the plaintiff alighting, they had proved that fact by their witnesses, and the witnesses of the defendant had admitted it. They were trying their case on the theory that the knowledge of the conductor was a potent fact in their favor, so that they had no cause to seek an instruction upon a state of facts of which there was no evidence, a state of facts under which the conductor did not know, but ought to have known, that the plaintiff was alighting from the car when it started. This was the reason why they asked no instruction upon the latter theory.

However that may be, the only basis for their complaint regarding the portion of the charge now under consideration is a bare exception to it which specifies no grounds or reasons for the challenge. There was no error in the charge as it was given. No request was preferred to the court to give the additional rule of law of the omission of which complaint is now made, and the failure to give it was not, therefore, reversible error. Where there is no error in the charge given, the omission to give other rules of law or to state other facts is not challenged by a mere objection or exception to the instruction. An effective presentation of the question suggested by the omission can be made only by a suitable request to the trial court to embody the rules or facts omitted in its instructions, and a failure to make such a request is a waiver of any error inherent in the omission. *Chicago G. W. Ry. Co. v. Healy*, 30 C. C. A. 11, 16, 86 Fed. 245, 250; *Pennock v. Dialogue*, 2 Pet. 1, 15, 7 L. Ed. 327; *Texas & Pac. Ry. v. Volk*, 151 U. S. 73, 78, 14 Sup. Ct. 239, 38 L. Ed. 78; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 575, 18 Sup. Ct. 445, 42 L. Ed. 853; *Humes v. U. S.*, 170 U. S. 210, 211, 18 Sup. Ct. 602, 42 L. Ed. 1011; *Shutte v. Thompson*, 82 U. S. 151, 164, 21 L. Ed. 123; *Express Co. v. Kountze Bros.*, 75 U. S. 342, 353, 19 L. Ed. 457; *Mutual Life Ins. Co. v. Snyder*, 93 U. S. 393, 394, 23 L. Ed. 887; *Carter v. Carusi*, 112 U. S. 478, 484, 5 Sup. Ct. 281, 28 L. Ed. 820. The truth is that there was no error and no omission in the charge of the court. The rule that the company was liable if the conductor ought to have known that the plaintiff was alighting was inapplicable to this case, because the uncontradicted evidence was that he did know, and the court properly limited its instruction to the jury upon this subject to the rule applicable to the case before it. The charge was an admirable one. It was brief, clear, and pointed. It presented to the jury the crucial question which they were to decide, and applied the rules of law which governed the case as it existed to the very issue before the jury, so that their duty was not only made clear, but its discharge was made easy. Such a charge is far more helpful to a jury and much more conducive to a just and speedy administration of the law than abstract propositions of law or dissertations on



theories which may be sound, but respecting the application of which to the issues of the case the jury are left in doubt. The judgment below cannot be reversed on account of the alleged errors in the charge.

There are two specifications leveled at rulings of the court upon the introduction and rejection of evidence. One is that the court admitted a rule of the company which required its servants to stop its cars on the farther cross-walk of street crossings, and the other is that it rejected two rules of the company offered by the plaintiff to the effect that when a car has stopped the conductor shall give the signal for it to start, and that no car shall be started when a passenger is attempting to board or to alight from it. The plaintiff charged the defendant and its servants with negligence in that they stopped a car on the near cross-walk on a street crossing, and then started it again, while the plaintiff was attempting to alight from it. The defendant denied this charge, and averred that it had made a rule that its employes should not stop any car at the near crossing, and that they had obeyed this rule. The adoption and enforcement of such a rule was certainly some evidence of reasonable care in the operation of all its cars across the streets of the city of Omaha, including the car upon which the plaintiff was riding. In view of this fact, the admission of the rule in evidence cannot be said to be error.

For a like reason the rules offered by the plaintiff should have been received. If the testimony of the plaintiff's witnesses was true that the conductor and motorman of the car upon which she was riding violated the rules which she offered in evidence when they started the car after it was stopped without signal and while she was alighting, the existence of the rules which were thus violated certainly had a natural tendency to prove that they were not exercising reasonable care.

This error was, however, robbed of all its potency by the subsequent charge of the court. At the close of the evidence the court instructed the jury that if this car stopped, and if the conductor knew that the plaintiff was alighting when the car started, the company was liable for all the plaintiff's injuries as a matter of law. The jury could not have given the rules of the company and the alleged acts of the employes in violation of them any greater effect than to have charged the defendant with liability for the plaintiff's injuries on account of them, and the court gave those acts, without the rules, that effect as a matter of law. The rejection of the rules, therefore, was not prejudicial, and could not have been prejudicial to the plaintiff's case, and error without prejudice is no ground for reversal.

There was no reversible error in the trial of this case, and the judgment below is affirmed.

## In re ROCHFORD et al.

(Circuit Court of Appeals, Eighth Circuit. July 14, 1903.)

## No. 33.

**1. BANKRUPTCY—JURISDICTION OF DISTRICT COURTS AND CIRCUIT COURTS—CONTROVERSIES OVER PROPERTY HELD BY ADVERSE CLAIMANTS.**

The District Court sitting in bankruptcy has no jurisdiction over a controversy between trustees in bankruptcy and an adverse claimant relating to the title or possession of property in the custody of the latter, in the absence of his consent, but such an issue is a controversy at law or in equity, as distinguished from a proceeding in bankruptcy, within the meaning of section 23 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431].

**2. SAME—DISTRICT COURT—JURISDICTION—CONTROVERSY OVER PROPERTY SEIZED.**

The District Court has jurisdiction of such a controversy in a case in which it finds it absolutely necessary for the preservation of the estate to take the possession of the property from the adverse claimant by means of its receiver or the marshal, under clause 3 of section 2 (Act July 1, 1898, c. 541, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3421]), and such a seizure and the determination of the issue thus raised between the trustee and the adverse claimant is a proceeding in bankruptcy as distinguished from a controversy at law or in equity, within the true interpretation of section 23 of the act (30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]).

**3. SAME—DISTRICT COURT—JURISDICTION—CONTROVERSIES AS TO PROPERTY IN ITS CUSTODY.**

The District Court sitting in bankruptcy has jurisdiction to determine, after a reasonable notice to the claimants to present their claims to it, the claims of all parties to property and to the proceeds of property which its officers have lawfully reduced to their possession in the course of the administration of the estate of the bankrupt, and controversies between trustees in bankruptcy and adverse claimants to property which has in that way reached the custody of the District Court are not controversies at law or in equity, as distinguished from proceedings in bankruptcy, within the proper construction of section 23 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431].

**4. SAME—JURISDICTION OF REFEREE.**

A referee in bankruptcy has jurisdiction to draw to himself by summary process or notice, and in the first instance to determine, the question of the validity of the claim of a third party to a lien upon, or an interest in, property or the proceeds of property lawfully in the custody of a trustee in bankruptcy.

**5. BANKRUPTCY—EQUITY JURISPRUDENCE.**

The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence.

(Syllabus by the Court.)

Petition for Review of Decision of the District Court of the United States for the District of South Dakota, in Bankruptcy.

Joe Kirby, for petitioners.

Park Davis, W. H. Lyon, J. H. Gates, and F. B. Dodge, for respondents.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is a petition for a review of a decision of the District Court of South Dakota sitting in bankruptcy which confirmed the order of a referee that disallowed the claim of a mortgagee to a lien upon property in the custody of the trustee in bankruptcy. It presents this single question: Has a referee in bankruptcy jurisdiction to draw to himself by summary process or notice and to determine the question of the validity of the claim of a third party to a lien upon or an interest in property or the proceeds of property lawfully in the possession of the trustee in bankruptcy?

The property which is the subject of this controversy was a stock of goods situated in the state of South Dakota. The petitioner G. E. Rochford, a citizen of Iowa, had a chattel mortgage upon it made by the Redburn Grocery Company, a corporation, on August 5, 1902. The Redburn Grocery Company had obtained the property about July 16, 1902, from Walter B. Redburn and George W. Redburn, copartners as W. B. Redburn & Son, who were subsequently adjudged to be bankrupts. On August 16, 1902, a creditors' petition for an adjudication of the bankruptcy of the copartnership and its members was filed in the court below. This petition contained averments that the sale of the property from the partnership to the corporation was made with intent to defraud the creditors of W. B. Redburn & Son, and that it constituted an act of bankruptcy. On September 3, 1902, the partnership and its members were adjudged bankrupts on this petition. Meanwhile, and on August 18, 1902, the court appointed H. G. Smith receiver of the property of the bankrupts, and ordered him to take possession of the stock of goods covered by the chattel mortgage. He obeyed the order. Then the sheriff of the county in which the goods were situated by direction of the petitioner Joe Kirby, who was the attorney for the petitioner Rochford, seized the property under the chattel mortgage. The District Court then issued an order to the petitioner Kirby and to the sheriff to show cause why they should not be directed to surrender possession of the property to the receiver. Rochford and Kirby, without any objection to the jurisdiction of the court below, submitted to it the question of their right to the possession of the mortgaged property, and the court decided and ordered that the possession belonged and should be surrendered to the receiver. This order was obeyed, and thenceforth the receiver and his successor, the trustee, held the custody of the property and its proceeds. On November 24, 1902, after notice to the creditors and parties in interest and without challenge of the jurisdiction of the court by any one, an order was made that the trustee, who had succeeded the receiver, should sell the mortgaged property free of all liens and charges, and on November 29, 1902, the trustee made a sale of the property under this order. On November 28, 1902, the referee made an order that the petitioner Rochford should assert and propound to him any right, title, claim, or interest which he had in the mortgaged goods, and that he and his attorney, Kirby, were enjoined from threatening any intending purchaser of the property with their adverse claim to them. This order was served upon Rochford and Kirby, and it came on for a hearing on December 20, 1902. Kirby appeared generally for himself and specially for Rochford, on

whose behalf he objected to the jurisdiction of the court, and Rochford presented no claim to any right to, lien upon, or interest in the mortgaged property or its proceeds. The referee disregarded the objections to his jurisdiction, and adjudged that the chattel mortgage to Rochford was void as against the creditors of the bankrupts, and that neither he nor Kirby had any title or interest in, or lien upon, the stock of goods or its proceeds. This judgment was considered and sustained by the District Court on a petition for review, and it is now presented to this court for reconsideration.

It will be noticed from this brief statement of the facts which condition the question at issue (1) that the receiver and the trustee obtained possession of the mortgaged property under an order of the District Court which was the result of a hearing in which the question of the right of possession was submitted to it for decision by the mortgagee, Rochford, and by all the other parties in interest, without objection to its jurisdiction; and (2) that the trustee sold the property free from all liens and claims under an order issued, after notice to all parties in interest, under like circumstances.

The subsequent order of December 24, 1902, that the chattel mortgage is void in the face of creditors, was first made by the referee, but it was confirmed by the District Court, and it is assailed here, not upon the ground that the referee was without jurisdiction while the court had the requisite power, but upon the theory that the court had no authority to hear and adjudge the question determined by it in a summary way upon an order to show cause or a notice, and that the only method by which the mortgage could be avoided and the proceeds of the property relieved of the claim of the mortgagee was by a suit in equity in some court which could obtain jurisdiction of the parties by the service of a regular subpoena or summons. Moreover, if the District Court had jurisdiction to require the mortgagee, by a notice or an order to show cause, to present his claim before it, or to be barred of any lien upon, or right to share in, the proceeds of the property in its possession, the referee had like power in this particular instance; for neither the bankruptcy act nor the general orders in bankruptcy require such a proceeding to be had before the judge or the court. General Orders in Bankruptcy, xii, 1. 89 Fed. vii, 32 C. C. A. xvi. The real question, therefore, is whether or not the District Court sitting in bankruptcy had jurisdiction to determine in this summary way the claim of the mortgagee to the proceeds of the property in its custody. The bankruptcy act of 1898 provides that the District Courts shall have jurisdiction to "(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts, after the filing of the petition and until it is dismissed or the trustee is qualified; \* \* \* (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided. \* \* \*" Act July 1, 1898, c. 541, § 2 (30 Stat. 545, 546; 3 U. S. Comp. St. 1901,

p. 3421). It also contains a provision that "(a) the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." Section 23, 30 Stat. 552, 553 (3 U. S. Comp. St. 1901, p. 3431).

It will be seen that under subdivisions 6 and 7 of section 2 the court had plenary authority to bring in additional parties when necessary for the complete determination of a matter in controversy, to reduce the estates of bankrupts to money, to distribute this money and to determine controversies in relation thereto, "except as herein otherwise provided." This exception refers to section 23 of the act, which defines the jurisdiction of the courts of the United States and of the states. The most striking characteristic of section 23 is that it separates "controversies at law and in equity between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees" from "proceedings in bankruptcy." It provides that such controversies in law and in equity, as distinguished from proceedings in bankruptcy, shall fall within the jurisdiction of the Circuit Courts of the United States to the same extent as though bankruptcy proceedings had not been instituted. But it leaves controversies in "proceedings in bankruptcy" within the jurisdiction of the District Court which conducts those proceedings. Now, the petitioner Rochford is a citizen of the state of Iowa, and if the controversy between him and this trustee in bankruptcy is a "controversy at law or in equity as distinguished from proceedings in bankruptcy," under section 23, the concession must be made that the jurisdiction to determine it was not in the District Court of South Dakota, but in the United States Circuit Court for one of the districts of Iowa, or in some state court which could by service of summons obtain jurisdiction of the mortgagee, Rochford. Where, then, is the line of demarcation between "controversies at law and in equity" and "proceedings in bankruptcy," within the meaning of section 23? It is perhaps impossible to correctly draw this line in the absence of further adjudications, and it may be the part of wisdom to leave it to be marked by the decisions in actual cases as they shall arise. Fortunately there are already two decisions of the Supreme Court which sufficiently illustrate the distinction between the two classes of cases to enable us to readily place the controversy before us in the class in which it belongs.

In *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, that court held that a controversy between a trustee of a bankrupt estate and parties in possession of personal property under a conveyance by the bankrupt, which the trustee alleged to be fraudu-

lent as to creditors, was a controversy in law or in equity, under section 23, and that the District Court had no jurisdiction to hear or determine it on the theory that it was a proceeding in bankruptcy.

On the other hand, in *Bryan v. Bernheimer*, 181 U. S. 188, 197, 21 Sup. Ct. 557, 45 L. Ed. 814, the Supreme Court held that a controversy between an assignee under a state law of a party who was subsequently adjudged a bankrupt, a purchaser from such an assignee, and the United States marshal who had taken possession of the property from the purchaser, pursuant to an order issued under clause 3 of section 2 of the bankruptcy act, was a proceeding in bankruptcy, and that the District Court had jurisdiction (1) to order the marshal to take the goods from the possession of the purchaser, and (2) to adjudge the latter's claim to them upon a summary order to him to propound it to that court within 10 days or to be decreed to have no right or interest in the goods. It is true that in that case the purchaser appeared in the District Court and presented his claim to the property without protesting against its jurisdiction, but it is equally true and not less significant that the Supreme Court plainly declared that the District Court had the power under clause 6 of section 2 to bring in the assignee if necessary for the complete determination of the matter in controversy (page 198, 181 U. S., 21 Sup. Ct. 557, 45 L. Ed. 814), and that the District Court sitting in bankruptcy had plenary authority to summarily take property from the possession of adverse claimants by means of its receiver or the marshal, in case it found it absolutely necessary for the preservation of the estates under clause 3 of section 2. Pages 196, 197, 181 U. S., 21 Sup. Ct. 557, 45 L. Ed. 814. From these two decisions the following conclusions are fairly deducible:

(1) The District Court sitting in bankruptcy has no jurisdiction over a controversy between trustees in bankruptcy and an adverse claimant over the title or possession of property in the custody of the latter in the absence of his consent. But such an issue is a controversy at law or in equity, as distinguished from a proceeding in bankruptcy, within the meaning of section 23 of the bankrupt act of 1898.

(2) The District Court sitting in bankruptcy has jurisdiction of such a controversy in cases in which it finds it absolutely necessary for the preservation of the estate to take possession of the property from the adverse claimant by means of its receiver or the marshal under clause 3 of section 2, and such a seizure and the subsequent determination of the issue thus raised between the trustee and the adverse claimant is a proceeding in bankruptcy as distinguished from a controversy at law or in equity, within the true construction of section 23.

(3) The District Court sitting in bankruptcy has jurisdiction to determine, after reasonable notice to the claimants to present their claims to it, the claims of all parties to property and to the proceeds of property which its officers have lawfully reduced to their actual possession in the course of the administration of the estate of the bankrupt, and controversies between trustees in bankruptcy and adverse claimants to property which has in this way reached the cus-

tody of the District Court are not controversies at law or in equity, as distinguished from proceedings in bankruptcy, within the proper interpretation of section 23.

The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence. *Bardes v. Hawarden Bank*, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Swarts v. Siegel*, 54 C. C. A. 399, 402, 117 Fed. 13, 16. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. *Chauncey v. Dyke Brothers*, 119 Fed. 1, 3, 55 C. C. A. 579.

In the case in hand the court below lawfully acquired the possession of the mortgaged goods, and it lawfully converted them into money. The rightful custody of the property and its proceeds imposed upon that court the duty to distribute the latter to their true owners. This possession and this duty necessarily empowered it to call the petitioners by a notice or order to show cause to present their claims to the property or its proceeds to the court which held them within a reasonable time, or to be barred of any right to receive the property or the proceeds or any part of either. The order which was issued by the referee gave reasonable notice to this effect to the mortgagee and to his attorney. That portion of that order which enjoined the petitioners from threatening the purchasers at the sale with their adverse claims to the property may have overstepped and probably did pass beyond the limits of the authority of the referee. But that fact is immaterial now. The only question here presented is whether or not the referee and the court had jurisdiction to determine the validity of the claim of the mortgagee to the property or its proceeds. The sale was valid. The court lawfully acquired and rightfully held the custody of the property. The conversion of it into money by the sale was a rightful proceeding in bankruptcy. The issue of the notice to the mortgagee to present his claim to the court and the adjudication of it were far within the jurisdiction of the referee and of the court below, and the petition to review their action cannot be sustained. It is dismissed.

## AMERICAN SUGAR REFINING CO. v. RICKINSON SONS &amp; CO.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 181.

## 1. SHIPPING—DAMAGE TO SUGAR CARGO—FAULT IN MANAGEMENT OF SHIP.

Sugar cargo stored in a hold was damaged during the voyage by seawater, which entered from a water ballast tank through a manhole. The ship's carpenter, who made the manhole joint some three weeks before the vessel was loaded, testified without contradiction that he made a good tight joint, and that it was tested several times before sailing by the filling of the tank, and did not leak. The top of the tank was some 17 feet below the water line, and it was shown that shortly after sailing the sea cock was opened for the purpose of filling the tank, and negligently left open for  $7\frac{1}{2}$  hours, although 2 hours was sufficient to fill the tank, by reason of which the tank was subjected to great pressure. As to whether or not such pressure was sufficient to cause the packing to blow out of the manhole joint if properly constructed there was a conflict of testimony. *Held*, that it was not incumbent on the owners to test such joint by a pressure greater than it would be subjected to under conditions of good navigation, and that the evidence was not sufficient to show that the ship was unseaworthy at the beginning of the voyage, but rather showed that the leakage was caused by leaving the sea valve open, which was a fault in the management of the ship, for the consequence of which the owners were exempted from liability by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel in personam.

For opinion below, see 120 Fed. 591.

Appeal from a decree of the District Court for the Southern District of New York, entered February 20, 1903, for \$3,713.55, in favor of the libellant for damages to cargo of sugar laden on the respondent's steamer Albion, in August, 1900. The libellant alleges that the damage was occasioned by the failure of the respondent to use due diligence to make the vessel seaworthy before sailing. The essential facts are fully stated in the opinion of the court below.

The testimony of respondent was taken at Newcastle-on-Tyne, the parties being represented by members of the English bar who seem to have been unfamiliar with the provisions of the Harter act. The consequence is that the record is vague and indeterminate. Much testimony which seemingly could have been adduced has been omitted, and other testimony has been returned which has little relevancy to the points in controversy.

The damage was occasioned by seawater admitted through the manhole door of ballast tank No. 4, which was directly under hold No. 3, where the sugar was stowed. The ship's carpenter, who made the manhole joint, which gave way and caused the damage, testified that he made a good, tight joint at Java three weeks before loading and sailing and within that time it was tested on several occasions by filling the tank. He says: "The condition of the manhole door before the cargo was loaded at Java was good and the joints were perfectly tight. I made it myself. \* \* \* It was after we reached Soerabaya that I made this manhole joint. Whilst we were lying there the ship was being painted and the after ballast tanks run in and pumped out and the fore tanks similarly vice versa for tipping the ship to paint. During the whole of that time there was no leakage from that manhole door. \* \* \* At the time when the cargo was loaded the vessel was a little by the head and had a list to port. I know that something was done to correct the trim by filling No. 3 and No. 4 tanks."



Tank No. 4 was filled with seawater after the voyage was begun. Through the negligence of the engineers the valve was left open from about 8 o'clock in the morning until about 3:30 in the afternoon. Two hours were sufficient to fill the tank. During several hours after the tank was filled the manhole joint was, therefore, subjected to the pressure of the sea. In speaking of this the carpenter says: "If the sea cocks were not closed when the tank was closed the result would be a great strain on the top of the tank, which would very likely cause the manhole packing to give out. By a great strain I mean hydraulic pressure from the sea bearing on the top of the tank."

In his opinion no other cause except this pressure can be assigned for the subsequent blowing out of the packing of the manhole joint.

The manhole door "is held in position by dogs on the top side of the tank and bolts through the dog and through the door and nuts on the upper end of the bolts, and where the flange or edge of the manhole door bears upon the tank top, it is packed by white lead and spun yarn." There is some testimony that this work belongs to the engineer's department, and should have been undertaken by one of the engineers, but it is by no means satisfactory, the custom differing on different ships. The making of the joint was not a matter of much difficulty and was entirely within the capacity of the carpenter or any mechanic of ordinary intelligence.

The chief engineer and third engineer of the Albion were also examined. They knew nothing regarding the joint made by the carpenter. They testified that after leaving Java the tank was run up and the sea cocks were open until 3:30 p. m.; that the manhole door must have had the full pressure of the sea for several hours, and that this pressure, "which must be enormous," would account for the leaking of even a good joint. The third engineer says: "I agree with the carpenter that it must have been a tremendous pressure of the sea outside that burst the packing. The joint must have given way by the great pressure." The chief engineer testifies that "the excessive pressure on the tank by leaving the sea cock open after the tank was full was bound to start the manhole. \* \* \* I admit that the fault here was the sea cock not being closed, thus causing excessive pressure on the manhole of the tank. \* \* \* I adopt the position that this water in the hold and damage to the cargo resulted from the want of attention of the officers of the ship." He also testifies: "At Java we ran up the tanks several times, but not knowing when the manhole door was made, it is difficult for me to say when it would burst. It is perfectly clear that it did not burst in Java but in leaving. It is perfectly clear that it did not burst when the ship took in cargo or we would have seen it."

The only oral evidence offered by libellant was the testimony of two experts who say, in substance, that if the manhole joint had been properly packed no amount of pressure by leaving the sea cock open could have blown out the joint. Conceding that it is improper to leave the pressure of the sea on the top of a tank for several hours after a ballast tank is filled, it is their opinion that this would produce no effect upon a manhole joint if it were perfect, and the fact that the packing blows out warrants the inference that the joint is unsound.

J. Parker Kirlin and James T. Kilbreth, for appellant.  
Charles C. Burlingham, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). In the case of *International Nav. Co. v. Farr & Bailey Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830, the Supreme Court, at page 226, 181 U. S., page 594, 21 Sup. Ct., 45 L. Ed. 830, say:

"Even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised."

The questions to be determined, therefore, are, first, was the ship seaworthy at the commencement of the voyage, and, second, if not seaworthy did her owners exercise due diligence to make her so?

It is unnecessary to discuss the negligence of the engineers in leaving the sea cock open, for the reason that this fault is undisputed in the testimony and is practically conceded by the libellant. In the brief it is stated:

"If it is admitted that it was a fault in management to allow the sea cock to remain open for five hours longer than usual, this error will not exonerate the shipowner, for he has failed to furnish a seaworthy ship."

That the careless filling of the tank was a fault in the management of the vessel is manifest. The *Glenochil* (1896) Prob. Div. 10, 8 Asp. N. S. 218. For such faults the owner, if he has exercised due diligence to make the vessel seaworthy, is not responsible, under the third section of the Harter act.

The witnesses for the respondent agree that the pressure produced by the open sea cock was sufficient to blow out the packing no matter how carefully made. The libellant's experts deny this, but admit that it would produce some additional pressure upon the top of the tank. One of them testified as follows:

"The pressure that could come from the sea would only be due to the ordinary floating of the ship, and that pressure is within the ordinary conditions for which a ship is constructed, and for which the tanks are constructed."

No tests were made and no data appears in the record from which the amount of pressure can be estimated. In such circumstances the court must proceed upon the proof as made by the parties. We are not permitted to enter the domain of science and attempt an application of the principles of hydrostatics to the facts in hand even if competent to do so. We may, however, consider some propositions which appear to be elementary.

The top of the tank was about 17 feet below the level of the sea, and it is evident that if the manhole door and the sea cock had both been left open the water in the water-tight hold would in time have risen to the level outside. With the manhole door closed the pressure produced by this tendency of water to rise to its own level was resisted by the top of the tank, the door being a part thereof. The degree of force thus exerted is not shown, but it must have been considerable and it was a force that the door was not intended to resist.

Assuming that the cock had been closed when the water had risen to a point an inch from the top of the tank, it is apparent that, when the ship was on an even keel, no strain whatever would have been brought upon the joint. The rolling and pitching of the ship would have produced pressure in all respects similar to that which the joint successfully withstood when the ship was being painted at Java.

The contention seems to be well founded that the pressure last described might cause an imperfect joint to leak so that the water would percolate through the packing, but that it would not cause the entire packing to "blow out" as was the case with the joint in question. Such a result, it is argued, could only result from a much greater pressure than is produced by the normal conditions of navigation.

One of the libelant's experts says:

"If the joint is effectively and properly made I do not think that any pressure coming on it would start the joint on a construction such as indicated by the description. The greater the pressure the tighter the joint will be."

It would seem that this opinion leaves out of view the fact that the pressure upon the joint was equal in all directions. The lateral pressure upon the packing was as great as the vertical pressure upon the steel door itself. But, in any view, we are unable to accept the accuracy of the statement; it seems clear that sufficient pressure might be and, in fact, was brought against the packing to cause it to burst.

We have, then, a confessed act of negligence on the part of the engineers, sufficient to account for the damage to libelant's cargo. All the witnesses who were present at the time, and are familiar with the facts, unite in saying that it was this fault which caused the leakage and that no ordinary joint could have withstood the pressure thus occasioned. The great weight of testimony is with the respondent upon this branch of the case, and the discussion might safely end at this point were it not for the libelant's contention that the joint was unseaworthy and that this condition contributed, in connection with the fault of management, to produce the damage.

Did the owners exercise due diligence to make the Albion seaworthy when she sailed? Was the joint properly packed? The carpenter who packed it appears to be an intelligent and competent person and he testified that it was tight, strong and perfect in every particular. No one else saw it and his testimony is wholly uncontradicted. After the joint was made it was tested by filling the tank and tipping the ship in various positions. The test showed no defect. This testimony is also uncontradicted.

The District Judge criticises this test for the reason that it does not satisfactorily show that the tank had been subjected to the amount of pressure which afterwards caused the leak. This seems to us hardly a fair criterion. The pressure which afterwards caused the leak was an abnormal and extraordinary pressure and one which the owners could not foresee and were not bound to guard against. If the manhole door were made in the usual way and withstood the ordinary tests it should be sufficient. The owners were not called upon to apply a strain to which, in a well-managed ship, it would never be subjected.

The accuracy of the tests at Java is also questioned by the libelant for various reasons, based upon assumptions not found in the record, but we are unable to accept these criticisms as well founded. It is true that all the details of the tests are not given, but if additional particulars were desired they could have been obtained on cross-examination. It is difficult to perceive what more the respondent could have done. No other test is suggested in the proofs. It is plain that no other test could be more effectual. If the tank withstood the pressure of ordinary filling nothing more was needed.

We do not feel justified in permitting the opinions of the experts to overthrow the direct and positive testimony that the joint was properly made and properly tested. If the tank had been filled in the usual

way there would be unquestioned force in the expert's theories, but when it appears that the treatment which the tank received might have destroyed a much better joint than the respondent was legally bound to furnish, the principal reason for accepting their opinions disappears. Having found a perfectly plain and adequate cause for the damage we are not required to resort to speculation and guesswork to find an additional cause. "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport." *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241.

We think the *Albion* was reasonably fit to carry the libellant's sugar, and that she would have carried it safely had not the gross carelessness of her officers permitted the influx of seawater.

The decree is reversed with costs and the cause is remanded to the District Court with instructions to dismiss the libel with costs.

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### THE VALLEY FORGE. THE EAGLE HILL. THE GILBERTON. THE KEYSTONE.

(Circuit Court of Appeals, Third Circuit. June 17, 1903.)

No. 18.

1. COLLISION—TUG WITH TOWS AND STEAMSHIP MEETING—CHANGE OF SIGNAL. Evidence considered, and *held* to sustain a finding of the trial court that a tug which was passing up the Delaware river in the evening, with three tows abreast, was solely in fault for a collision with a steamship passing down, on the ground that after an exchange of proper signals for passing to the starboard she suddenly changed her signal and course, and attempted to pass on the starboard side of the steamship, when the vessels were so near together that the latter could not avoid the collision, although she did all that was possible to that end by at once giving alarm signals and reversing.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

In Admiralty. For opinion below, see 107 Fed. 999.

John G. Lamb, for appellant.

John F. Lewis, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. These are cross-libels, in which liability for a collision between the steamer "*Carisbrook*" and the steam tug "*Valley Forge*" is charged by each libellant upon the other. From a careful examination of the testimony, the relevant facts appear to be as follows:

The steamer "*Carisbrook*," whereof James Hummel was master, hailed from the port of Glasgow, Scotland, and was of 1,350 tons register. Late in the afternoon of December 9, 1898, she started from the port of Philadelphia, and was bound down the Delaware river on a voyage to Amsterdam, carrying a cargo of general merchandise. Between half past 7 and 8 o'clock in the evening, while the

¶ 1. Signals of meeting vessels, see note to *Union S. S. Co. v. Erie & W. Transp. Co. et al.*, 30 C. C. A. 630.

steamer was on what is called the "Tinicum Island" range, which runs about east and west, and nearing its junction with the "Schooner Ledge" range, running about northeast and southwest, she observed the "Valley Forge" coming up the river somewhat below Chester, with a tow of three barges abreast, as indicated by her lights. When the "Carisbrook" arrived at the junction of the two ranges, and had turned down, or was about to turn down, on the Schooner Ledge range, the "Valley Forge" was opposite Market street, in the city of Chester, about three-quarters of a mile away, on the said range, or a little to the westward on a course parallel thereto. While the steamer and tug were in these relative positions, according to the weight of testimony, the "Carisbrook" blew one blast of her whistle, signifying that she would keep to starboard, according to the sailing rules, and pass the tug port to port. The "Valley Forge" promptly accepted, and answered with an assenting signal of one blast. The "Carisbrook" was then justified in assuming that the "Valley Forge" understood the situation as it was understood by the "Carisbrook," and properly made her preparations to pass to the right and to the westward of the tow. Within a very short time (the captain of the tug saying almost immediately, and those on the "Carisbrook" saying within a few minutes), the "Valley Forge" made a cross-signal of two blasts of her whistle, indicating that she would go to the westward of the "Carisbrook," and she accordingly put her wheel to starboard and sheered over towards the western shore of the river. The pilot and officers of the "Carisbrook" heard this signal, and observed immediately that the "Valley Forge" was showing her green light and shutting out her red.

It is at this point that the testimony is somewhat contradictory. The captain of the "Valley Forge" testified that, at the time the answering signal of one blast was blown, it was intended only to signify that the signal of the "Carisbrook" had been heard and understood; that immediately the cross-signal of two blasts was given, to indicate that the first signal could not be accepted, and that the "Valley Forge" would insist on passing to the westward, and that the "Carisbrook" then had time to accept said signal and pass to the eastward of the "Valley Forge." He further alleges that he was constrained to this course by the facts, first, that a tug, towing a three-masted schooner, was coming down the river above him, on the Schooner Ledge range, and second, that a steamer was anchored on or near said range to the eastward, about half way between Market Street Wharf and the junction of the two ranges, and that, therefore, there was not room for him to pass with his tow to the eastward, as suggested by the signal of the "Carisbrook."

On the other hand, the pilot, captain and second officer of the "Carisbrook," who were on the bridge, testified to a different situation. The pilot on the steamer testifies that, when the "Carisbrook" blew one blast of her whistle, and was answered by the "Valley Forge" with one blast, they were from a half to three-quarters of a mile apart; that immediately thereafter, the "Carisbrook" went about half a point to the westward of the Schooner Ledge range, and that the "Valley Forge," which, when the first whistle was blown, was

showing red and green lights, then shut out the green and showed red, indicating that she was acting in accordance with the signal given and received. That about two minutes thereafter, and when the vessels were about a quarter of a mile apart, the said pilot testifies that he heard two blasts from the "Valley Forge," which was then showing her green light and shutting out the red; that at this time, the "Carisbrook" was to the westward of the ranges, and could not possibly have gotten her head around, so as to have cleared the barges; that she, therefore, immediately sounded one whistle and then the danger signal of three whistles, and the signal for stop and full speed astern. The "Valley Forge," according to all the testimony, kept on her course to the westward, without stopping or slowing, the captain alleging as a reason therefor, that, the flood tide being with him, the tow would have drifted in on him had he stopped. The pilot and officers of the "Carisbrook" all testified that it was impossible to have avoided the collision, after hearing the signal of two blasts from the "Valley Forge," unless, possibly, the "Valley Forge" had stopped.

Such being the difference in the statements of those on board the steamship and the tow respectively, fortunately there is the disinterested testimony of the pilot and officers of the steamship "Corean," which was lying at anchor a little to the eastward of the Schooner Ledge range, and nearly midway between the junction point of the two ranges and Market Street Wharf, at Chester, somewhat nearer the latter than the former. The captain of the "Corean" testifies that the "Carisbrook" was turning around the bend below "Tinicum" when he first noticed her. As his steamship was riding at anchor, with her bow down stream, the "Carisbrook" was on the starboard quarter, more astern than on the quarter. "Indeed, she was almost right astern when I first saw her." He heard the signal of one blast of the whistle of the "Carisbrook," which was immediately replied to by one whistle from the "Valley Forge," which was below him and on his starboard bow. She was showing her green light and was about half a mile away. He thinks the steamer and the tug were close on to a mile apart when the first signal of one blast was given. The chart, however, corroborates the weight of the testimony, that they were about three-quarters of a mile apart. The next signal of two blasts of the whistle from the "Valley Forge," he testifies, was given when the barges of the tow were nearly abreast of the bridge of the "Corean," where he was standing, and about half the length of his ship away from his starboard side, which would be about 175 to 200 feet; that immediately on blowing the two blasts, the tug starboarded her helm; that when these two whistles were blown, there was not the slightest danger of either the tug or the barges colliding with the "Corean." At the time the tug blew the two whistles, he thinks the "Carisbrook" was to the westward of the range; that shortly after the blast of two whistles from the tug, the "Carisbrook" blew three whistles, meaning that she was going full speed astern; that the tug had plenty of time to alter her course to starboard and clear the steamer, when the steamer gave the signal of full speed astern; and that the "Carisbrook" could not, in his opinion, have done anything other than was done, to avoid the colli-

sion; that the collision occurred a minute or probably less after the two whistles were blown by the "Valley Forge." McKillip, second officer of the "Corean," was on deck and was watching these two vessels, as he was waiting until they had passed to heave up anchor and get under way. He says his vessel was lying to the eastward of the Schooner Ledge range, (of which fact he is certain, because the upper range light opened to the eastward of the lower range light; he therefore could not have been mistaken). He heard the signals on both vessels, and confirms the testimony of the captain as to all important points. He heard the tug boat blow the two whistles, when nearly abreast of the "Corean," which was answered by one blast from the "Carisbrook," and immediately thereafter by the danger signal of three. He thought the steamer was to the westward of the ranges at that moment, and that nothing could have been done by her to have avoided the collision. They were too close. Both officers say that they were astonished to hear the two whistles from the tug, and see her starboarding her helm, as they were both of opinion that a collision was then inevitable. Kelley, the pilot on the "Corean," corroborates this testimony, and says that the "Carisbrook" and "Valley Forge" were about three-quarters of a mile apart when the "Carisbrook" blew one whistle and the "Valley Forge" answered it. All three of these witnesses testify that there was nothing in the river to prevent the "Valley Forge" and the barges keeping to the eastern side of the channel; that no schooner towed by a tug down the river was between the "Carisbrook" and "Valley Forge" at the time the first whistle was blown; that such a tow had passed down some time before, and had passed the "Valley Forge" and was below Chester when the first whistle was blown. The second mate of the "Valley Forge," who was at the wheel, testifies that there was no other vessel than the "Corean" between the "Valley Forge" and the "Carisbrook," when the "Valley Forge" was opposite Market Street Wharf, at Chester, as was charged in the libel and testified to by the captain, and when asked why, after the "Valley Forge" blew one whistle, she did not go to starboard, as indicated by the whistle, answered, "I do not know."

Believing that the facts thus summarized are established by the weight of testimony, the conclusion inevitably follows that the "Valley Forge" was in fault, and that the "Carisbrook" did all that could be required under the circumstances to avoid the collision that occurred. If the captain of the "Valley Forge" gave the cross-signal of two whistles, and starboarded his helm to go to the westward, under the mistaken belief that there was no room for him to pass to the eastward, he was liable, both on the ground that he mistook the situation, and that, even supposing that he was not mistaken, he erred in giving the signals that were given from his vessel. Under the rules adopted by the board of supervising inspectors, and approved by the Secretary of the Treasury, in 1899, he should not, after accepting the signal of one blast of the whistle of the "Carisbrook," and returning it, have given a cross-signal of two whistles, as he did. The duty imposed by rule 3 of the rules just referred to, require that he should, if he doubted his ability to pass to the eastward, have

slowed down and given four or more rapid blasts of his whistle, to indicate that he was in doubt, and that there was danger. The cross-signal which he did give, is peremptorily forbidden by the rule referred to, and produced a situation of doubt and danger, in which the "Carisbrook" would have been free from liability, even had she, under the circumstances, acted upon a mistaken judgment as to the proper course to pursue. The weight of the testimony, however, convinces us that the "Carisbrook" acted in accordance with those rules of prudence, which should govern a careful and skillful navigator, and was without blame in the premises; and for these reasons we think the decree of the court below in each case was right, and should be affirmed

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SLOAN v. WOLF CO.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1903.)

No. 1,848.

1. CONTRACT—PROPOSAL—REJECTED BY COUNTER OFFER—ACCEPTANCE OF LATTER—EFFECT.

An offer of a modification or condition in answer to a proposal for a contract is a rejection of the original proposition, and an acceptance by the first proponent of the counter offer of his respondent concludes the agreement, and makes the modification or condition a part of it.

2. SALE—GUARANTY—DAMAGES FOR BREACH—OPTION OF PURCHASER.

The purchaser of machinery or personal property under a broken guaranty has a choice of remedies. He may retain the property and recover the difference between its actual and its contract value, or he may return the property and recover the purchase price.

3. SAME—LIMITATION OF REMEDY BY STIPULATION.

But where the contract of guaranty expressly provided that if any part of the property sold was found defective the vendors would upon receipt of notice replace that part on board the cars at their factory, *held*, this stipulation limited the liability of the vendors for furnishing a leaky and worthless turbine wheel to placing a first-class wheel in place of the worthless one on board the cars at their factory, and it imposed upon the purchaser the duty of notifying the vendors of the defect as soon as it was discovered.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

H. C. Brome (A. H. Burnett, on the brief), for plaintiff in error.  
John C. Cowin, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This was an action by the Wolf Company for the purchase price of the machinery for a mill which they sold and delivered to Thomas L. Sloan, the defendant. Sloan denied that the plaintiffs had performed their contract, and pleaded counterclaims (1) for moneys paid at the request of the plaintiffs for labor and materials used in reconstructing the forebay, penstock, and race; (2) for a breach of plaintiffs' guaranty to furnish a first-class turbine wheel;



(3) for a breach of their guaranty to furnish proper elevator trunking and spouting; and (4) for a breach of their guaranty to furnish two No. 1 Imperial scourers.

The contract was that the defendant would construct the forebay, penstock, race, and the building for the mill, but that the plaintiffs would furnish working drawings for the construction of these parts, and that they would furnish the turbine wheel, the trunking, spouting, scourers, and other machinery. The parties proceeded in the performance of their agreement until the mill was completed. But when it was started it failed to develop sufficient power to do any grinding, and in order to make it operative it became necessary to take out, lower, and rebuild the penstock at an expense of several hundred dollars. Thereupon a controversy arose between the parties over the question which of them should bear the expense of reconstruction, and after one Stevens, who had been the agent of the plaintiffs to take the original order for the machinery, had made the proposition set forth in the telegram recited below, and had directed certain employes to proceed to take out and rebuild the penstock, the following telegrams passed between the parties:

"The Wolf Co., Chambersburg, Pa.

"Have following proposals from your agent.

"We propose to adjust your water-wheel, and remodel wheel pit and tail-race to conform to Ponsar's plans which we guarantee to give ample power under 8 foot head to operate your mill to full capacity. We guarantee our wheel to be perfect and not to leak. We propose to do this at our own expense and should the fault prove to be in us we will cheerfully acknowledge and pay for same.

The Wolf Co.,

"Per P. A. C. Stevens, Agt."

"Have not accepted. Men at work at your direction and responsibility. Have protested against work without guarantee for cost and damages.

"Thomas L. Sloan."

"Febr. 21, 1900.

"Dated Chambersburg, Penn 21.

"To Thos. L. Sloan, Pender.

"Don't do anything till hear further from us are waiting Stevens letter.

"The Wolf Co."

"Febr. 23, 1900.

"Dated Chambersburg Penn 23.

"To Thos. L. Sloan, Pender, Nebr.

"Stevens letter received order millwrights proceed with work all satisfactory our responsibility.

The Wolf Co."

After the receipt of the last telegram the defendant permitted the employes to proceed with the work of reconstruction, paid for the labor and materials used for that purpose at the request of the plaintiffs, and charged the moneys thus expended to them. The defendant seeks the recovery of these moneys by his first counterclaim.

It is assigned as error that the court below instructed the jury, in the light of these facts, that the Wolf Company did not by the above writings become guarantors of the expense of lowering and rebuilding the penstock, but that the legal effect of these telegrams was to leave the company liable for the expenses of lowering the penstock in case they were to blame for the faulty construction of it, and in that case only. If this was the only effect of the writings under considera-

tion, then they had no effect; for the plaintiffs were liable, in the absence of the telegrams, for all the expenses of the reconstruction, if the mistake in the original construction was attributable to their negligence or to their fault. This was the proposition which Stevens made to the defendant, and which the defendant rejected. His answer to it was that he had not accepted it, that the men were at work at the plaintiffs' direction on their responsibility, and that he protested against the work without a guaranty of the costs and damages. This was a clear rejection of the original proposition, and an offer to accept it on the condition that the plaintiffs would be responsible for the cost and damages. The plaintiffs accepted the proposal with the tendered condition or modification, and the contract was complete. They replied: "Order millwrights proceed with work all satisfactory our responsibility." Until that telegram was received the minds of the parties had not met upon any agreement. The minds of the plaintiffs insisted that they should be responsible for the cost of reconstruction only in case the fault in the original building was theirs. The mind of the defendant rested upon the proposition that the plaintiffs should be responsible for the cost and damages of the reconstruction in any event, whether the mistake was the fault of the plaintiffs or of the defendant. Their minds first met on the defendant's proposition. They met the moment the plaintiffs telegraphed that all was satisfactory, and that the millwrights should proceed upon their responsibility. The Circuit Court was in error in its construction of the contract made by these writings. It should have charged the jury that the plaintiffs promised to pay the cost of the reconstruction of the penstock and its connections by their telegram of February 23, 1900, when they directed the work to proceed upon their responsibility.

An offer of a modification or condition in answer to a proposal for a contract is a rejection of the proposal, and an acceptance by the original proponent of the offer of his respondent concludes the agreement, and makes the modification or condition a part of it.

Another specification of error is that the court instructed the jury that the defendant was entitled to no allowance or credit on account of the defects, if any, in the wheel and scourers. This instruction was given on the theory that the defendant gave no notice of any defects in these parts of the machinery until after he had accepted and used them for two or three years. If no such notice was given, it is not perceived how this specification of error can be sustained. It would not be profitable to review the evidence in the record to learn whether or not there was any evidence of such a notice which should have been submitted to the jury, because the case must be tried again in any event, and upon the second trial it is probable that the testimony will differ in some respects from that now before us. It will be more conducive to a correct result at the coming trial to briefly express our views of the relations and rights of the parties with reference to the subjects of these counterclaims under the contract between them. That contract provided that the defendant should have no right to operate or run the mill or machinery until a settlement was made by him according to its terms, and that his operation of it without the written consent of the plaintiffs should be considered a full acceptance of the mill and its

machinery. It also contained this clause: "The company guaranties that the entire equipment of machinery herein described shall be first class, and not likely to get out of order, and to be in all respects as herein specified. Should any part be found defective upon starting, the company agrees to replace the same upon receipt of notice on board cars at factory." These provisions of the contract clearly evidence the intention of the parties to make an immediate notice of defects at the time that the machinery was ready to start a condition precedent to the defendant's right to recover on the guaranty. They also disclose the intention of the parties to fix and limit the damages resulting from any defective part of the machinery to the delivery by the vendor of a first-class corresponding part on board the cars at the factory. It may be that the remedy of the defendant for a latent defect or for a slight one which could be remedied at a small proportion of the expense of replacing the defective part was not restricted by the agreement to his right to have the defective part replaced on board the cars at the factory. But that is not the nature of the imperfections that are the subjects of the counterclaims in this action. Take, for example, the turbine wheel which is the subject of the second counterclaim. The defendant pleaded and he testified that when he received this wheel it was and has ever since been worthless, and that the amount he was entitled to recover on account of the defects in it was the entire contract price of the wheel. It is plain that under this contract the only liability of the plaintiffs for such a plain and complete failure as this was their liability to replace the worthless wheel with a first class one on board the cars at their factory. And it is not less clear that a speedy notice by the purchaser of such a patent and fatal defect in the motive power of the mill was a condition precedent under this contract to a recovery for such defects in the wheel.

In the absence of stipulation to the contrary, the purchaser of machinery or personal property under a broken guaranty has a choice of remedies. He may retain the property and recover the difference between the actual value of the article as delivered and its value as agreed to be delivered, or he may return the property and recover the purchase price. *Whalen v. Gordon*, 37 C. C. A. 70, 78, 95 Fed. 305, 312; *Dorr v. Fisher*, 1 Cush. 271, 273, 274; *Rogers v. Hanson*, 35 Iowa, 283, 287; *Hyatt v. Boyle*, 5 Gill & J. 110, 121, 25 Am. Dec. 276. But in the case in hand the parties to the contract expressly agreed, as they had the lawful right to do, to the extent and character of the damages which the defendant should recover for a defect in any part of the machinery. They stipulated that he (Sloan) should receive a first class piece of machinery on board the cars at the factory of the plaintiffs in the place of the defective piece which had been delivered. These provisions of the agreement are too plain to be evaded or misunderstood. They contemplated and required a notice by the defendant at the starting of the machinery of so patent a defect as the utter worthlessness of the turbine wheel, and permitted the plaintiffs to relieve themselves from all damages on that account by replacing the defective part of the machinery with a first-class turbine wheel of the character described in the contract on board the cars at their factory in Pennsylvania. It is unnecessary to extend this opinion, and a

rational application of the views which have already been expressed to the facts which may be developed at the coming trial will doubtless lead to a just and correct result. The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

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N. K. FAIRBANK CO. v. WINDSOR et al.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 161.

1. EQUITY—POWER OF COURT TO REVISE INTERLOCUTORY DECREE.

An interlocutory decree adjudging that defendant was chargeable with unfair competition, and directing an accounting for damages and profits, remains under the control of the court, and subject to revision on the merits, until the entry of a final decree.

2. UNFAIR COMPETITION—GROUNDS FOR RECOVERY OF DAMAGES—FRAUDULENT INTENT.

Damages and profits for unfair competition in trade are recoverable only on the ground of intentional fraud, which must be found either from direct proof, or by inference from the facts shown; and such a finding by inference is not warranted where defendants purchased, with the other property of an insolvent corporation, a quantity of cartons, the use of which had been determined by a Circuit Court, not to constitute unfair competition as against complainant, and used the same until the decision of such court was reversed, when they at once ceased such use.

Appeal from the Circuit Court of the United States for the Western District of New York.

This cause comes here upon appeal from a final decree of the Circuit Court, Western District of New York, which adjudged that defendants pay to complainant \$2,173.26, as gains, profits, and advantages fraudulently diverted from complainant to defendants, together with master's fee and costs. The facts are set forth in the opinion.

For opinion below, see 118 Fed. 96.

Tracy C. Becker, for appellants.

Archibald Cox, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. Some time prior to 1890 complainant began the manufacture of a new variety of soap powder, which it called "Gold Dust," and put on the market in a distinctive form and style of package. It spent large sums of money in advertising, and thereby created a large demand for the powder in every state and territory of the United States. In 1892 or 1893 a corporation known as the R. W. Bell Manufacturing Company began to make a soap powder containing the same constituents, and offered it on the market in competition with complainant's. Prior to that time it had manufactured a soap powder, which it marketed in distinctive packages; but, when the

¶ 1. See Equity, vol. 19, Cent. Dig. § 1027.

¶ 2. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

formula was changed, the persons who conducted the affairs of the Bell Company made changes in its style and form of package. Of these this court said (*Fairbank Co. v. Bell Co.*, 77 Fed. 869, 23 C. C. A. 554):

"It seems impossible to escape the conviction that the new form of package was devised with a clear intent to simulate, to a greater or less extent, the complainant's package."

And we added that:

"Although we are satisfied that defendant's new form of package was devised with an intent to produce a package resembling complainant's, the continued use of such package should not be enjoined unless the similarity between the two is of a character to convey a false impression to the public mind, and to mislead and deceive the ordinary purchaser."

The Fairbank Company sued the Bell Company for unfair competition. The suit came on for trial in the Northern District of New York. That court reached the conclusion that, whatever resemblance there might be, there was no probability that a buyer of ordinary prudence would be imposed upon by the Bell package, and on January 8, 1896, entered a decree dismissing the bill. 71 Fed. 295. The complainant appealed to this court, which on January 5, 1897, reversed the Circuit Court, holding that the Bell Company had intentionally and fraudulently devised a form and style of package which so closely resembled complainant's as to constitute unfair competition, and to mislead and deceive the ordinary purchaser. *Fairbank Co. v. Bell Co.*, supra. Prior to this the Bell Company had become financially embarrassed, a receiver of its property had been appointed, and in July, 1896, he sold to the defendants a large quantity of its assets, including a quantity of the paper boxes or cartons, which, when put together, constituted the packages complained of in the suit against the Bell Company. Defendants took a lease of the old soap factory of that company at Buffalo, and proceeded to manufacture soap powder, selling the same in said boxes or cartons, until the mandate of this court in the Bell Case was filed. Thereupon defendants promptly ceased such manufacture and sale.

On March 31, 1897, the suit at bar against Windsor and his partner was begun, the bill alleging that since July 1, 1896, defendants have unlawfully, intentionally, and fraudulently prepared, put up, and sold soap powder in the form and style of package complained of. Issue was joined and the cause came on for trial on November 22, 1897. The facts were stipulated; it being admitted that between June 1, 1896, and January 5, 1897, defendants sold soap powder in packages which were in every way the same packages as those referred to in the decrees against the Bell Company. The court adjudged that, between the dates named, defendants entered into an unlawful competition with the complainant, and that defendants' use of the packages described "constitutes an unlawful and inequitable competition in business." It decreed an injunction, and "an account of the gains, profits, and advantages which have been fraudulently diverted from the complainant to the defendant." The defendants did not appeal from this decree. Before the master they contended that there could be no recovery of damages or profits for the period during which the de-

cree of the Circuit Court remained in force, which held the packages not to be such a simulation of complainant's package as to constitute an unlawful and inequitable competition. The master overruled this contention, as he was bound to do under the decree which appointed him. The same point was presented to the Circuit Court at final hearing by exception to the master's report, but the report was confirmed in all respects, and final decree entered as above stated.

Where there has been an infringement of a patent, damages and profits may be recovered, if the articles have been marked "Patented," as the statute requires, although no infringement were intended, and the defendant was even ignorant of the existence of the patent. *Hogg v. Emerson*, 11 How. 587, 13 L. Ed. 824; *Emerson v. Simm*, 6 Fish. Pat. Cas. 281, Fed. Cas. No. 4,443; *Walker on Patents*, § 569. The complainant contends that a like rule should be applied here. We do not agree with him. As to what should be the rule where there has been an unintentional copying of a registered technical trade-mark, we need not discuss, because in the suit at bar there is no question of trade-mark. Relief is sought only upon the theory of unfair competition, and there can be no recovery unless the court is satisfied that there has been an intent on the part of defendants to palm off their goods as plaintiff's. In many of these unfair competition cases the fraudulent intent is inferred from the facts, sometimes against the sworn protestations of the infringer that he was trying to differentiate his packages from those of the complainant, not to simulate them. But in all cases where there has been recovery, intentional fraud has been found. In the case at bar it will be noted that defendants did not design the offending package. The various details of change from an earlier form and style of package, which in the *Bell Co.* Case were found to be so illuminative of an intention to confuse and to divert trade, do not affect these defendants. They bought the materials for making packages, which a court of competent jurisdiction had decided did not resemble complainant's packages sufficiently to constitute unfair competition. They continued making and selling such packages only while that decision stood, and upon its reversal they at once desisted. Whether that decision was sound or not is immaterial. It would be straining the doctrine of inferred intent beyond all reasonable bounds to hold that one who bought, made, and sold while that decision between the original manufacturer and the designer of the package remained in force, intended to enter into "an unlawful competition" with complainant. See, also, *Weed v. Peterson*, 12 Abb. Prac. N. S. 178. We are clearly of the opinion that, upon the facts in proof, complainant was not entitled to recover damages or profits. And it was competent for the Circuit Court at final hearing to make such a disposition of the cause, notwithstanding that the interlocutory decree found unlawful competition, and ordered recovery of damages and profits. At final hearing all of the previous interlocutory orders in relation to the merits were open to revision, and under the control of the court. *Fourniquet v. Perkins*, 16 How. 82, 14 L. Ed. 854; *Steam Stone-Cutter Co. v. Sheldon* (C. C.) 21 Fed. 875; *American Diamond Drill Co. v. Sullivan Co.* (C. C.) 21 Fed. 74.

In view of the unusual character of the litigation, and the defendants' unnecessary delay in presenting their objections to the court, we think the decree should stand as to the master's fees and the costs of the Circuit Court. The decree appealed from, however, should be modified by striking out so much of it as affirmed the report of the master, and directs the payment of \$2,173.26 costs.

Decree reversed and cause remanded, with instructions to decree in conformity with this opinion.

### Petition for Reargument.

(August 5, 1903.)

PER CURIAM. The appellee misunderstands the scope of the decision. The findings of fact by the court at interlocutory hearing are in no way disturbed. It is still "ordered, adjudged, and decreed" that the defendants, without right, put up and sold packages in infringement of complainant's, and that complainant is entitled to an injunction against the continuance of such acts. The Circuit Court, however, did not, at the interlocutory hearing, where judgment was entered by consent, undertake to fix the amount of damages and profits. Therefore that question was open, upon the record and proofs, before the master and when the cause came on for final hearing. Being open before the Circuit Court at final hearing, where decree was not entered by consent, but was opposed, the same question was open for review here.

Petition for reargument is denied.

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### MORGAN et al. v. THOMPSON et al.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1903.)

No. 1,862.

#### 1. CIRCUIT COURTS OF APPEALS—APPELLATE JURISDICTION—REVIEW OF FINAL DECISIONS.

The appellate jurisdiction of the United States Circuit Courts of Appeals is limited to the review by writs of error or appeals of final decisions of the courts below. U. S. Comp. St. 1901, p. 549, § 6, Act March 3, 1891, c. 517, § 6, 26 Stat. 828; Act March 1, 1895, c. 145, § 11, 28 Stat. 698.

#### 2. FINAL DECISION—DEFINITION.

A final decision completely determines the rights of the parties affected by it. An order, judgment, or decree which does not substantially and completely determine the rights of the parties affected by it in the suit, so that, if it should be affirmed, the court below would have nothing to do but to execute the order, judgment, or decree it had already rendered, is not a final decision, and cannot be reviewed in the Circuit Court of Appeals.

#### 3. SAME—JUDGMENT REVERSING AND REMANDING NOT A FINAL DECISION.

A judgment of the United States Court of Appeals in the Indian Territory which reverses the judgment of an inferior court, and remands

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¶ 1. Orders, decrees, and judgments reviewable in Circuit Courts of Appeals, see note to *Salmon v. Mills*, 13 C. C. A. 374.

¶ 2. What decrees are final, see note to *Brush Electric Co. v. Electric Imp. Co.*, 2 C. C. A. 379.

the case for further proceedings, in which the trial court may determine the rights of the parties, is not a final decision, and is not reviewable in the United States Circuit Court of Appeals.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

W. A. Ledbetter, S. T. Bledsoe, and J. B. Thompson, for plaintiffs in error.

O. W. Patchell and A. F. Pyeatt, for defendants in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is a writ of error to review a judgment of the United States Court of Appeals in the Indian Territory which reversed a judgment of the United States Court for the Southern District of the Indian Territory, overruling a demurrer to a petition, and remanded the case to the trial court "for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered."

The jurisdiction of this court to review the judgment of the United States Court of Appeals of the Indian Territory is derived from this provision of section 11, c. 145, Act March 1, 1895, 28 Stat. 698:

"Writs of error and appeals from the final decision of said appellate court shall be allowed and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States."

The act creating the Circuit Courts of Appeals grants jurisdiction to them to review the decisions of the Circuit Courts of the United States, in these words:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act unless otherwise provided by law." U. S. Comp. St. 1901, p. 549, § 6, Act March 3, 1891, c. 517, § 6, 26 Stat. 828.

A final decision, within the meaning of these provisions of the acts of Congress, is one which completely adjudicates the rights of the parties to the suit, so that if it is affirmed the court below will have nothing to do but to execute the judgment or decree which evidences the decision it has already rendered. An order, judgment, or decree which does not have this effect—one which leaves the rights of the parties to the suit undetermined and subject to farther adjudication—is not a final decision, and the Courts of Appeals have no jurisdiction to review it. *Standley v. Roberts*, 59 Fed. 836, 839, 8 C. C. A. 305, 308; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 111 Fed. 81, 85, 49 C. C. A. 229, 233; *Carmichael v. City of Texarkana*, 116 Fed. 845, 846, 54 C. C. A. 179, 180, 58 L. R. A. 911. The judgment challenged by the writ of error in this case reversed the judgment below, and remanded the case to the trial court for further proceedings. The plaintiffs, William J. Thompson, Samuel C. Wall, and Ellen Wall, had brought an action of forcible entry and detainer against the defend-



ants, William Morgan and Robert Morgan. The case had proceeded until a second amended petition had been interposed by the plaintiffs, and a demurrer to it by the defendants. The trial court sustained the demurrer and entered a judgment for the defendants. The plaintiffs appealed to the United States Court of Appeals in the Indian Territory. That court held the petition sufficient, reversed the judgment below, and remanded the case to the trial court for further proceedings not inconsistent with its opinion. The effect of this ruling of the Court of Appeals is to compel the trial court to overrule the demurrer, to permit the defendants to answer and to proceed to a trial of the issues which may be raised by the pleadings. The statutes of the Indian Territory provide that "upon a demurrer being overruled the party demurring may answer or reply." Ind. T. Ann. St. 1899, § 3284; Mansf. Dig. § 5079. Thus it conclusively appears that the judgment of the Court of Appeals reversing the judgment of the trial court is not a final decision of the rights of the parties to the controversy, but that these rights remain undetermined, and subject to the trial of the issues which are yet to be framed and determined in the trial court.

The Supreme Court has jurisdiction in certain classes of cases to review "a final judgment or decree in any suit in the highest court of a state." Rev. St. § 709, U. S. Comp. St. 1901, p. 575, § 709. But that court held that a judgment of the Supreme Court of Wisconsin reversing a judgment of an inferior court which overruled a demurrer to a complaint was not a final judgment, and could not be reviewed in that court, because it did not finally determine the rights of the parties but remanded the case to the court below for further proceedings. *Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 341, 342, 16 Sup. Ct. 850, 40 L. Ed. 991. There is a long line of decisions in that court to the effect that a judgment of a supreme court of a state reversing a judgment, order, or decree of a trial court, and remanding the case for farther proceedings either at law or in equity, is not a final decision, and cannot be reviewed by the Supreme Court of the United States. *Moore v. Robbins*, 18 Wall. 588, 21 L. Ed. 758; *St. Clair v. Livingston*, 18 Wall. 628, 21 L. Ed. 813; *Parcels v. Johnson*, 87 U. S. 653, 22 L. Ed. 410; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; *Brown v. Union Bank*, 4 How. 465, 11 L. Ed. 1058; *Pepper v. Dunlap*, 5 How. 51, 12 L. Ed. 46; *Tracy v. Holcombe*, 24 How. 426, 16 L. Ed. 742; *McComb v. Commissioners of Knox Co.*, 91 U. S. 1, 23 L. Ed. 85; *Baker v. White*, 92 U. S. 176, 23 L. Ed. 480; *Davis v. Crouch*, 94 U. S. 514, 24 L. Ed. 281; *Whiting v. United States Bank*, 13 Pet. 6, 10 L. Ed. 33; *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404; *Craighead v. Wilson*, 18 How. 199, 15 L. Ed. 332; *Beebe v. Russell*, 19 How. 283, 15 L. Ed. 668; *Bronson v. Railroad Co.*, 2 Black, 524, 17 L. Ed. 347; *Thomson v. Dean*, 7 Wall. 342, 19 L. Ed. 94; *Railroad Co. v. Swasey*, 23 Wall. 405, 23 L. Ed. 136; *Crosby v. Buchanan*, 23 Wall. 420, 23 L. Ed. 138; *Commissioners v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Rice v. Sanger*, 144 U. S. 197, 12 Sup. Ct. 664, 36 L. Ed. 403. Whether the question be considered from the standpoint of reason or of authority, the conclusion is inevitable that a judgment which reverses the order or judgment of a trial court,

and remands the case for a subsequent hearing and adjudication of the rights of the parties, is not a final decision which may be reviewed either in the Supreme Court or in this court under the acts of Congress to which reference has been made. The judgment of the Court of Appeals of the Indian Territory was of this character. This court is without jurisdiction to review it, and the writ of error must be dismissed.

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BALDWIN v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Circuit Court of Appeals, Sixth Circuit. July 29, 1903.)

No. 1,185.

1. EQUITY—CONFORMITY OF DECREE TO PLEADINGS—VARIANCE.

Where the allegations of a bill and the proofs are wholly at variance, the complainant is not entitled to a decree in conformity with either, since relief can only be granted on the case made by the bill.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The bill in this case states that on the 25th day of April, 1893, the complainant was the owner of the tug Sea Gull, and, as such owner, made application to the defendant for insurance against loss by fire for one year, and that the defendant wrote a Michigan standard policy on the tug for \$4,000, a copy of which is annexed to the bill of complaint, but by mistake of defendant's servants the policy was written in the name of Captain James Reid instead of complainant; that on April 30, 1893, the Sea Gull was totally destroyed by fire, and complainant was damaged in the sum of \$30,000, and that the defendant now disclaims all liability under the policy; that, by reason of the mistake made in writing the policy in the name of Captain James Reid instead of in the name of complainant, the complainant is unable to bring an action at law upon the policy; that Captain James Reid recognized the mistake, and disclaims any interest in the insurance. The bill prays that the mistake may be corrected and the policy reformed so as to read as a policy issued to the complainant instead of Captain James Reid, and that an account of the loss under the policy be taken, and the defendant company decreed to pay the same to complainant.

The answer of the defendant denies that the complainant owned the Sea Gull or made application to the defendant for insurance on her, or that the defendant agreed with complainant to insure or did insure the boat, but admits writing the policy, and avers that it was issued on the application of Captain James Reid, through the Aetna Insurance Company as broker of Reid, and that the defendant was not prior to the commencement of this suit informed of complainant's ownership, nor was it directed to insure the Sea Gull in the name of complainant, and denies all error or mistake on its part, and all information to the effect that Reid disclaims any interest in the policy, and states that the policy was written on an application made by the Aetna Insurance Company to the defendant on the 2d day of May, after the destruction of the tug, in which application the complainant was not in any way mentioned, and that defendant was ignorant of the previous loss of the tug by fire, which occurred on the 30th day of April, and learned of it for the first time on the 5th day of May, and on the 6th day of May the defendant company notified the Aetna Insurance Company of having learned that the tug had been burned on April 30th, and asked a return of its policy.

The evidence showed that the tug Sea Gull was sold in April, 1891, at marshal's sale, and bid in, at the request of Reid, by the complainant, who

¶ 1. See Equity, vol. 19, Cent. Dig. § 1001.

agreed in writing to transfer it to Reid on the payment of certain indebtedness, and Reid remained in possession and management until she was burned. On April 24th or 25th Reid went to the office of Cook, Calbeck & Co., who, were insurance agents and vessel brokers at Chicago, and asked them to place insurance, both fire and marine, upon the Sea Gull, and they made out an application for insurance in the Ætna Insurance Company on account of Captain James Reid for \$10,000, "loss, if total, payable to Stephen Baldwin," and informed Reid that the Sea Gull would be covered the next morning. Cook, Calbeck & Co. had arrangements with the Insurance Company of North America and the Ætna Insurance Company, by which, when a vessel owner or manager came to them for insurance, they placed part of it with each of these companies. The local manager of the Ætna Company had an arrangement with the local manager of the defendant by which it was to carry as much insurance as the Ætna did on any one risk, if applied to by the Ætna. The clerk in the Ætna's office made an application to the defendant company for a \$4,000 policy for part of this insurance on the tug Sea Gull, to be issued to Captain James Reid, leaving out, "loss, if total, payable to Stephen Baldwin," and the policy in question was afterwards issued on this application in the following manner: On May 1st, one of the partners of Cook, Calbeck & Co. found that the Sea Gull's policies had not been received at the office, and sent out for them, and it was found that the policy applied for from the Ætna had not been written, and when notified the manager of the Ætna went to the office of the defendant, and reminded its manager of the agreement that defendant should write part of insurance when offered by the Ætna, and made request for the issuance of the policy in question, which was issued the next day, and delivered to the Ætna Company. The manager of the defendant company learned, on the 5th of May, of the loss of the tug Sea Gull, and thereupon wrote the manager of the Ætna the following letter: "Between the hours of 12 and 1 p. m. upon Monday, the 1st inst., we agreed to accept a risk for you upon the tug Sea Gull, and, upon an application received later in the day from your office, issued our policy No. 334,327, in the sum of \$4,000, upon Tuesday, the 2nd inst., dating said policy back to April 25th, at your request. We learn from sworn statements of the marine department that the tug in question was burned at or about the hour of 7 o'clock p. m. upon Sunday, April 30th. As we have no liability under our policy, will you have the kindness to return same to this office, and much oblige?" The policy was not returned, and, the defendant refusing to recognize it as binding, this suit was brought. On the final hearing the court below dismissed the bill of complainant, who brings the cause here by appeal.

W. G. Fitzpatrick, for appellant.

John D. Conely, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The complainant was in equity only a mortgagee of the vessel which he claims to have insured as owner. *Davidson v. Baldwin*, 79 Fed. 95, 24 C. C. A. 453. The policy which was issued provided, among other things, that it should be void if the interest of the insured was other than unconditional and sole ownership. Whether if a policy had issued insuring Baldwin as sole and unconditional owner, without qualifying words, it would have been enforceable, we need not decide, for there was no evidence of any agreement to insure Baldwin as sole owner. But it is urged that a policy should be decreed to be written according to the terms of the application made to the Ætna Insur-

ance Company. There is nothing in the pleadings to warrant such a decree. No such issue was tendered by the bill, which states that the complainant, who is only the mortgagee, was the owner of the tug, and as such owner made application for the policy, which by mistake was written in the name of Captain James Reid. The application which was actually made was not set out in the bill, and as it was made to Cook, Calbeck & Co., and not to the defendant, the defendant knew of no such application until the evidence was taken. If Reid were a party to the suit, and there were sufficient averments in the bill to sustain a decree under the prayer for general relief, directly contrary to the case made out by the bill, the other questions raised might be discussed. But such a decree, if the complainant were entitled to it under the proofs, would be entirely outside of the pleadings on a case not made or contemplated by the bill, and to which the defendant has not been called upon to answer, and, in fact, has not answered. "The recovery must be had upon the case made by the pleadings or not at all." *Grosholz v. Newman*, 21 Wall. 481, 488, 22 L. Ed. 471; *Hoffman v. McMorran*, 52 Mich. 318, 17 N. W. 928; *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570. No relief can be granted for matters not charged in the bill, and a party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. *Beach*, *Modern Eq. Prac.* §§ 99, 100, 790, and the text-books and numerous authorities cited in the notes.

The decree dismissing the bill must be affirmed.

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#### RUE v. MILLER.

(Circuit Court of Appeals, Sixth Circuit. July 7, 1903.)

No. 1,174.

#### 1. INSOLVENCY—SET-OFF.

In case of two insolvent estates, each indebted to the other, the dividend to one is to be set off against the dividend to the other.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

On the 4th of February, 1897, the First National Bank of Franklin, Ohio, became insolvent, and was put in charge of the appellee, Joseph D. Miller, as receiver. At that time it was a creditor of the Franklin Paper Company, an Ohio corporation, in the sum of \$53,602.87, and was also a stockholder in said company to the amount of \$5,650, and had prior to that time held other stock it had disposed of, amounting to \$5,650. On the 7th of July, 1896, the paper company having become insolvent, Walter B. Schaeffer, a creditor, brought suit in the court of common pleas of Warren county, Ohio, against the bank and all other stockholders of the paper company to enforce the statutory liability, under section 3260 of the Revised Statutes of Ohio of 1892, providing for the double liability of stockholders, in which suit judgment was rendered against all of the stockholders of the paper company. There was a judgment against the bank for \$2,361.13 on a liability of \$5,650 on the stock which it had sold, which judgment was for the benefit of only 11 creditors, not including the bank; and there was another judgment against the bank for \$5,650 on the stock still held by the bank, which was for the benefit of all the creditors of the paper company, including the bank. Dividends aggregat-

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¶ 1. See *Insolvency*, vol. 28, Cent. Dig. § 174.

ing 70 per cent. have been declared by the Comptroller of the Currency, to be paid by the receiver out of the assets of the bank. The estimated dividend from the fund in the hands of the complainant is 5 per cent. Because the receiver claims the right to set off the dividends due the creditors of the paper company on the judgment of \$5,650, in which it is a beneficiary, against the dividends which will come to him on the claim of \$53,602.87 out of the fund being collected by the receiver of the paper company, this suit has been brought to compel him to issue a certificate for the full amount of the dividends, without reference to the anticipated dividend he may receive. On final hearing the court below decreed that the defendant receiver issue to the complainant a certificate for the sum of \$2,361.13, the amount of the judgment which was obtained for the benefit of only 11 creditors of the paper company, not including the bank, and pay the complainant on that certificate the dividends theretofore declared and thereafter to be declared, and paid to the creditors of the bank; that the defendant also issue to the complainant a certificate for the sum of \$5,650, the amount of the judgment rendered against the bank, in which the bank was interested to the amount of the dividends it should receive on its claim against the paper company; that the defendant pay to the complainant on the last-named certificate dividends to an amount which, together with the dividend to be paid by the complainant to the defendant, shall equal the amount of the dividends theretofore declared and thereafter to be declared and paid to the creditors of the bank, including the complainant, on the judgment of \$5,650; and that the cause be retained until the exact amount of dividend to be paid by the complainant has been determined, and for such further orders as may be necessary. From this decree the receiver for the paper company appealed.

George A. Burr, for appellant.

Harlan Cleveland, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

There is no dispute as to the judgment for \$2,361.13, as it was for a fund in which only 11 creditors of the paper company were interested, of which the bank was not one, and its receiver, therefore, has no set-off against that judgment, and admits he must pay the full amount of dividends declared and to be declared on it.

The complainant receiver claims that the defendant receiver should also issue to him a certificate for the full amount of the \$5,650 judgment, and should be decreed to pay such dividends as have been declared and will hereafter be declared upon the claims of other creditors, without reference to any dividend that may be declared and paid to the beneficiaries of the fund in his hands, because a stockholder who is indebted to the fund is not entitled as a creditor to receive any part of it until he shall have first discharged in full his indebtedness; and, as the total amount of the dividends declared and to be declared by the Comptroller of the Currency, when applied on this judgment, will leave a balance due amounting to a greater sum than the dividend to which the bank would be entitled to receive out of the fund, there will be nothing coming to the defendant, and therefore no deduction should be made.

On the other hand, the defendant contends that, while he does not deny the claim of the receiver of the paper company to be recognized

as a creditor of the bank by virtue of his judgment, he has the right to set off, so far as the judgment of \$5,650, which is recovered for the benefit of all of the creditors of the paper company, including the bank, is concerned, the dividends payable to him, as such receiver, from the fund in the hands of the receiver of the paper company.

The contention of complainant that to set off the dividend payable out of the fund realized on the judgments against the dividends payable to the fund, would operate as an unequal distribution among the creditors of the paper company in favor of the bank is true only because the bank is insolvent. If the bank's claim against this fund was held by some other person, then the fund could only receive the full amount of the dividends declared by the Comptroller of the Currency, and would be obliged to pay on this claim the full amount of the dividend that should be paid to the beneficiaries of the fund. If no dividend is paid to the bank receiver out of this fund, the bank, as a creditor, and its creditors will receive a less amount than the other creditors of this fund. There seems to be no way of making an equitable distribution of the two funds except to offset one dividend against the other. Insolvency is a recognized ground on which a court of equity will compel a set-off. *Waterman's Set-Off*, §§ 431-441, and cases there cited. In applying the doctrine that equity is equality, it seems to us that the court below made the only equitable disposition of the case possible. The bank could not pay the claims against it in full; neither can the fund in the hands of the complainant; and the beneficiaries of the two funds can be placed on an equality only by offsetting the dividends due from each. The debtor to either fund, if solvent, could pay in full, and as a creditor of the fund would be entitled to share in it only after full payment; but the equities of two insolvent funds or estates, where the beneficiary of one fund is a debtor to the same fund, can only be adjusted for the benefit of all the beneficiaries of the two funds by the setting off of one dividend against the other. In *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788, the precise point involved here was decided, and the dividends were set off. Any other rule would work injustice.

The decree must be affirmed.

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#### THE MINNEHAHA.

(Circuit Court of Appeals, Second Circuit. July 1, 1903.)

No. 182.

#### 1. COLLISION—STEAMSHIP AND TUG—PREMATURE FASTENING OF TOWLINE.

Evidence considered, and held to support the finding of the trial court that the sinking of a tug in collision with a large steamship, from which she had just taken a line to assist her in docking, was not due to fault of the steamship in making fast the line prematurely and without orders from the tug while it was being paid out, but to the negligent navigation of the tug in getting under the bow of the steamship, and in failing to keep out of the way, although the ship was moving with only sufficient speed to give her steerageway.

Appeal from the District Court of the United States for the Eastern District of New York.

For opinion below, see 115 Fed. 852.

Appeal by libelants from a decree of the District Court for the Eastern District of New York dismissing the libel, entered April 23, 1902. The opinion of the District Court will be found reported in 115 Fed. 852.

James J. Macklin and La Roy S. Gove, for appellants.

J. Parker Kirlin and James T. Kilbreth, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. But little need be added to the comprehensive opinion of the District Judge. The Minnehaha is one of the largest steamships entering the port of New York. She is 600 feet in length and 65 feet beam. The tug America is about 80 feet in length.

On the morning of September 18, 1900, the tug approached the steamship to assist her in docking at Pier 39 North river, and called for a line. After the line was made fast the tug got under the stern of the steamer, was rolled over and sank and two of her crew were drowned. The libel now under consideration was filed to recover damages for injury to the tug.

The libel alleges that after the hawser was made fast to the bitts on the stern of the tug and when 60 or 70 feet had been passed out in the customary way it was suddenly made fast to the steamship without any warning to the tug, thus bringing the tug under the port bow of the steamship capsizing her and doing her serious damage.

The fourth paragraph of the libel is as follows:

"Fourth. That it is and has been the custom and practice for many years when steam tugs assist in docking vessels in the harbor of New York, and when passing out the hawser to the steam tug or steam tugs, to continue the paying out of the same until the person in charge of the steam tug would signal or inform those on the steamer to cease doing so and thereupon make fast the hawser on said steamer, which custom and practice on the occasion aforesaid was entirely disregarded, thus bringing about the damage which the said steam tug sustained."

The burden was, then, upon the libelants to prove these allegations. Not only have they failed to sustain the burden, but the preponderance of proof establishes the steamship's freedom from fault in paying out the hawser.

The controversy turns upon two questions of fact: First, was the line too short? And, second, if it were too short was it the fault of the steamship or of the tug?

The libelants' witnesses all testified that, in the circumstances detailed, it was the custom of the port to give the tug 35 or 40 fathoms of line. The witnesses for the steamship testified that this was about the length of line given to the American. They also testified to seeing the tug 80 feet ahead of the steamship's stern, which was sufficient space to enable her to avoid being run down.

The court can almost take judicial notice of the fact that a tug 80

feet in length, with its powerful machinery and ability to execute any maneuver with the greatest celerity, could not, unless guilty of negligence, have been run down by a steamship, moving only fast enough to make steerageway, when the tug had room enough to keep her stern 80 feet in front of the bow of the steamship. On the other hand, the master of the *America* testified that he received only 70 or 75 feet of line. There was, therefore, a dispute upon a question of fact with the preponderance in the number of witnesses and their opportunity for observation, in favor of the steamship. Not only so, but the claimant's version is supported by a strong presumption in its favor.

The libelants insist that the tug should have received over 200 feet of hawser. That about this length was required is admitted by the claimant. The requirements of the situation were well known to all concerned. Is it probable that the experienced mariners on the steamship would have given the tug a third only of the needed length? And is it to be believed that the men on the tug would have left the bitts if they had not been convinced that a sufficient length of line was out and properly fastened? Would the tug have gone ahead in the manner stated with no more dissent than that indicated in the testimony of her master? He says: "After my boat's stern brought up I tooted the whistle for more hawser and got none." This was after the tug was in extremis. It was then too late to save her.

Assuming, however, that the libelants are correct as to the length of the line, whose fault was it? The testimony is uncontradicted, though sharply criticised, that the *Minnehaha's* boatswain called out to the men on the tug to inform him when they had line enough and that, thereafter, a man on the tug called back to "make fast" and held up his hand as a signal to the same effect. The line was then made fast in response to this order from the tug. It is true that the only members of the tug's crew who could testify upon this subject were drowned, but the court was not justified in disregarding the steamship's testimony because it might have been contradicted. The situation called for careful scrutiny of the testimony and this it certainly received. It is enough to say that the controversy involves questions of fact which were decided by the judge who heard all of the 13 witnesses but 2, and we see no reason to disagree with his conclusions.

The decree of the District Court is affirmed with interest and costs.



## CARNEGIE STEEL CO., Limited, v. BRISLIN et al.

(Circuit Court of Appeals, Third Circuit. August 6, 1903.)

No. 18.

## 1. PATENTS—INFRINGEMENT—FEEDING MECHANISM FOR ROLLING MILLS.

The Brislin and Vinnac patent, No. 345,953, for feeding mechanism for rolling mills, claim 1, which covers a combination of feed tables pivoted at the back, and having lifting mechanism to raise and lower the front to present the metal to higher or lower rolls of the same set, furnished with positively actuated feed rolls, and means for moving the tables laterally from one set of rolls to another, "substantially as set forth," is not entitled to a broad construction, as embodying the first mechanism for the complete mechanical rolling of heavy pieces. This was accomplished by machines of the prior art, and especially by those shown in the Slade patent of 1879, and the Saylor patent of 1885; the combination of the latter differing from that of the claim in question only in that the tables are lifted in a horizontal position, instead of being pivoted. Such feature, however, was also old in the art, and its substitution for the horizontal tables of such prior patents did not involve invention; and said claim 1 must be limited to the specific means shown by the specification for laterally shifting the carriage and roller frame, and the devices for inclining said roller frame on its pivot. As so construed, the claim *held* not infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. For opinion below, see 118 Fed. 579.

John R. Bennett, for appellant.

J. N. Cooke and James I. Kay, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court of the United States for the Western District of Pennsylvania, which sustains the patentability of the combination covered by the first claim of the United States letters patent No. 345,953, issued to Brislin and Vinnac, July 20, 1886, for "feeding mechanism for rolling mills," and finds the defendant below, the appellant here, to have infringed the same. As to the two other claims of the patent in suit, the bill was dismissed, on the ground of noninfringement of the second, and that the third was not involved in the litigation. The bill likewise was dismissed as to a charge of infringement of the claims of letters patent No. 352,748, issued to Hanley and Richey, November 16, 1886, for "feed table for rolling mills." We are only concerned, therefore, with the consideration of the first claim of the Brislin and Vinnac patent.

The invention claimed in the patent relates to the art of the mechanical rolling of iron and steel, the process of which is thus described in the specifications:

"In the process of rolling iron it is necessary to elevate the iron so that it will pass through between the upper and middle rolls when a 'three-high' mill is used, and in case of a 'two-high' mill it is necessary to pass the iron over the top of the upper roll in the process of rolling; and in moving the iron from one groove to the other, and from one set of rolls to another set, it is

necessary to move the iron bodily sidewise. In heavy rolling the labor attendant upon elevating the heated iron and moving it laterally for the several passes required in the process of rolling is very laborious, and the difficulty attendant upon said manipulation causes a loss of time, and at the same time a loss of heat, thereby causing the iron to be more difficult to roll, and the stiffening of the iron by the cooling process due to said loss of time often results in the breaking of the mechanism connected therewith. Mechanical contrivances have been constructed and used for the purpose of vertical lift of the heated iron in the operation of rolling it. Our invention has for its object not only the vertical lifting of the heated iron, but also the lateral movement of it in the process of rolling; and our invention consists in a lifting mechanism and laterally moving mechanism combined with rolls of a rolling mill for the vertical lifting and lateral movements of the heated iron in the operation of rolling it."

The first claim of the patent (which alone is in contention here) is as follows:

"(1) The combination, in a rolling mill, of rolls, a carriage, a roller frame therefor for feeding to the rolls and pivoted at its outer end, means for laterally shifting said carriage and roller frame, and devices for inclining said roller frame on its pivot, so as to vary the feed of the latter to the rolls, substantially as set forth."

It will thus be seen that the invention claimed in the patent in suit is, speaking generally, for such a combination of elements as would mechanically present to the rolls of a rolling mill, or receive therefrom, the iron or steel to be rolled, on tables furnished with feeding rolls, pivoted at their outer ends, and capable of being mechanically raised in a vertical direction at their inner ends, so as to present the metal which had gone through one pass of rolls for further reduction through an upper or higher pass, and of laterally moving said tables from one set of rolls to another, or from one groove to another of the same rolls. This is claimed, in the arguments and contentions of the appellees, to be what is called "complete mechanical rolling," and to have been first accomplished by the invention described in the first claim of the patent in suit. This broad construction of the first claim has been sustained by the learned judge of the court below, and upon it rests the decree declaring infringement.

The history of the prior art, so far as the case before us is concerned, and as shown in the record, may be briefly stated. It is undoubtedly true that, in the prior art, hand feeding to the rolls was at one time universal, and that various devices for lifting billets and bars, by hooks attached to pulleys for heavy work, were in use before mechanical rolling was practiced. We do not, however, find that the invention of the patent in suit made the first advance from manual rolling to complete mechanical rolling. It no doubt made an advance in mechanical rolling, which is quite a different thing from an advance to mechanical rolling.

The French patent to Sauvage, No. 32,389, of May 27, 1858, sets forth a single stand of three-high rolls, on each side of which, the specifications state,

"A lifting table is disposed to receive the piece coming from the heating furnace, which the heater or his helper places upon the aforesaid table on the side nearer to the train. The head roller then takes it and pushes it between the cylinders. The catcher placed behind the train on the opposite side from

the head roller, takes the piece when it comes from the rolls, draws it upon the lifting table, causes the latter to move upward, and in same time engages the piece into the rolls; the head roller on this side performs the same operation until the piece is completed."

As appears by the drawings and specifications, the "Sauvage" lifting table is pivoted at its outer end and is vertically movable at its inner end, so as to permit of its inner end being raised and lowered, in order that it may deliver the metal to and from all the rolls of a three-high stand. Of this apparatus, the defendant's expert, Laureau, says:

"I have read the French patent you refer to and I believe I understand it. It relates to a certain arrangement of rolling mills which permits to roll plates at one heat. The train is a three-high train, the rolls of which can be moved vertically so as to vary the distance between them. In order to facilitate the handling of the plates, lifting tables are placed at the front and back of the rolls. These tables are pivoted at their outer end and are capable of vertical motion at their inner end. This vertical motion is communicated to them by steam cylinders placed directly above the inner ends and connected to them by means of a yoke. The operation is very simple and easily understood. The piece being placed on the front table passes through rolls, it is caught at the back by the back table, which, by means of the cylinder placed above it, raises the piece to the level of the upper rolls. The piece then passes back to the front, is caught by the front table which has been raised and lowered again to the lower rolls, etc. It will, therefore, be seen that the feed table apparatus consists essentially of a frame having loose rollers upon it and pivoted at its outer ends, the inner end being raised up and down by a cylinder placed directly above it. As compared with the Brislin and Vinnac patent, this apparatus shows a feed table pivoted at its outer end and capable of a vertical motion at its inner end."

So that, the device of the "Sauvage" patent, so far as a single stand of high rolls is concerned, presents all the advantages of complete mechanical rolling. This is not controverted in the opinion of the learned judge of the court below. The "Sauvage" apparatus only lacks means for laterally shifting the table, consisting of the frame with the loose rollers, pivoted at its outer end and capable of being lifted at its inner end, so that it might serve two or more stands of rolls placed side by side. We will not pause here to consider whether the thought or idea of laterally moving this device for the purpose stated, was one worthy of being called a patentable invention, apart from the specific mechanical means devised for such lateral movement. We will only remark, in passing, that the suggestion of the moving of such a table on a carriage or truck, laterally, so as to bring the same successively in front of stands of rolls placed side by side, does not seem to us to so involve patentable invention as to be entitled to the monopoly accorded to such invention by the patent law. The mounting of such a table upon the truck moved upon rails in front of the rollers, would violate such a monopoly were it granted. The traveling crane comes within its functional principle. The particular mechanical means or device by which such lateral movement is made, of course may be of such a character as to deserve the protection of a patent. We are not surprised, therefore, to find that in the "Alleyne" (British) patent of April 4, 1861, is described a rolling mill of several stands of "two-high" rolls, and that the object of one part of the invention of the patent is thus described:

"A second part of my invention has for its object the obviating of the difficulty attendant on transferring large masses of iron at a very high temperature from one groove in the rolls of a rolling mill to the next groove, or from one set of rolls to another, as is the case in rolling plates which may also be without grooves. For this purpose I construct a tramway on either side of the rolling mill just in the front of and behind the rolls, running parallel with the same, and either sunk in the floor of the mill or level with the same, or at the same inclination as the floor of the mill. Upon these tramways I place travelers capable of running along on both sides of the rolls in a direction parallel with the same, and actuated either by steam or other power. Thus in one arrangement I prefer to make the level of the top of these travelers on the same level or inclination as the floor of the mill, and I fix transversely upon them rails corresponding with other rails placed upon the mill floor, and leading at a certain incline down from the heating furnaces to the rolling mills, such as have already been made use of, which do not form part of my invention. Upon these rails I place other carriages or trucks which receive the heated iron as it comes out of the furnace, and which are then run down the incline and onto the traveler; the heated iron is then received by a groove in the rolls and run through the same, or it is run through plain rolls as in ordinary plate rolls. On arriving on the other side of the rolls, the iron is received upon the other traveler, which is then moved laterally till the iron is before the next groove or before the next pair of rolls, or the traveler is adjusted by being moved to a very slight extent, so as to get the iron into the rolls, the other traveler being allowed to stand still, and the iron is then run back through the rolls on to the first-named traveler, the motion of the rolls having been reversed; or the iron may be run backwards and forwards through the same groove or plain rolls several times, the rolls being made to approach at each operation. Sometimes I have only such before-mentioned traveler and tramway on one side of the rolls, and on the other side I fix two sets of rollers at certain distances along the rolls, one set being placed with the axes parallel with that of the rolls, while axes of the other set are at right angles to the axes of the rolls."

This patent also clearly describes a vertically moving table, placed on a laterally moving carriage, so that the metal may be passed through one set of rolls and then returned through a higher set. As in the "Sauvage" patent, it is especially claimed in the "Alleyne" patent, that the devices described are especially adapted for the rolling of large masses of metal, the specifications of the "Alleyne" patent opening as follows:—

"My invention has for its object the facilitating of the manufacture of large masses of iron into plates or bars, tee and angle iron, beam or joist iron, \* \* \* by the operation of rolling in rolling mills."

The "Alleyne" apparatus, therefore, combines both a laterally moving mechanism and a vertically moving or lifting mechanism, the lifting mechanism differing from that of the patent in suit, only in that the table is raised bodily and horizontally, instead of the free end next the rollers only being raised on the fulcrum of the pivoted further end.

We now come to a stage in the development of the art of complete mechanical rolling, from experience in which seems to have been developed the alleged infringing device of the appellant. This stage of development is illustrated by feed roller tables of the Fritz and Wellman types, used by defendant in its mills some years prior to 1892. The "Fritz" type is embodied in a patent of December 10, 1872, in which the patentee states that he has "invented certain improvements in rolling mills for rolling steel and iron in every form," of which the following is a specification:

"The first part of my invention relates to feeding rollers, driven by friction or otherwise, on a movable table, which is raised and lowered by hydraulic or other power and which carries the metal to be rolled, said driven rollers feeding the metal into the rolling mill on one side, taking it out on the other side, and drawing it clear from the mill rolls and guides, and then returning it in the same manner, thus passing the metal back and forth as the tables are elevated and lowered until the process of reduction is completed, said feeding rollers being combined with and moved by a shaft-operating gear and friction wheels, which are supported by and attached to a yoke suspended in such manner that the friction wheels connected with it may be brought in contact with or detached from a friction wheel operating the feed rollers, by a slight movement of levers in front and rear of the machine."

It will thus be seen that the feed rollers are positively driven by a shaft and operating gear, and their rotation is reversible, or, as stated by the patentee, "it will be observed that the combination of the movable table with the driven rollers is found in my invention, whether said driven rollers are reversed or driven in one direction only." The second part of the "Fritz" invention relates to a turning and shifting mechanism, by which the piece to be rolled could be turned upon the movable table, so as to be rolled both sidewise and edgewise. So far as there was necessity for only one stand of rolls, complete mechanical rolling could be accomplished by the "Fritz" device. The roller table, to be sure, was lifted vertically and horizontally, but the function of such movable table and the positively driven rollers was the same as that of the pivoted table and rollers of the patent in suit. The tables of the "Fritz" patent were raised and lowered by hydraulic cylinders from beneath, but it is stated in the specifications that they may be arranged and operated in any other suitable manner. There was no lateral movement of these tables, which, being of the width of the rolls, were sufficient to serve the several passes of the single stand of rolls. The weight and length of the pieces to be raised on these tables was a question of more or less power in the hydraulic cylinders, or other lifting means, and of the length of the tables.

The other type in use in defendant's mills, during the period testified to, that is, between 1885 and 1892, was that of the "Wellman" patent, of May 15, 1883. Defendant's expert, Kennedy, testifies that, during the time stated,

"The plate mill was equipped with 'Wellman' tilting tables, which were tables pivoted a short distance from their rear end, having the ends next the rolls arranged to rise and fall in unison, while the rollers were arranged to be run in either direction, so that the plate could be passed in at one side under the metal roll, lifted up at the other side, and started back above the metal roll; this operation continuing until the plate was rolled down to the required thickness."

The learned judge of the court below gives the following description of the device of the "Wellman" patent:

"On either side of a stand of three-high rolls Wellman employs a table pivotally supported at its outer end on a stationary foundation. This construction, of course, leaves the inner end free to be raised or lowered to either roll pass. In the bed of the table are rollers adapted to be positively revolved and reversed when the inner end of the table was at either angle. The inner ends of the table are raised and lowered simultaneously by a hydraulic cylinder placed on one side of the rolls. The feed rollers are

actuated by a single reversible steam engine. Wellman adopts the general prior teaching of the art—viz., the indifference of the mere modes of power application to his rolling agents. Thus, in speaking of driving his reversible feed rollers, he says:—"This is accomplished by means of suitable lines of shafting, with gearings which are preferably driven by means of reversible engine F, but they may be driven by means of any suitable driving power." He also showed the application from a fixed point of positively propelling power to feed rollers adapted to feed at two different planes. But the important feature was the return to the use of the pivoted table which proved an essential element, in combination, in the subsequent advance in heavy rolling. The importance of the pivoted table is that by releasing the inner end of the table we are enabled to elevate the metal to an upper pass without raising either the whole bulk of the metal or the whole weight of the roller frame or table."

The "Wellman" tables did not travel laterally, a fact explained by the appellant's expert, Laureau, as follows:

"In the Wellman table which I saw in use, the material produced was plate steel, such as tank and boiler plate. In the production of such material, ingots or blooms of the proper size and weight are rolled down to their finished size in one stand of rolls only, and there is no necessity to transfer them from one stand to another. In fact the nature of the product itself is such that it must be finished as quickly as possible because as it becomes thin and spreads out, it radiates heat very fast, and it must be passed through the rolls as rapidly as possible."

Prior to the issue of the "Wellman" patent, to wit, September 27, 1881, the "Lewis" patent was issued. This patent describes a mill in which, on either side of several sets of "two-high" stands of rolls, tables, on which are feed rollers positively driven, are mounted on wheels running upon tracks, parallel with the axis of the rolls, and adapted to carry material to be rolled from one set of rolls to another, alongside thereof. "The feed rollers are actuated when opposite the roll pass by gearing in engagement with the main shaft which conveys power to the rolls." These roller tables were stationary, and therefore not adapted to raising the material to be rolled from a lower to a higher roll pass. The court below, in its opinion, admits that a complete mechanical rolling could be accomplished by the device of this patent.

Prior to this, the "Slade" patent of December 23, 1879, shows a "three-high" mill, equipped with a laterally moving and vertically lifting feeding mechanism, for the complete mechanical rolling of a heavy piece of metal. The feed roller table is here lifted bodily and horizontally. We think that appellant's counsel has pertinently asked, in his argument,

"How could invention have been involved in simply substituting the 'Sauvage' or 'Wellman' pivoted feed roller table for the horizontally movable feed roller table of the 'Slade' patent? Or, to put it in another form, to simply pivot the feed roller table of the 'Slade' patent at its outer end and apply lifting mechanism to its inner end, as Sauvage had done, and as Wellman had done?"

This brings us to the "Saylor" patent of June 30, 1885. In the device of that patent, there are feed tables equipped with positively driven feed rollers, which are raised and lowered vertically and horizontally. These tables are mounted upon carriages run upon tracks

parallel to the axis of the rolls, and are operated on both sides of the rolls. We have here the combination of a feed roller table raised and lowered vertically, and means of moving the same laterally, by which the metal to be rolled can be raised from lower to higher rolls in the same set, and moved laterally from one groove of the same rolls to another, or to another set or sets of rolls placed side by side with the first, and in the same relation to the line of lateral movement. Complete mechanical rolling is here accomplished by a combination not differing from that of the patent in suit, except that the feed roller table is lifted horizontally instead of being pivoted at its outer end with the inner end free and capable of being lifted. The "Saylor" mechanism differs from the "Slade," in that it employs positively driven feed rollers, precisely as those employed by Fritz and Wellman and by Brislin and Vinnac.

Mr. Laureau, appellant's expert, uses this language in regard to the "Saylor" patent, which is quoted without adverse criticism by the learned judge of the court below:

"The relations of the Saylor device to claims 1 and 2 of the Brislin and Vinnac patent is very close, and with the single exception that the Saylor tables are not pivoted at their outer ends, the claims alluded to are an exact description of the Saylor table. There is the same combination of rolls, carriages, roller frame, means for laterally shifting carriages and devices for allowing the roller frame to deliver metal to both upper and lower passes. \* \* \* The Saylor device is, therefore, substantially the same as the Brislin and Vinnac device."

This brief statement of the prior art makes clear that all the elements of the combination of the first claim of the patent in suit are old, except the specific means for laterally shifting the carriage and roller frame, and devices for inclining said roller frame on its pivot. The learned judge of the court below says:

"Conceding that all the elements of Brislin and Vinnac were in themselves old, yet it must be conceded that they were the first to take the separate individual elements of advance in the rolling art, and so combine them as to accomplish continuous, complete mechanical heavy rolling, and to make possible a new product—to wit, a machine rolled heavy beam."

We have already seen, however, that the conclusion of the learned judge is too sweeping, and that complete mechanical rolling had been admittedly accomplished by the methods of several patents prior to the patent in suit. The position of the appellees, as sustained by the court below, comes, then, to this, that the combination described in the first claim of the patent in suit, inasmuch as it provides for the lateral movement of a feed roller table pivoted at its outer end, involves such invention as to entitle it to the monopoly of a patent. It is this broad construction of the first claim of the patent in suit that we think cannot be sustained, in view of the prior art. The complainant below cannot claim all lateral movement of a feed roller table capable of vertical lifting, because more than one previous patent has described a device for accomplishing this result, and the court below has admitted that complete mechanical rolling has been accomplished thereby. But, as we have already said, it could hardly involve invention, to carry laterally a feed roller table capable of being lifted only at its inner end, and

pivoted at its outer end, instead of a table only capable of being raised horizontally. That the pivoted table, whether stationary or carried laterally, is a better contrivance and accomplishes better results in mechanical rolling, cannot alter our judgment in this respect. Both forms of a vertically lifted roller table were in use prior to the patent in suit. One of them had been mounted on a laterally moving carriage, to serve multiple rolls. To substitute the other on the moving carriage, was clearly not invention within the meaning of the patent law. It merely involved good judgment and ordinary mechanical experience.

If the court below were justified in placing upon the first claim of the patent in suit the broad construction which it did, and which we have just been considering, the device of the defendant below clearly infringed the same, since it exhibits the very feature of the combination set forth in the first claim of the patent in suit, upon which, thus broadly construed, invention is predicated, to wit, the lateral movement of a pivoted feed roller table,—discarding here for the moment any consideration of the question as to whether defendant's table is pivoted at the outer end, within the meaning of the first claim. Dissenting, however, as we do, from this broad construction of the patent in suit, and for the reasons above stated, we are compelled to consider the question of infringement, in view of a narrower scope to be given to the claim in question. The combination described in that claim, and as explained in the specifications to which it refers, if a patentable invention at all, is a specific unitary organization, to which the particular means described for laterally moving feed roller tables, pivoted at their outer end, and actuated synchronously on both sides of the rolls by power transmitted through or from the rolls themselves, is necessary. In other words, we do not think that the first claim covers all means and devices for laterally shifting the carriage and tilting the feed roller frame at its inner end. Limited as above stated, appellant's structure does not infringe the specific organization covered by the first claim of the patent in suit. The words "substantially as set forth," with which the claim concludes, cannot here be ignored, and the language of the Supreme Court is in this case especially applicable:—

"Where the claim immediately follows the description of the invention, it may be construed in connection with the explanation contained in the specification, and where it contains words referring back to the specification, it cannot properly be construed in any other way."

In appellant's mechanism, the carriages on the opposite sides of the rolls do not operate simultaneously through a set of connecting instrumentalities. There is no connection or combination whatsoever between the rolls and the carriage, and the feed roller frame pivoted thereon, neither of which are driven by power derived from the rolls. The means for laterally shifting the carriage and feed roller frame, and the devices for inclining the roller frame, are not the same as those of the patent in suit. In appellant's table, there was a separate steam engine located on each carriage, whereby the carriage was shifted laterally and the feed rolls driven, and a separate hydraulic cylinder on each carriage, by which the roller frames were inclined. There was no



connection through suitable shafting and gearing, as in the device of the patent in suit, between the rolls and the carriage, or the roller frame and feed rolls. Again, the claim of the patent in suit, as well as the description contained in the specifications, requires a feed roller table, pivoted at its outer end. Interpreted reasonably, this, of course, does not mean the very tip of the outer end, but the functional outer end for the purpose of pivoting. The appellant's feed roller table, however, is not pivoted at its outer end, but, as shown by the drawings exhibited to the court, at a point 22 feet 4 inches from the outer end of a table 57 feet 4 inches long; in other words, about two-fifths of its length from the outer end. The pivoting of appellant's table not far from its center, was clearly shown to have been for a useful purpose, and was not a mere evasion of the structure of the patent in suit. Much longer beams could be more easily rolled onto such a table, and better supported and handled while delivering them to the passes of the rolls. We do not, however, think it absolutely necessary to differentiate the pivoting of appellant's table from that of the patent in suit. The view here taken of the restrictions to be placed upon the broad interpretation given by the court below to the first claim of the patent in suit, finds support in the disclosures of the file wrapper. The correspondence between the attorneys for the patent and the examiner's office, resulted in limitations of the first claim, which we are justified in calling enforced. These limitations relate to the pivotal point of the roller frame, the means for laterally shifting the carriage, for the roller frame, and devices for inclining the roller frame on its pivot. The letter of the examiner, of March 20, 1886, required that these three things should be set forth, and in obedience to that requirement, they were set forth and incorporated in the claims. The broader claims of the first application were abandoned, and the claims finally adopted cannot be construed as coextensive therewith.

It is not contended, either by complainants' experts or in the opinion of the court below, that the means and devices of the first claim of the patent in suit are specifically found in appellant's mechanism. The decree of infringement is founded only on the basis of the broad construction given by the court below to the first claim, which is made to cover, in the language of the court, "the coupling of a pivoted table and a movable carriage." As we cannot sanction the giving of such a scope to this claim, there is no difficulty in declaring noninfringement of the first claim of the patent in suit, as restricted to the particular means and devices set forth in the specifications of the patent.

The decree of the court below must, therefore, for the reasons above stated, be reversed.

CUTLER-HAMMER MFG. CO. et al. v. HAMMER et al.  
(Circuit Court, N. D. Illinois, N. D. March 31, 1903.)

No. 24,965.

1. PATENTS—VALIDITY—EFFECT OF PRIOR DECISION.

The judgment of a court adjudging a patent void, while not conclusive on another court in the same circuit in a suit between different parties, is very persuasive, where the same matters are presented, and unless the reasoning fails to appeal to the judgment of the second court, in view of the new presentation of the case, such judgment should prevail.

2. SAME—INFRINGEMENT—ELECTRIC MOTORS

The Blades patent, No. 418,678, for an electric switch for motors, was not anticipated by the Walter patent, No. 373,034, the two devices being designed to accomplish different ends, nor by anything in the prior art, but discloses patentable novelty, and is valid. Claims 1 and 4 construed, and held infringed.

In Equity. Suit for infringement of letters patent No. 418,678, for an electric switch for motors, granted to Harry H. Blades January 7, 1890. On final hearing.

Jones & Addington (W. Clyde Jones and Keene H. Addington, of counsel), for complainants.

Parker & Carter (Donald M. Carter, of counsel), for defendants.

KOHLSAAT, District Judge. The bill herein was filed to restrain infringement of claims 1 and 4 of patent No. 418,678, which read as follows, viz.:

"(1) In a shunt-wound electric motor, the combination, with the field circuit, of a magnet in the said circuit, a hand switch adapted to open and close the armature circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and means for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field circuit, substantially as described."

"(4) In a shunt-wound electric motor, the combination, with the field circuit, of a magnet in said circuit, a hand switch adapted to open and close the armature circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and a spring for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field circuit, substantially as described."

Defendants assert several defenses: First, that the patent has been pronounced void in this circuit for want of patentable novelty; second, that pending the issuance of the patent the patentee made such changes in his application as to make the patent void; third, that the patent is void for want of patentable novelty—citing the following patents: Ways, 29,533; Pope, 126,486; Reed, 237,776; Brush, 224,511; Edison, 251,555; Weston, 264,979; Same, 264,980; Same, 301,027; Same, 301,028; Same, 264,983; Wightman & Lemp, 367,082; Same, 301,228; Edison, 251,541; Stevens, 316,076; Thompson, 335,547; Van Depeole, 347,903; Knight, 338,085; Mordey & Watson, 12,982 (British); Menges, 181,115 (French); Walter, 373,034; Baxter, 449,660; Whittingham, 396,791; Shepardson, 389,254; Stockwell, 292,382; Same, 326,603; Davis & Scott, 425,991; Rae, 437,662;

Same, 454,626; Freeman, 290,025; Clark, 404,602; Thomson, 302,963.

In the case of *Detroit Motor Co. v. Jenney Electric Motor Co.* (C. C.) 84 Fed. 180, relying mainly upon the Walter patent, No. 373,034, the court holds that the claims here in suit are void for want of patentable novelty. It is urged that the decision in that case is res adjudicata, and, failing that point, this court should, by way of comity, concur in that decision. In view of the difference of parties in the suit at bar and the former suit, I do not consider the claim of res adjudicata sustainable. As to comity, the judgment of another court upon the same subject-matter is of great weight, wherever the same matters are presented in substantially the same manner. As the authorities express it, "they are very persuasive." Unless, therefore, the reasoning of the court or the presentation of facts in such case fail to appeal to the judgment of the court, in view of the new presentation of the case, such judgment should prevail.

The Walter patent relates to a means for starting motors or generators from a distant point. It shows a self-starter, with a pulling magnet located in the shunt-field circuit, designed to attract the contact arm, operating in the armature circuit, from the so-called off position to the so-called on position, when energized, thus leaving the arm in the off position until the shunt-field circuit is fully energized. The tendency of the arm to move to the magnet precipitately when once the power of the magnet is felt is overcome by a plunger working in a dash pot as shown. The resistance is thus cut out automatically and gradually. When the shunt-field circuit is demagnetized, the arm is released by the magnet and then returned by hand to an off position. It shows no retracting device such as a spring. Manifestly it would require a much stronger magnet to draw the arm to the on position, if there were added to the load of the dead arm the resistance of a spring or other retracting device. Walter does not seem to have had in mind any method for stopping the motor, other than by hand. The Blades patent provides for a manual moving of the arm toward the on position, there to be retained by the magnet in the shunt-field circuit, and then to be returned automatically to the off position by a spring or similar device. The action of the motor in the armature circuit is greatly influenced by the condition of the shunt-field circuit. Thus the experts assert that an increase of speed beyond 10 per cent. by the insertion of resistance in the field circuit of a shunt motor renders the motor inoperative, unpractical, and uncommercial, and that the addition of a spring to the Walter self-starter would increase the speed of a shunt motor from 50 to 80 per cent. We are here dealing with the actual operation of electricity, and accept the fact without ascertaining the reasons. Now, if it be a fact that such is the case, and that the location in the field circuit of a magnet having sufficient size and energy, when magnetized, to draw a contact arm, retarded by a retracting device such as Blades', would seriously affect the vitality of the shunt-field circuit, so as to unduly quicken the action of the motor in the armature circuit, it must follow that Walter purposely omitted the addition of a spring to return the arm to an off position, and left that return to be made by hand. Such, in my judgment, from the testimony, is the fact.

The court, in the case of *Motor Co. v. Motor Co.*, above cited, holds that the mere addition of a spring to the Walter device, for the purpose of returning the arm to the off position, would not be invention; and in this I concur. But is that the only difference or advance accomplished by Blades? From what I have said, if it be a proper deduction from the evidence, it is evident that the addition of a spring to Walter's device would not have been practicable. It would have worked injury to the motor in the armature circuit, and would not have been commercial. The two devices are for radically different ends. Walter had in view the moving of the contact arm to the on position, and Blades had in mind the automatical moving thereof to the off position. The reverse movement of the arm is accomplished in each case by hand. Considering, therefore, the difference in operation and purpose of the two devices, together with their relation to the shunt-field circuit, and the advantages growing out of the location of the magnet in the shunt field, I am of the opinion that the Walter patent does not anticipate the Blades patent in many of its essential features. None of the other patents cited in said cause cover the principle of Blades' patent, requiring the location of the magnet controlling the contact arm within the shunt-field circuit, with the automatic retracting device and the ends thereby secured. It therefore follows that the court should examine into the merits of the patent in suit, provided there was no such change in the application therefor, pending said application, as to make its issue void. I am unable to see that any such vital change was so made as to justify defendants' contention in that regard, and will therefore proceed to the merits of the case.

The rheostat and the contact arm are old in the art. Owing to the innumerable causes of accident which beset the economical and careful management of the electrical current for power purposes, the prior art teems with devices designed to provide for and anticipate the same. A mere consideration of the prior art may well lead me to doubt if there is any merit in complainants' contention that the patent in suit is a pioneer patent. It is insisted that by applying the retaining magnet to the starting box, and connecting the same in the shunt-field circuit of a shunt-wound motor, Blades overcame the following dangers to which the shunt motor was subjected, viz.: (1) The accidental opening of the field circuit; (2) the leaving of the contact arm of the starting box in an intermediate position; (3) the re-establishment of the current supply at a time when the starting resistance is removed from the armature circuit.

Formerly it was deemed important that the motors should be so wound as to create a high resistance. This was necessarily followed by various controlling devices. Then low-resistance armatures were found to be practicable. To properly regulate the flow of electricity in these starting boxes, resistance coils are provided, making a gradual letting on of the current in the armature circuit. It was found that for one cause and another there should be some device for the regulation of the current in case of a cessation of the same and a quick re-establishment thereof, and similar dangers. The Shepardson patent, 389,254, covers a device for the regulation of the current by

automatically opening the same at the main switch. This device places the attracting magnet in series on the motor circuit. The switch is adapted to be closed by hand. The closing of the circuit to the motor causes the current to flow through the magnet, which becomes thus energized to attract the switch arm, when at the on position, and hold it in the closed position. When the magnet is de-energized, it releases the arm, which is then returned to the off position by a retractile spring. It is claimed that the device does not provide against the dangers due to the leaving the contact arm on an intermediate segment. The patentee, at line 75, after describing the operation of the switch, uses the language, "thus breaking the original circuit by removing," etc.; and at line 81, "if the lever, G, is pushed down before the current is restored, it will remain down unless held positively in place." This is repeated at line 33. While no reference is made to a starting box, or rheostat, of the motor, yet I am of the opinion that the result is the same, and that the Shepardson patent does provide against the danger last named.

In the various patents cited in the prior art, the mechanical arrangement of a magnet so as to hold the contact arm when on the on position is anticipated. So, also, is the retractile spring, restoring the arm, when released by the magnet, to the off position. The only advance upon the prior art made by Blades was the location of the device in the shunt-field circuit in such a manner as to provide automatically against accidents in that circuit, and the alleged advantage gained by a slightly retarded release of the contact arm, by reason of the alleged fact that the shunt-field circuit does not respond as promptly to an opening of the main circuit as does the armature circuit. As to this last result, if it is attained, there remains in the mind of the court so much doubt as to utility and desirability that it cannot have any controlling weight in the disposition of the case at bar.

This narrows the inquiry to the locating of the magnet and spring within the shunt-motor circuit to control the arm which contacts with the resistance plates located in the armature or motor circuits in such a manner as to provide automatically against accidents to the field circuit. Blades has taken the shunt motor, the starting box operated by hand, the electro-magnet, and the retractile spring, all old, combined these into a structure, by associating the retaining magnet with a manual starting box and placing the magnet in the shunt-field circuit in such a manner as to produce for the first time an effective and operative result, which seems to automatically overcome the dangers incident to accidents in the shunt-field circuit. Both the combination and result were new. The end attained was most desirable. It has gone into extensive use in a modified form, and defendants have found it to their advantage to use it. The court is of the opinion that it amounted to patentable novelty, and that the patent in suit is valid. *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 49 C. C. A. 409; *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 890, 53 C. C. A. 36.

The infringement is conceded. Complainants are entitled to a decree for an injunction in accordance with the foregoing. Counsel may prepare the same and present it to the court.

## HALLOCK et al. v. BABCOCK MFG. CO.

(Circuit Court, N. D. New York. July 16, 1903.)

## 1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement will not be granted when defendant is responsible, and a substantial doubt of his infringement exists, or where the complainant's right is doubtful.

## 2. SAME—DEFENSES—IRREGULARITIES IN APPLICATION.

Irregularities in the signing of the drawings filed with the application for a patent, or in witnessing the signatures, where they did not operate as a fraud on the commissioner who considered the application and issued the patent on the merits, cannot avail to defeat a suit for its infringement.

## 3. SAME—INFRINGEMENT—WEEDERS.

The Hallock patent, No. 600,782, for a weeder, claims 1 and 3, held valid and infringed on a motion for a preliminary injunction.

In Equity. This is a motion for an injunction pendente lite restraining the defendant, the Babcock Manufacturing Company, as prayed for in the bill of complaint, from the further infringement of claims 1 and 3 of letters patent No. 600,782, issued on the 15th day of March, 1898, to the complainants herein for an improvement in weeders.

Kerr, Page & Cooper and Marcellus Bailey, for complainants.  
Howard P. Denison, for defendant.

RAY, District Judge. The papers in the case are quite voluminous, and the court has examined the bill of complaint, affidavits, etc., with considerable care. It is not now called upon to pass on the merits of the case finally, as that will be its duty when the cause is finally submitted. This court has heretofore said, in substance, that an interlocutory injunction against the infringement of a patent will not be granted unless the complainants' title and defendant's infringement are either admitted or so clear that the court can entertain but little doubt in the matter. When the defendant is responsible, and a substantial doubt exists whether the defendant is guilty of infringement, or where the complainants' right is doubtful, then an injunction pendente lite will not be granted.

In this case as it now stands there can be no question that the defendant is guilty of infringing the complainants' patent. The defendant's weeder is the same in all respects as the complainants' weeder, with the single exception that the tooth dragging in the earth is round in the complainants' device, while it is made somewhat angular in the defendant's device.

The defendant claims anticipation, and that the complainants' weeder is old. The defendant has put in evidence before the court a farm implement commonly known as a harrow. In that device, in place of the tooth that drags in the earth in complainants' weeder, there was a shoe or small plow attached, and it does not appear that any person ever entertained the thought of removing the tooth or plow, and, with certain other changes and transformations, using that instrument as a weeder. The validity of the complainants' patent has been

¶ 1. See Patents, vol. 38, Cent. Dig. § 495.

more than once adjudicated in his favor, and there has been long acquiescence in its validity.

No useful purpose can be served at this time by reciting the evidence. On the evidence presented this court is satisfied that the complainants' patent is valid, and that the defendant has infringed and is infringing.

The main contention of the defendant is that the complainants' patent is invalid because the application upon which the patent issued was not executed in accordance with the statute. The defendant has filed a plea denying that the letters patent in suit were signed, sealed, and delivered in due form of law, and alleging that the drawings were not signed by the inventors and their attorney in fact, and attested by two witnesses, in compliance with the statute, but that the names of the inventors and the attorney's name were signed by one Ewell A. Dick, who, as a subscribing witness, attested his own signature where he signed the name of the attorney in fact of the inventors; and says the plea, after reciting these facts, "whereby it was falsely and fraudulently represented to the Commissioner of Patents that said drawings were duly signed by the attorney in fact and attested by two witnesses, all in violation of section 4889 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3383]." That section provides, in substance, that, when the nature of the case admits of drawings, the applicant shall furnish one copy, signed by the inventor or his attorney in fact, and attested by two witnesses, and a copy of the drawings to be furnished by the Patent Office shall be attached to the patent as a part of the specifications. In this case we find the drawings signed, "Daniel Y. Hallock, Daniel E. Hallock, by Marcellus Bailey, Attorney," and as witnesses, "L. C. Hills" and "Ewell A. Dick." It is claimed that Dick first signed the names Hallock and the name Bailey, and that he then signed as a witness. There is no proof that this was done fraudulently or with intent to deceive, nor is there any proof that Dick had no authority to sign these names if he did. The presumption is that he had authority to do all that he did do, and if after signing the names of the inventors by authority, and the name of the attorney in fact by like authority, he signed as a witness to such signatures, it raises a question of regularity and of the sufficiency of the witnessing of the document. There is no claim that the Commissioner of Patents was misled on the merits, or that the patentability of the complainants' device is in any way affected by this failure to properly witness the signature to the drawings, even if it be conceded that they are not properly witnessed.

In *Railway Register Mfg. Co. v. North Hudson C. R. Co.* (C. C.) 23 Fed. 593, new specifications and claims filed in the application on which the patent in suit was granted were not signed by the applicant or attested by any witnesses, and it was claimed that for this failure the patent was invalid. The court said:

"I do not find any irregularity in the method of procedure which authorizes me to declare the patent void. There is a long list of cases holding that patents cannot be invalidated by proving that the requirements of the statute to be observed by the commissioner in order to their issue have not been regarded."

If the signatures to these drawings in the case now before the court were not made by a person authorized to sign them, or if the signatures were made with authority and they were not properly witnessed, such failures would have authorized the commissioner to reject the application. But no such question was raised, and the commissioner acted on the merits of the application, and issued the patent on the merits of the invention, and not on the strength of the signatures to the drawings or the sufficiency of the witnessing. This court holds that such irregularities in the signing of the drawings, conceding them to exist, are not a defense to this action. Should an action be brought to set aside the patent, a different question would be presented.

In *Child v. Adams*, 1 Fish. Pat. Cas. 189 [Fed. Cas. No. 2,673], the patent was held null because of the false oath of an alien patentee as to his citizenship whereby he avoided the payment of \$300 fee, and the putting and keeping on sale of his invention in the United States, both of which burdens were imposed upon the alien patentee by the then existing statute. That case arose under and was governed by the patent act of 1836 (5 Stat. 121, c. 357), which allowed the granting of letters patent to aliens only upon peculiar conditions to which citizens of the United States were not subject. By the stringent language of the act, the fee of \$300 was required to be paid by the applicant before the application for a patent could be considered by the commissioner. The patent was held null and void because it was procured by a fraud perpetrated upon the government of the United States.

In *Hoe v. Cottrell* (C. C.) 1 Fed. 597, it was insisted that the patent was invalid because of sundry omissions and irregularities during and prior to the transit of the application through the Patent Office, one of which was that there were no original drawings or model accompanying the description, as required by the statute. In that case the court, per Shipman, J., held, that all these alleged irregularities and omissions relate to the formal acts to be done by the inventor, preparatory to and connected with the issuing of the patent, and that the commissioner's decision upon the fact that the acts were done, and upon the fact of the compliance of the applicant with the requirements of the statute in regard to his application, was not reviewable collaterally. The judge said:

"For the purpose of this case the commissioner's decision is final that the drawings and the model required by the statute has been presented; that Durgin was the duly constituted attorney of the applicant or his assignee, and had authority to amend or alter the specification; and that the specification had been sufficiently sworn to by the inventor. If the patent is invalid by reason of any or all of these defects, its invalidity is to be determined in a proceeding to set aside the patent by scire facias, or by bill or information [citing *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Jackson v. Lawton*, 10 Johns. 23, 6 Am. Dec. 311]." Page 599, 1 Fed.

See, also, *U. S. Rifle & C. Co. v. Whitney Arms Co.*, 2 Ban. & A. 493, 497 [Fed. Cas. No. 16,793].

The requirement of the signatures to the drawings, like the other formal requirements referred to, is directory, and may not be dispensed with by the Patent Office, but does not substantially affect



the validity of the patent when granted, except that a direct action might be maintained to set aside and cancel the patent if such omissions perpetrated a fraud upon the government, and secured the issue of a patent which ought not to have been issued.

It appears to this court that the complainants have a valuable and patentable invention, and that the defendant is infringing the same knowingly and willfully, and that the complainants' patent is valid. The injunction asked for pendente lite is therefore granted.

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AQUARAMA CO. v. OLD MILL CO. et al.

(Circuit Court, E. D. New York. May 27, 1903.)

1. PATENTS—EXPIRATION WITH FOREIGN PATENT—IDENTITY OF INVENTION.

The Pickard patent, No. 448,072, for construction of pleasure canals or waterways, shows a canal which, while the same in principle, is not identical in structure with that shown in the prior British patent of 1888, No. 10,519, to the same inventor, but contains the additional feature that the longitudinal partition through the center is extended to the ends, dividing the canal throughout its entire length, while in the British patent an opening is left at each end, through which the water flows and the boats pass. Hence, as to such feature, which is an improvement of great value and utility, showing patentable invention, the United States patent did not expire with the British patent.

In Equity. Suit for infringement of letters patent No. 448,072 for construction of canals, granted to Arthur Pickard March 10, 1891. On motion to vacate temporary injunction.

Kenyon & Kenyon (William Houston Kenyon, of counsel), for complainant.

Edward Hymes, for defendants.

THOMAS, District Judge. Pending the final hearing an order enjoining the defendants from using the complainant's patented device has been granted. The present motion has no relation whatever either to the facts, law, or equities involved upon the hearing and granting of such order. The immediate inquiry is whether the patent has expired by reason of its dependence upon the British patent, which itself expired by limitation of time on July 20, 1902. The British patent was granted on July 20, 1888, and the United States patent on March 10, 1891, upon an application filed June 4, 1889. If the United States patent is identical with the British patent, it expired with the latter. The inventor, Arthur Pickard, obviously regarded the two patents as coincident in their general scope. In his application for the United States patent he describes himself as a subject of the Queen of Great Britain and Ireland, residing at Leeds, county of York, England, and in the specification he declares that he has "invented new and useful improvements in the construction of canals, for which patent has been granted me in Great Britain, dated 20th July, 1888 (No. 10,519), of which the following is a full and clear description." In the affirmation to the American application he states that "he verily believes himself to

[ 1. See Patents, vol. 38, Cent. Dig. § 188½.

be the original and first inventor of improvements in the construction of canals described and claimed in the foregoing specification; that the same has not been patented to him or to others, with his knowledge or consent, except in the following countries, Great Britain and Ireland, dated 20th July 1888, No. 10,519." At the head of the specification is the following:

"Arthur Pickard, of Leeds, England.

"Construction of Canals.

"Specification forming part of Letters Patent No. 448,072, dated March 10, 1891.

"Application filed June 4, 1889. Renewed February 11, 1891.

"Serial No. 381,028. (No model.) Patented in England July 20, 1888, No. 10,519."

The United States patent states:

"The object of my invention is to construct canals or water courses of a direct or circuitous description, and to provide means for imparting a current to the water for moving boats or other vehicles."

The British patent states:

"The object of my invention is to construct canals so as to produce a stream in both directions, either artificially or otherwise, whereby boats of ordinary description can be made to move in either direction without the aid of horses or locomotives on the banks of such canal, or without the employment of steam engines on the vessel."

Four figures are shown in the United States patent and three in the British patent. In each specification it is stated that "Fig. 1 shows a plan looking at the top of canal." The United States specification states as follows:

"In the drawings I have shown a canal or water course which is either straight, as shown at A, divided longitudinally by a wall partition or mid-feather, B, or continued, as shown at C, to any required distance in a circuitous or ornamental meandering form. In order to create a current in either direction or throughout the length of such canal or water course, I employ a propeller, D, paddle wheel, pump, or other mechanical means, whereby the water is drawn from one side, E, to the other side, F, and passed round in a current throughout the whole length of the canal, as shown by arrows, the same water being passed round or made to travel in a current as often as required. The movement of the current may be reversed at pleasure by reversing the motion of the propeller, D, or other motor. The boat or other vehicle is placed in the water, say at G. The current then being produced, it floats along with the stream until it arrives at H. It is then conducted through lock, J, and round again to the starting point, G. Other means may, when preferred, be employed for transferring the boats or other vehicles from one side, H, to the other side, G. The rotary movement is imparted to the propeller, D, or other motor from any convenient source."

The British patent contains the following description:

"A represents the canal between locks B and C. In canals of ordinary construction the water is generally level so that no perceptible current takes place. Now, in my improvements, in order to produce currents in both directions, I divide the canal longitudinally into two equal parts by means of a wall, partition, or mid-feather, D, constructed down or along the center to a suitable distance from the locks at each end as shown, and, in order to produce the required current, I provide any required number of paddle wheels, E, at one or both ends, or any suitable position in the length of the wall or mid-feather, D. These paddle wheels, E, may be caused to revolve by being connected through suitable shafting, F, and gearing, H, to some suitable motor.

By this arrangement of paddle wheels the stream is caused to flow in two directions, as shown by arrows, and by such stream the boats are moved in such directions and separated from each other by the mid-feather or wall, D, as shown in Fig. 2. On the wall or mid-feather, D, guide rails, J, may be provided into which runners, K, attached to the boats may be passed, and by this arrangement the necessity of steering is avoided. Instead of producing the stream of water artificially as above described when the supply of water is large from natural sources, the mid-feather or wall, D, may be continued up to the lock gates at one end, so that the connection at that end is stopped, and, the stream of water being let in at one side of the wall or mid-feather, D, passes along that side and round the other or open end, and continues its course down the opposite side discharging itself through a sluice or other opening at the other side of the mid-feather or wall, but at the same end as the water had previously been admitted."

Fig. 3 of the United States patent is identical with Fig. 2 of the British patent, and Fig. 4 of the United States patent is similar to Fig. 3 thereof, except that it shows a transverse section through one leg of the canal. Fig. 2 of the United States patent shows a propeller whereby the water is drawn from one side of the canal to the other for the purpose of creating the current. Fig. 3 of the British patent shows paddle wheels used to produce the current. The United States patent, Fig. 2, shows the propeller wheel reaching nearer the bottom of the canal, and thereby made more efficient, but there is no reference to this in the specification. It also shows a housing of the propeller. It is alleged that the paddle wheels shown in the British patent would be inefficient on account of their slight submergence, and the absence of such housing. That is a mere matter of degree. The general plan is precisely the same. In one case the adaptation is better than in the other. Although there is some change in the language, the United States specification shows no enlargement of conception. This statement should be modified in this regard: that Fig. 1 of the British patent shows the canal open at both ends. Fig. 1 of the United States patent shows the canal continuous at one end and closed at the other. All other distinctions attempted to be pointed out by the complainant appear strained, and without foundation. The general scheme is the same in each patent, and the practical illustration, except in degree and efficiency of appliances, is the same in each, save in the one regard that in the United States patent the canal is throughout its whole length, "divided longitudinally by a wall partition or mid-feather, B, or continued, as shown at c, to any required distance in a circuitous or ornamental meandering form." That is, to the extent that the canal is direct, it is divided longitudinally by the partition, and so far as it is extended in a circuitous form the space intervening between the two branches takes the place of, and becomes, the partition or mid-feather. The diagram Fig. 1 shows this, and, in addition to the words above quoted from the specification, illustrating that the canal is to be divided through its whole length, there are directions for conducting the boat after it has made its circuit through one lock, J, and around the mid-wall to and through the other lock, J, for the purpose of bringing it again into its first position. If the wall did not intervene and close the entire space to the lock, this would be unnecessary. Moreover, the third and fourth claims explicitly provide for such arrangement, and are as follows:

"(3) A continuous canal or water course divided longitudinally by a wall partition or mid-feather, and provided with a propeller wheel for forcing the water from one side of said canal into the other side, whereby a continuous current is established, substantially as set forth.

"(4) A continuous canal or water course divided longitudinally by a wall partition or mid-feather, and provided with a propeller wheel for forcing the water from one side of said canal into the other side, whereby a continuous current is established, and lock, J, for transferring boats from one side of the canal to the other, as set forth."

It is not a partial longitudinal wall, but one occupying the entire length of the canal. In the British patent it is painstakingly shown that there is an opening at each end of the partition wall, so that the current may pass from one side to the other uninterruptedly, and the specification states that:

"By this arrangement of paddle wheels the stream is caused to flow in two directions as shown by arrows, and by such stream the boats are moved in such directions and separated from each other by the mid-feather or wall, D, as shown in Fig. 2."

Here is a fair statement that the arrows illustrate the course of the stream around the ends of the mid-feather, and that the boats follow the stream; hence the arrows illustrate the course of the boats. But, aside from this, in exact terms the inventor in the British patent states that the partition is constructed "to a suitable distance from the locks at each end as shown." Moreover, he says:

"Instead of producing the stream of water artificially, as above described, when the supply of water is large from natural sources, the mid-feather or wall, D, may be continued up to the lock gates at one end so that the connection at that end is stopped, and the stream of water, being let in at one side of the wall or mid-feather, D, passes along that side and round the other or open end, and continues its course down the opposite side, discharging itself through a sluice or other opening at the other side of the mid-feather or wall at the same end as the water had previously been admitted."

Thus the inventor's conception was that, if the water were to be supplied from natural sources, the mid-wall should be continued to the lock on one side, "so that the connection at that end is stopped," whereupon the water is carried around the other end of the mid-wall, and brought back, and allowed to escape through a sluice at the end from which it started. But this arrangement was not to exist where provision was made for propelling or pumping water from one side of the mid-wall to its other side. Where the water was let in from natural sources, the intention was to close the gap, send the water around one side, and send it out the other side; and the gap was closed so that it would be so discharged, and not go around the near end of the mid-wall. Where the water in the canal was to be pumped or propelled from one side to the other, the evident intention in the British patent was to leave the space open. In the United States patent the obvious purpose was to close the space. Everything shows that the space was to be kept open in the British patent and to be closed in the United States patent. The broad conception of the canal was the same in both, but the devices for making it operative were more effectual in the United States than in the British patent, and the provision for closing the gap is a distinguishing feature of the United States patent. It is quite improbable that the arrangement in the

British patent for carrying the water from one side of the mid-wall to the other would be operative. That the United States patent is operative is undoubted. Therefore, while broadly the British and the United States patents are the same, the provision in the United States patent for closing the gap between the end of the wall and the lock is new, and is specifically provided for in claims 3 and 4. It is novel, unless it may be said to have been anticipated by the provision in the British patent for closing the space "when the supply of water is large from natural sources." But the fact that the inventor did not conceive of closing it, where he propelled or pumped the water from one side of the canal to the other, and obviously did not intend to do so, leads to the conclusion that this improvement had not then occurred to him, and that he did not perceive its necessity or utility until after the British letters were issued. The new conception is so valuable, and apparently so indispensable to the proper operation of the canal, that it must be concluded that it shows patentable invention. Hence the defendants cannot be permitted to operate a canal which can be closed in such a way as to come within the terms of claims 2 or 3. In other words, the defendants cannot close the gap between the end of the mid-wall and locks, as above discussed, and as shown in the British patent.

The motion to vacate the injunction is denied as regards the use of a canal whose mid-wall is extended to the lock.

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AQUARAMA CO. v. OLD MILL CO. et al.

(Circuit Court, E. D. New York. July 18, 1903.)

1. PATENTS—INFRINGEMENT—PLEASURE CANALS.

In order to avoid infringement of the Pickard patent, No. 448,072, for the construction of canals, by following the expired English patent to the same inventor, there must be an opening at the end of the mid-wall sufficiently wide to permit the free flow of the water from one side of the canal to the other.

In Equity. Suit for infringement of letters patent No. 448,072 for construction of canals, granted to Arthur Pickard March 10, 1891.

Kenyon & Kenyon, for complainant.

Edward Hymes, for defendants.

THOMAS, District Judge. The change made by the defendants with reference to the mid-wall of their canal is not substantial. Six inches of the mid-wall longitudinally have been removed, and, as understood, the water passing through the opening is 8 inches deep near the upper end and 4 inches deep near the lower end, while the canal itself is 51 inches wide, and the water there is some 12 inches deep. The flow of water around the end of the wall nearest the lock is still practically uninterrupted. The English specification states:

"By this arrangement of paddle wheels the stream is caused to flow in two directions as shown by arrows, and by such stream the boats are moved in such directions and separated from each other by the mid-feather or wall, D,

as shown at Fig. 12. \* \* \* Instead of producing the stream of water artificially, as above described, when the supply of water is large from natural sources, the mid-feather or wall, D, may be continued up to the lock gates at one end, so that the connection at that end is stopped, and the stream of water being let in at one side of the wall or mid-feather, D, passes along that side and round the other or open end, and continues its course down the opposite side, discharging itself through a sluice or other opening at the other side of the mid-feather or wall, but at the same end as the water had previously been admitted."

The English patent shows an artificial stream, enabled to flow around the ends of the wall. This free flow the defendants interrupt. It seems also that the English inventor intended that the boat might follow the stream, although the figure does not show a space at the end of the wall equal to the usual width of the canal. In any case, there is not at present a free flow around the defendants' mid-wall. There may be doubt whether the space should be sufficiently wide to allow the passage of a boat, but it should be sufficiently wide not to interrupt practically the water as it sets back. How wide or narrow the opening may be or should be may admit of doubt, but it is now determined that a passage six inches wide, permitting a flow of water of the depth above described, is not sufficient to differentiate the defendants' canal from the complainant's invention.

It is appreciated that an injunction embodying the views here stated would prevent the defendants from using their canal during the present season, and that thereafter the defendants would be without redress, even though they should seek to review the present determination. In view of possible error in the present decision, it is thought that it would be just to permit the defendants to continue the operation of their canal, provided they enter into an absolutely satisfactory bond for making just payment for the use of complainant's invention during the present season, provided upon an appeal from the order to be entered hereon there should be an affirmation thereof. If the parties cannot agree upon such compensation, the court will determine it. Such an arrangement would give to the defendants the use of the canal during the season, if they are entitled to it, and would give the complainant compensation for the infringement of its patent, if it be entitled thereto.

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UNITED STATES CONSOLIDATED SEEDED RAISIN CO. v. PHOENIX  
RAISIN SEEDING & PACKING CO. et al.

(Circuit Court, N. D. California. August 3, 1903.)

No. 12,806.

1. PATENTS—INFRINGEMENT—JURISDICTION—OBJECTIONS—WAIVER.

Act Cong. March 3, 1897, c. 395, 29 Stat. 695 [U. S. Comp. St. 1901, pp. 588, 589], provides that in suits brought for the infringement of letters patent the circuit courts shall have jurisdiction in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular place of business. *Held* that, if defendant is not a resident of the district in which he is sued, he must both have a place of business and have infringed the patent in such district.

2. SAME—WAIVER.

Such provision with reference to the district in which the action shall be brought affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which is waived by defendant's appearance and failure to object to the jurisdiction before answer.

John H. Miller, for complainant.  
Wheaton & Kalloch, for respondents.

BEATTY, District Judge. While this is an action for the infringement of letters patent, the question of infringement is eliminated from discussion because of a ruling by the Circuit Court of Appeals of this circuit concerning the same patent in another case.

This action turns upon a question of jurisdiction, resulting from the act of Congress approved March 3, 1897 (29 Stat. 695, c. 395 [U. S. Comp. St. 1901, pp. 588, 589]), entitled "An act defining the jurisdiction of United States Circuit Courts in cases brought for the infringement of letters patent," which contains the following, among other provisions:

"That in suits brought for the infringement of letters patent the Circuit Courts \* \* \* shall have jurisdiction \* \* \* in the district of which the defendant is an inhabitant, or in any district in which the defendant \* \* \* shall have committed acts of infringement and have a regular and established place of business."

The design in the passage of this act, as well as its import, as worded, is so clear as to be without the range of doubt or discussion. It is simply that in patent cases the defendant must be sued in the district of his inhabitancy, or in that where he has infringed the patent and has a place of business. If he is sued in any other place, he may, by the proper procedure, have the action dismissed. But the turning question is whether he may waive his right of dismissal when sued in the wrong district, and permit the action to proceed to final judgment, or does this statute establish such an imperative rule of jurisdiction that no waiver can prevent the dismissal of the action, whenever it appears to the court that it was not commenced in the proper district? The complainant's contention is that a defendant may waive his right of forum, and that he does so when he fails, on his first appearance in the action, to make objection to the court's jurisdiction. It appears that the defendant herein not only entered a general appearance in the action, but filed several pleadings before raising the question of jurisdiction, which was first done in the answer.

We are all familiar with the act of 1887 (Act March 3, 1887, c. 373, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]) providing for the jurisdiction of Circuit Courts, and with the provision thereof which directs that "no civil action shall be brought before either of said courts against any person \* \* \* in any other district than that whereof he is an inhabitant." This statute is as imperative and as clear as that first above referred to. Its most apparent construction is that jurisdiction is limited to the district of defendant's residence. Considering

† 2. Waiver of right as to district in which suit may be brought see note to *Central R. & Banking Co. v. Farmers' Loan & Trust Co.*, 52 C. C. A. 152.

the context of the statute, as well as the fact that the courts have constantly construed the entire act as intended to restrict jurisdiction, it is somewhat surprising that it should be so construed as to permit litigants to select a place of trial for which the act, directly, at least, did not provide. But the Supreme Court, in construing this provision, has said that the "district in which the action shall be brought does not touch the general jurisdiction of the court, \* \* \* but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection." *Interior Construction Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401. Such being the construction of the act of 1887, why should not the same be applied to that of 1897? The phraseology of each is substantially the same. The first is that "no civil action shall be brought \* \* \* in any other district than that whereof he [defendant] is an inhabitant." The second is that in patent cases the "courts \* \* \* shall have jurisdiction \* \* \* in the district of which defendant is an inhabitant," etc. There is no difference, save that in one act it is directed that the action shall be brought in the district, and in the other it is declared that the courts shall have jurisdiction in the district. To make this difference a reason for a different construction would seem a mere subterfuge or a shield for the desire to change the construction. If under the first act it was simply a question of personal privilege to the defendant where he could be sued, I can see no reason why the same personal privilege should not be extended to him under the last act. It is said that this latter act was especially for the purpose of regulating the jurisdiction, as shown by the title. So, also, of the title to the first act. It is conceded that both acts were enacted for the purpose of regulating, and do regulate, such jurisdiction. But counsel for defendant insist that the courts have held, in effect, that under the act of 1897 the defendant cannot waive his right of forum, but that in all patent cases a suit can be maintained against him only in the district directed. I have examined all the cases cited by counsel. They hold that the act places the jurisdiction in the district where the defendant resides, or in that in which he has infringed and has his place of business, and that if he is sued in any other he may, by proper procedure, have the action dismissed. Undoubtedly such is correct, and it is precisely the same ruling that obtained under the former act. But in none of these cases is it clearly stated or decided that a defendant cannot or does not waive his right of dismissal by his failure to ask it at his first appearance, or by a general appearance. In most of them the proper steps for dismissal were taken upon first appearance. The case in 115 Fed. 634 (*Streat v. Rubber Co.*; C. C.) is an exception. There the parties proceeded to trial, and upon the close of complainant's testimony a motion to dismiss was made because it had not been shown both that the defendant had a place of business and had infringed in the district. It appears that he had not infringed in that district. He alleged that he had not infringed in that district or else-



where. It does not appear that he infringed anywhere, nor does it appear that there was any offer of testimony that he had infringed in any other district. The only question, so far as appears from the case, was whether infringement had occurred in that district. The case is certainly not a clear authority for defendants' position in this case. In 116 Fed. 641 (*Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co.*; C. C.) a motion for preliminary injunction was denied because the complaint failed to show the jurisdictional facts, while in 118 Fed. 852 (*Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Co.*; C. C.) a like motion was granted, it appearing that the court had jurisdiction. In all these cases the question of jurisdiction growing out of this act was more or less discussed, and possibly by a strained construction some support for defendants' position may be inferred from them. But I cannot conclude that they so directly either consider or decide the exact question we have here, namely, that the defendants waived their right by failing to timely object, as to deem them authorities thereon.

Several rulings were referred to by counsel which were oral, and therefore not before me. As counsel differed concerning their effect, they are passed.

After careful consideration, I do not think I would be justified in entertaining the views urged by defendants, but must hold that the ruling applied in 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, to the statute of 1887, must be followed in the construction of the statute under consideration. It is therefore held that, as to defendant Phoenix Raisin Seeding & Packing Company, this action cannot be dismissed, but it is dismissed as to defendant Gartenlaub, for the reason that it appears that in what he did he acted only as an officer of the defendant company.

The complainant is entitled to its judgment and decree against the defendant company.

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MERRIMAC MATTRESS MFG. CO. v. SCHLESINGER et al.

(Circuit Court, S. D. New York. July 24, 1903.)

No. 8,107.

1. PATENTS—INVENTION—COUCH-BEDS.

The Leighton patent, No. 667,916, for a couch-bed, is not void on its face for lack of patentable invention and novelty.

2. SAME—SUIT FOR INFRINGEMENT—TERMS FOR ANSWERING AFTER FRIVOLOUS DEMURRER.

Where defendant, in a suit for infringement, interposes a demurrer which is manifestly without merit, and apparently for the purpose of delay only, complainant's counsel residing at a distance from the court, he will be permitted to answer only on payment of the costs, and a further sum sufficient to reimburse complainant for the unnecessary expenses to which he was thereby subjected.

In Equity. This is a demurrer to the complaint, which complaint seeks to restrain the defendants from infringing letters patent No.

¶ 2. Pleading in patent infringement suits, see note to *Caldwell v. Powell*, C. C. A. 595.

667,916, for a couch-bed, dated February 12, 1901, and issued to Eugene R. Leighton, and thereafter assigned to the complainant, a corporation of the state of Massachusetts.

A. Parker Smith, for the demurrer.  
Milton E. Robinson, opposed.

RAY, District Judge. The verified bill of complaint in appropriate language alleges the incorporation of the complainant and its residence in the state of Massachusetts; the residence of the defendants in the city and state of New York; that Eugene R. Leighton was the original and first inventor of a certain and useful improvement in couch-beds, which had not been known or used by others in this country before his invention or discovery thereof, with all the other appropriate allegations showing that the alleged invention was patentable. The issuing of letters patent therefor, No. 667,916, dated February 12, 1901, is also alleged, and a copy of such letters patent is annexed to the complaint. The assignment of said invention and patent to the complainant is also alleged, as is the ownership thereof by complainant. Due and sufficient notice to the defendants of such letters patent are also alleged. The bill of complaint then alleges:

"That the said William Schlesinger and Siegfried Schlesinger, well knowing the premises, against the will of your orator, and in violation of your orator's rights, have jointly constructed, sold, and used, and are now constructing, selling, and using, in the borough of Manhattan, city of New York, in said Southern District of New York and elsewhere, without the license of your orator, and to its great damage and injury, couch-beds embodying the invention patented in and by said letters patent, and substantially the same in construction and operation as that set forth and claimed thereunder, and the exclusive right to make, use, and vend which is by law vested in your orator under and by virtue of said letters patent; all of which acts tend to the manifest injury of your orator in the premises."

The bill of complaint then alleges that, unless the defendants are restrained from further infringement, the complainant will suffer irreparable injury. The bill of complaint further alleges that the defendants have constructed, sold, and used large numbers of the infringing couch-beds, the full extent of which is unknown, but alleges that the complainant has sustained large damages. Then follows the usual prayers for relief.

The demurrer is based upon two grounds, as follows:

"(1) That it appears upon the face of said amended bill of complainant's letters patent No. 667,916, therein referred to, that said letters patent No. 667,916 are void in law for lack of patentable invention and novelty.

"(2) That it appears upon the face of said amended bill of complaint that the complainant hath not, by its said amended bill, made such case as entitled it in a court of equity to any discovery from these defendants, or to any relief against them, as to the matters contained in the said amended bill, or any of such matters."

The demurrer must be overruled as to the first ground, unless the court can find and say from common knowledge—information so general that the court can take judicial notice of it—that the combinations covered in the claims of the patent are without novelty.

This court has before it the bill of complaint, the patent, which is presumed to be valid, and the common knowledge pertaining to such

matters, which a person of ordinary intelligence is supposed or presumed to possess. The patent, with its specifications and its claims, eight in number, is set out in full, with full drawings, containing, at least, five different figures, profusely numbered and lettered. It takes considerable careful study to comprehend or understand the patent, and, having given such study, this court is of the opinion that the patent is valid, and discloses a new and a useful invention, and that there is no lack of novelty. It is only in exceptional cases, where the question is entirely free from doubt, that want of patentability may be adjudged upon a demurrer. *Chinnock v. Paterson, P. & S. Tel. Co.*, 50 C. C. A. 384, 112 Fed. 531.

Couch-beds are articles of great utility and common use, and this court is not disposed to treat the matter lightly because of the article to which the patent relates. Improvements in couch-beds are to be welcomed as gladly and treated as fairly as improvements in the most costly machinery. Clearly, the bill of complaint makes such a case, assuming its allegations to be true, as entitles the complainant to an account and payment of such damages as may be proved. The attention of this court has not been directed to any substantial defect in the pleading.

This court is of the opinion that the demurrer was interposed for purposes of delay. It cannot believe, and does not believe, that it was interposed in good faith. This action was brought and is pending in the Southern District of New York, where the solicitor for the defendants resides, while the solicitor for the complainant resides in the city of Utica, about 200 miles from the place of trial. The interposition of this groundless demurrer has not only delayed the trial of the action while the alleged infringement is continued, but has put the complainant's solicitor to considerable extra expense by way of labor, time, car fares, and hotel bills.

The demurrer is overruled, with costs. The defendants will be allowed to answer the bill of complaint only upon payment of such costs when taxed, and the sum of \$150 to cover such expenses before mentioned, to which the complainant has been unnecessarily put by the interposition of the demurrer. Such answer may be served on the rule day succeeding, and notice of the taxation of such costs, provided such costs and such sum above mentioned are paid.

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BOYD et al. v. SCHNEIDER et al.

(Circuit Court, N. D. Illinois, N. D. July 1, 1903.)

No. 26,198.

1. NATIONAL BANKS—SUIT AGAINST DIRECTORS—WHO MAY MAINTAIN.

The right to maintain a suit against the directors of an insolvent national bank under Rev. St. § 5239 [U. S. Comp. St. 1901, p. 3515], to recover for general distribution, as assets of the bank, sums alleged to have

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¶1. Personal liability of bank directors, see notes to *Robinson v. Hull*, 12 C. C. A. 680; *Warner v. Penoyer*, 33 C. C. A. 230.

See *Banks and Banking*, vol. 6, Cent. Dig. §§ 950, 953, 1093.

been lost to it through the negligence or mismanagement of its affairs by defendants, is one vested in the receiver for the benefit of both creditors and stockholders; and conceding that such suit may be maintained without a previous adjudication forfeiting the bank's charter under said section, and even that it may be brought by others than the receiver, acting under direction of the Comptroller of the Currency (which is doubtful), it cannot in any case be maintained by creditors alone, who have no interest in the fund sought to be recovered, beyond the amount of their claims, and no authority to represent the stockholders to whom the remaining interest belongs.

**In Equity.** On demurrer to bill.

Runnells & Burry and Pam, Calhoun & Glennon, for complainants.

J. A. & H. R. Baldwin, E. Allen Frost, J. B. Leake, Flower, Vroman & Musgrave, Willard & Evans, Wilson, Moore & McIlvaine, and John J. Herrick, for defendants.

KOHLSAAT, District Judge. This cause was brought here by removal from the superior court of Cook county, Ill. The bill was filed by certain creditors of the National Bank of Illinois, an insolvent corporation, to recover from the defendants funds alleged to have been lost through negligence on the part of the directors of the National Bank of Illinois in the management of said bank; asking that the amount of money so lost "may become an asset of said bank, and of the receivership thereof, and be distributed by said receiver according to law." The bill charges that, after exhausting the assets of the bank and the liability of the stockholders, there still will remain a large sum due to the various creditors, including complainants. To meet this deficiency, complainants pray that an account be taken of what has been lost of the assets of the bank through the negligence, carelessness, and misconduct of the directors, and each of them; that it may be ascertained for what amount each of them should be held responsible in the premises; and that, when ascertained, each of said directors be decreed to pay the amount so found to be due from him to E. A. Potter, receiver of said bank, to be by him distributed in accordance with law. The bill further charges that complainants have applied to the receiver to institute the suit, and that he has refused. The bill is somewhat uncertain upon the point as to whether it is filed to create a general fund, or a fund for certain creditors, in that it charges the directors with giving out and pretending to the complainants and others that they were properly performing their duties, and that the affairs of the bank were in good condition; but, all its allegations and the prayer thereof considered, it must be deemed a bill to recover from the directors a bank asset, and to create a fund, and the allegations of the bill which seem to indicate a contrary purpose should be treated as surplusage. The defendants have filed general and special demurrers to the bill, claiming want of equity, and, in substance, that the bill is multifarious; that the right of action, if any, is in the receiver, and that complainants, being simple creditors, have no standing in such a case; that the bill is bad for want of certainty, and particularly that complainants fail to show interest in or injury by the acts complained of; that the right of action does not survive against executors or administrators.

of deceased directors; and that complainants have a complete and adequate remedy at law.

The demurrer must be sustained as to clauses 11, 12, and 14b of the bill, for the reason that said clauses are foreign to the general purport of the bill, and set up a different cause of action.

There are two points made by the demurrers which seem to me to call for consideration, as preliminary to all others raised, since they go to the rights of the complainants to maintain a suit against the defendant directors. The one is as to whether, under the banking act, a suit can be brought by any person other than the receiver, acting under the Comptroller of the Currency. The other is, conceding the right to bring suit without the direction of the Comptroller, whether creditors can maintain a suit like the one at bar against the directors to recover a corporate asset. Section 5239 of the banking act of the United States, tit. 62 [U. S. Comp. St. 1901, p. 3515], provides that:

"If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper Circuit, District or Territorial Court of the United States in a suit brought for that purpose by the Comptroller of the Currency in his own name before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders and any other person shall have sustained in consequence of such violation."

Considerable difference of opinion has arisen in the courts concerning the construction to be placed upon this section. Judge Shiras, of the Northern District of Iowa, has held in *Welles v. Graves* (C. C.) 41 Fed. 459, and *Gerner v. Thompson et al.* (C. C.) 74 Fed. 125, that, before suit can be brought by a receiver against directors to enforce their liability under this act, it must appear that a forfeiture of the charter of the bank has been adjudged in accordance with section 5239. To the same effect is *Bank v. Peters* (C. C.) 44 Fed. 13. While the case of *Hayden v. Thompson et al.*, 71 Fed. 60, 17 C. C. A. 592, and *Stephens v. Overstotz* (C. C.) 43 Fed. 771, hold the contrary. Thompson, in his *Commentary on Corporations* (volume 3, § 4303), speaks of the former construction as unsound. I am inclined to the opinion that such a proceeding by the Comptroller to declare a forfeiture is not a prerequisite to the bringing of a suit under section 5239. In the case of *Gerner v. Thompson*, just cited, Judge Shiras also holds that directors would be liable, independently of the statute, in an action of deceit. The case of *Hayden v. Thompson* states that the right to recover dividends wrongly paid out existed long before the act of Congress was passed. This doctrine is further sustained by the following authorities: *Richmond v. Irons*, 120 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

There can be no doubt, from a reading of the bill, that it is based upon the statute. It is a proceeding brought to recover losses of

the Illinois National Bank growing out of the wrongful acts of defendants, as directors, under section 5239 aforesaid. Can the liability and obligation imposed by the statute, being assets of the bank, be enforced by any one other than the receiver, except as in the act provided?

National banks are the creatures of the national legislature. So far as the act attempts to regulate them, it is supreme. It is not intended that they shall be created only to be launched as independent corporate entities, and thereafter be permitted to engage in general competitive commercial enterprises, subject only to certain general rules and limitations; but, owing to their relations to the moneyed and other interests which are reserved in and controlled by the government, they are kept under the strict regulation and watchful care of the government, and constitute a class of corporations entirely distinct from all others. It would seem that the powers given by the statute to the Comptroller are in their nature judicial. He can determine when a bank is insolvent. He alone is charged with the duty of enforcing compliance with the provisions of the law, subject only to the regulation of the Secretary of the Treasury. He must, through the receiver, take possession of all the bank's assets, collect and compromise debts, and sell the real estate. He alone can determine the need of and appoint a receiver. The receiver must pay the moneys collected by him to the Treasurer of the United States, subject to the order of the Comptroller. The Comptroller, through his receiver, is required to give notice to creditors to present claims, and make dividends from time to time. He is authorized to determine when it is necessary to institute proceedings against stockholders to enforce their stock liability. All these questions are referred to his judgment and his discretion. The receiver is the proper party to institute all suits. *National Ex. Bank v. Peters* (C. C.) 44 Fed. 13; *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304; *Stephens v. Overstotz* (C. C.) 43 Fed. 771; *Jackson v. U. S.*, 20 Ct. Cl. 305; *Bowes on Nat. Bk. Act*, § 425; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *U. S. v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Rushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43.

In *re Manufacturers' National Bank*, 5 Biss. 499, Fed. Cas. No. 9,051, was a proceeding instituted to throw the bank into bankruptcy. Judge Blodgett denied the petition upon the ground that the banking act was complete in itself. He held that the act furnished, "through the functions of an important public officer, the Comptroller of the Currency, a very complete and detailed scheme or plan for administering the affairs of an insolvent bank," and intimated that the sense of responsibility of the Comptroller would be sufficient to insure his action in all proper cases. Again he says, as to national banks, they constitute a class of corporations which have, as it seems, a bankrupt law of their own, ingrained into their own constitution, and a part of their organic law, by the same authority which enacted the bankrupt law.

In *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840, the court say:

"All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the Comptroller according to the act of Congress in such case made and provided."

Defendants claim that the status of such a receiver is analogous to that of an assignee or trustee in bankruptcy, a statutory assignee, or an administrator. In *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43, the court, referring to a suit brought by a creditor on refusal of the assignee in bankruptcy to sue, say the assignee is the only party designated by the bankrupt act as the proper claimant of the bankrupt's property and estate. It is further there held that, in framing the act, Congress intended to provide instrumentalities for its complete execution. The right of the creditor in such case to bring suit was denied. In *Plow Co. v. Bank*, 59 Kan. 38, 51 Pac. 892, the court denied the petition of a creditor to be allowed to bring suit upon the refusal of the assignee to sue. Indeed, it is almost axiomatic, and scarcely requires citation of authorities to support the proposition, that in case of bankruptcy, statutory assignments, administrators, executors, and similar officers, no one can sue except the party occupying the official position. *Brown v. Folsom*, 62 N. H. 527 (an assignee); *Mechanics' & Farmers' Bank*, 31 Conn. 63 (an assignee); *Jefferis' Appeal*, 33 Pa. 39 (an assignee); *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43.

In *Platt, Receiver, v. Beach*, 2 Ben. 303, Fed. Cas. No. 11,215, the court holds a national bank receiver to be an officer of the government which appoints him.

In *Price, Receiver, v. Abbott* (C. C.) 17 Fed. 506, Justice Gray said:

"By the statutes of the United States, the Secretary of the Treasury is the head of the Department of the Treasury, and the Comptroller is the chief officer of a bureau in that department. \* \* \* Being appointed, pursuant to an act of Congress, to execute duties prescribed by that act, he is, in the execution of those duties, an agent and officer of the United States."

In *Jackson v. U. S.*, 20 Ct. Cl. 305, Justice Davis says the intent of the statute is to throw the entire control of insolvent national banks into the hands of the Comptroller, to centralize power and responsibility, for the purpose of facilitating winding up the affairs of the association. Such, also, is the holding in *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304.

It is urged that the receiver, being appointed by the Comptroller, and not by a court, does not come within the rule above stated, and that to hold otherwise would be to invest the Comptroller with judicial powers. But does it require any greater judicial power on the part of the Comptroller to exercise complete control over his receiver than is involved in the appointment of a receiver? Has not the act clothed the Comptroller with powers which have always been deemed judicial? The power to appoint a receiver carries with it the power to remove him. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476. Would a court allow any person to bring a suit which

should be brought by its receiver? If the receiver failed to protect the assets of the estate committed to his care, he would be personally liable. Suppose a court should, upon investigation, determine that no cause of action existed, and refuse to permit its receiver to sue; could any person feeling aggrieved bring suit in his own name? If, on the other hand, a receiver refused to sue, the court might remove him, or, in a proper case, allow the party interested to sue in his name on giving proper indemnity. Are not the Comptroller and his receiver in a like position? The identical question here involved does not appear to have been adjudicated. It is true that federal courts have seemingly entertained suits brought by stockholders against directors to recover for negligent management of a national bank's affairs, as in *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782, and in many other cases, but in no case was the point raised that the suit should be brought by the receiver. The case last cited was brought in the state court, and went up on writ of error. It was based upon the common-law liability of the directors. Other cases turn upon facts different from those of the case at bar.

It would seem that the rights, duties, and powers of the receiver of a national bank could hardly be arrived at by analogy to those of any other receiver, but must be looked for in the act. If these creditors can maintain their suit, then others might institute proceedings to recover some other asset, and the liquidation proceedings might be unconscionably prolonged. Have the complainants not had the benefit of the statute, so far as the remedy here sought is concerned, when they have applied to the Comptroller, and he, on investigation, has decided that the suit should not be instituted? For these reasons, I should be inclined to hold that complainants cannot maintain their action herein, in the manner in which it has been instituted, but do not deem it necessary to dispose of the matter on that ground alone. These complainants seek to recover from the defendants the amounts lost through the defendants' wrongdoing—not simply the amount due the creditors, but the whole amount wrongfully dissipated. Damages sustained by the creditors alone would not belong to the receiver. *Thompson on Corporations*, § 4304. This proceeding must, then, be in the interest of the stockholders, as well as of depositors. The suit is by the creditors, as a class, to assert a right which, it is admitted, vested in the receiver, who could not bring suit for the creditors alone. The stockholders are not joined. They constitute another class. Complainants have no interest in the fund sought to be thus recovered, above the amount of their own claims. No recovery could be had beyond the amounts due the class bringing the suit. Complainants thus place themselves in the attitude of attempting to sue for two classes. The position of a stockholder would be different. He would be interested in the whole fund. Lord Cottingham said in *Mozley v. Alston*, 1 Phil. 790-798 et seq., that the relief which is prayed must be one in which the parties whom the plaintiff proposes to represent all have an interest identical with his own. 1 *Daniells*, Ch., side pages 240 and 241, and other cases cited. There are, however, many authorities which go to the extent of holding



that, in cases similar to the case at bar, creditors cannot maintain an action against directors for the creation of a fund. *Landis v. Sea Isle Co.*, 1 Am. & Eng. Corp. Cases, 208; s. c., on Appeal, 53 N. J. Eq. 654, 33 Atl. 964; *Deaderick v. Bank*, 100 Tenn. 457, 45 S. W. 786; *Bank v. Hill*, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Platt, etc., v. Beach*, 2 Ben. 203, Fed. Cas. No. 11,215; *Gerner v. Thompson* (C. C.) 74 Fed. 125; *Stanton v. Wilkeson*, 8 Ben. 357, Fed. Cas. No. 13,299; *Bank of Bethel v. Pahquogue Bank*, 14 Wall. 383, 20 L. Ed. 840; *Bank v. Peters* (C. C.) 44 Fed. 13; *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; *Landis v. Sea Isle Co.*, above cited.

Complainants lay much stress upon the claim that there exists between creditors and the trustees the relation of trustee and cestui que trust, citing among other cases that of *Hornor v. Henning et al.*, 93 U. S. 228, 23 L. Ed. 879. That suit was brought against the trustees of the Washington Savings Bank, organized under section 4 of the Act of Congress passed May 5, 1870, c. 80 (16 Stat. 102), which provides (bottom of page 105) that:

"If the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company."

The only point before the court was that the liability created by a violation of this clause of the statute constituted a claim inuring to the benefit of all creditors, and that an action at law could not be maintained thereon by one creditor among many, but that the remedy was in equity. This case might be in point were the case at bar based upon a liability to the creditors alone, but it has no bearing upon the issues here presented. There are cases which on casual examination seem to hold that the directors occupy some sort of a trust relation toward general creditors, but the language is loosely used, and evidently not intended to lay down the principle contended for by complainants. It may be fairly gathered from these decisions that all they intend to hold is that the relationship is similar to that of trustee and cestui que trust. If, however, the relation between the creditors and the directors is that of a trustee and cestui que trust, the right of action would not vest in the receiver, but in the creditors. It is not a bank asset, nor is it a general asset. The receiver, standing in the shoes of the bank, could not assert such a claim. It would be personal to the creditors. If, then, this suit is brought to recover an asset of the bank—and I am of the opinion that it is so brought—and the liability sought to be enforced grows out of a trust relation between the parties hereto, complainants have mistaken their remedy. I do not deem it necessary to pass upon the other ground of demurrer presented, at this time.

The demurrer is sustained.

## BOYER et al. v. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Missouri, E. D. August 17, 1903.)

No. 4,851.

## 1. MASTER AND SERVANT—RIGHT OF DISCHARGE.

In the absence of a contract for employment for a definite time, an employer has the right to discharge his employé without notice at any time.

## 2. SAME—CONSPIRACY TO DESTROY LABOR UNION.

As, in the absence of contract for employment for a definite period, the employer may discharge his employés at any time, for any reason, or for no reason, there can be no such thing as an unlawful conspiracy to destroy a labor union by discharging its members or refusing to employ them.

## 3. SAME—BILL FOR INJUNCTION—CONCLUSIONS OF LAW.

An allegation, in a bill by members of a labor union for an injunction, that defendant, its officers and agents, have unlawfully combined and confederated together to destroy the union, and by threats, intimidation, and coercion, and otherwise, are interfering with plaintiffs and with others of their employées for uniting with the union, and are seeking to prevent those discharged from obtaining employment, contains only conclusions of law.

## 4. SAME—BREACH OF CONTRACT OF EMPLOYMENT—EQUITABLE RELIEF.

The remedy for a discharge from employment is at law for breach of contract, and not in equity to enjoin the discharge.

## 6. SAME—RIGHT TO BLACKLIST.

An employer, having discharged employées for belonging to a labor union, has the right to keep a book containing their names and showing the reason of their discharge, and to invite inspection thereof by other employers, even though the latter, therefore, refuse to hire the discharged employées.

In Equity.

E. Douglas Andrews, for complainants.

Dickson, Smith & Dickson, for defendant.

ROGERS, District Judge. The plaintiffs named in the bill, for themselves and for others whom they describe as the "remaining members of Local Lodge No. 3, of St. Louis, of the Commercial Telegraphers' Union of America," filed this bill in equity and ask for an injunction. Its prayer is as follows:

"Forasmuch, therefore, as your orators have no adequate remedy in the premises except in equity, and to that end that the defendant, the Western Union Telegraph Company, may, if it can, show why your orators should not have the relief hereby prayed, and may, according to its best knowledge, information, and belief, be required to make full, true, direct, and satisfactory answer to the premises and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, but not under oath, the answer under oath being hereby expressly waived; that said defendant may be required to produce before the court on the hearing of this cause all papers, orders, and correspondence to and from said defendant and its officers and agents, or any of them, or either of them, to the other, or within their possession or control, or the possession or control of any of them, relating to any of the matters hereinbefore alleged, or leading up to the same, for 12 months last past, making full and explicit discovery and disclosure of all the matters aforesaid,

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 19.

according to the best and utmost of their knowledge, remembrance, and information and belief; that the hearing may be upon and touching matters of this bill of complaint alleged and charged; and that the said defendant, the Western Union Telegraph Company, its officers and agents, L. N. Boone, R. H. Bohle, and G. J. Frankel, individually and as representatives of said defendant, together with their representatives, clerks, agents, and all others who may be aiding and abetting them or either of them, may be restrained and prohibited by the order and injunction of this honorable court from discharging said employes without sufficient cause, and from in any manner coercing, persuading, inducing, or otherwise directly or indirectly preventing any of defendant's employes or other persons from joining and becoming members of said Commercial Telegraphers' Union of America, and from placing the names of your orators, or any of said persons belonging to Local Lodge No. 3 of the Commercial Telegraphers' Union of America, upon said blacklist, and from maintaining said blacklist, and from in any manner interfering, directly or indirectly, with your orators or either of them, or any of said other persons hereinbefore mentioned, from obtaining employment as telegraph operators in the city of St. Louis or elsewhere, and from ordering, coercing, persuading, inducing, or influencing, directly or indirectly, any of defendant's employes or other persons from becoming members of the Commercial Telegraphers' Union of America until the further order of this court, and that upon such final hearing of this cause said order and injunction may be made perpetual, and your orators may have such other and further relief in the premises as equity may require or may seem proper, and for costs."

A careful examination of the bill shows that the gist of it is this: That the defendant, having become aware that plaintiffs had become members of an organization known as the Commercial Telegraphers' Union of America, immediately discharged them, without notice or other cause; that "the defendant, its officers and agents, have unlawfully combined and confederated together to destroy the said union, and intend discharging all the members of said Union from the services of the defendant, \* \* \* and by threats, intimidation, and coercion, and otherwise, are interfering with your orators and with others of their employes for uniting with the Commercial Telegraphers' Union of America, and are seeking to prevent those discharged from obtaining employment as telegraph operators"; that defendant "has established and maintained what is commonly known as a 'blacklist.' It is a list of persons who have been in their employ and who have been discharged by the defendant, on which are placed from time to time the names of persons incurring the displeasure of the defendant company, and its officers and chief operators; and the defendant, by methods which are not fully known to your orators, and which cannot be fully set forth herein, prevents persons whose names are on said blacklist from again obtaining employment as telegraph operators; that your orators' names have been placed on said blacklist solely because they have become members of the Commercial Telegraphers' Union of America, and it is the intention of the defendant \* \* \* for the same reason to discharge from the employ and place upon said blacklist the names of several hundred other persons who are members of the Local Lodge No. 3 of the Commercial Telegraphers' Union of America, and thereby debar these your orators and said other persons \* \* \* from obtaining employment at their respective locations as telegraph operators," etc.

The first cause of complaint is that plaintiffs have been discharged without notice from the service of the defendant for no other cause

than that they joined that union. But the answer to that complaint is that in a free country like ours every employé, in the absence of contractual relations binding him to work for his employer a given length of time, has the legal right to quit the service of his employer without notice, and either with or without cause, at any time; and in the absence of such contractual relations any employer may legally discharge his employé, with or without notice, at any time.

The second ground for complaint is that defendant, its officers and agents, have unlawfully combined and confederated together to destroy the said union, and intend discharging all the members of said union from the service of the defendant, and by threats, intimidation, and coercion, and otherwise, are interfering with the plaintiffs and with others of their employés for uniting with the union, and are seeking to prevent those discharged from obtaining employment. I need not take time to multiply authorities to show that there is no such thing in law as a conspiracy to do a lawful thing. If the last allegation means anything, it is that the defendant, its officers and agents, have conspired to destroy the union by discharging all its members in its employ, and refusing to employ others, solely for the reason that they were members of the union. But it is not unlawful, in the absence of contractual relations to the contrary, to discharge them for that or any other reason, or for no reason at all. Hence there is no such thing in law as a conspiracy to do that, and it matters not whether you call such an agreement a conspiracy, a combination, or a confederation.

But it is said that the defendants "by threats of intimidation and coercion, and otherwise, so interfered with plaintiffs and others of its employés because they united with said union. But it does not appear what the threats were, what the intimidation was, or what the coercion was, of which they complain. Such an allegation is not one of fact; it is one of conclusion. What did defendant threaten to do? Perhaps it was to discharge them, or perhaps, if not employed by it already, to not employ them. But such a threat is not illegal. It is not illegal to threaten to do a lawful thing. It may be defendant threatened to employ nonunion men, instead of members of the union; but that, if true, is not illegal. Defendant had a perfect right to employ whom it pleased, if it could. How did defendant intimidate or coerce plaintiff? The complaint gives no answer. It will not be presumed that the threats, intimidation, or coercion complained of involved illegal acts. The law never presumes wrong, or crime, or illegality; it presumes always in favor of right and legal action. In the absence of any alleged wrongful act or threat, it would presume that defendant's interference was lawful and not unlawful. True, it is alleged that defendant, its officers and agents, unlawfully combined and confederated to destroy the union. But what is unlawful is a question of law; whether a thing done is unlawful depends on what is done or threatened to be done. But what the defendant company, its officers and agents, combined or confederated to do in order to destroy the union, is the precise thing the complaint fails to show. The court must always be able to look at the facts and say that if these facts are true they are illegal; otherwise there is no ground for invoking its protective agency.

But plaintiffs say defendant, its officers and agents, are seeking to prevent those discharged from obtaining employment as telegraphers. But how are they seeking to do so; what are they doing; are they doing acts that are unlawful? If so, what are they? The complaint gives no answer. There is no allegation in the complaint that there were any contractual relations between plaintiffs and the defendant company to retain plaintiffs in the service for any given period. But if there were, then it must be said that it was illegal to discharge them. Yet in that event equity can give no relief; the remedy is at law for a breach of contract, and each man injured must sue separately, and in his own right, for damages sustained. It would be intolerable if a man could be compelled by a court of equity to serve another against his will, or if a man could be compelled to retain in his employ one he does not want; courts of equity exercise no such power and grant no such relief.

But it is said that defendant maintains a blacklist containing a list of names of such persons as may have incurred its displeasure and have been discharged from its service, and that, by methods not known to them, it prevents such discharged persons from getting employment as telegraph operators; that they have blacklisted people solely because they belong to the union, and that they intend to blacklist others for the same thing, etc. We have seen it is not unlawful to discharge plaintiffs because they belong to the union. Is it unlawful for defendant to keep a book showing that they were discharged because they belonged to the union? The union presumably, and especially in view of the allegations in the bill, is an honorable, reputable, and useful organization, intended to better the conditions and elevate the character of its members. Is it illegal for defendant to keep a book showing that it had discharged members of such a union solely because they belong to it? That seems to be the real essence of the bill. Is it illegal to notify others that it keeps such a book and that they can inspect it, or to inform others what such a book shows? That seems to be the ground of complaint. There can be no question about it; the positive, direct, and unequivocal allegation is that defendant keeps such a book; that plaintiffs are placed on it solely because they belong to the union, and have been discharged solely because they did belong to the union. Can a court of equity grant relief to a man who says for his cause of action that he belongs to a reputable organization, and that he has been discharged solely because he did belong to it; that his employer who discharged him keeps a book on which is placed his name, and has set opposite thereto the fact that he discharged him solely because he belonged to such organization; and that he gives that information to other persons, who refuse to employ him on that account? Suppose a man should file a bill alleging that he belonged to the Honorable and Ancient Order of Freemasons, or to the Presbyterian Church, or to the Grand Army of the Republic; that his employer had discharged him solely on that account; that he had discharged others of his employés, and intended to discharge all of them, for the same reason; that he kept a book which contained all the names of such discharged persons, and set opposite the name of each discharged person the fact that he had

been discharged solely on the ground that he belonged to such organization; and that he had given such information to others, who refused to employ such persons on that account. Is it possible a court of equity could grant relief? If so, pray, on what ground? And yet that is a perfectly parallel case to this as made by the bill.

Those who may be interested in the questions raised by the demurrer to this bill will be entertained and instructed by reading the following cases, and especially the first: *Payne v. Western & Atlantic R. R. Co.*, 49 Am. Rep. 666; *Dinah Worthington et al. v. James Waring et al.*, 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. Rep. 294; *Hundley v. Louisville & Nashville Railway Co.*, 48 S. W. 429, 88 Am. St. Rep. 298; *Raymond v. Russell et al.*, 9 N. E. 544, 58 Am. Rep. 137; *McDonald v. Ill. Central R. R.*, 187 Ill. 529, 58 N. E. 463; *Wabash R. R. Co. v. Hannahan et al.* (C. C.) 121 Fed. 563.

These cases, and the cases cited in them, discuss and cover every principle involved in this bill, although, of course, the facts are different. I have not discussed the right of the plaintiffs to bring this suit for themselves and others. The bill is without equity as to the complainants named, and it is useless, therefore, to discuss their right, under the allegations of the bill, to represent other persons. It is enough to say that there is no apt authority cited, and none found, to sustain that right.

The demurrer is sustained from want of equity in the bill.

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#### BURDEN v. BURDEN et al.

(Circuit Court, N. D. New York. August 6, 1903.)

##### 1. EQUITY PLEADING—BILL—SCANDALOUS AND IMPERTINENT MATTER.

Matters alleged in a bill which are relevant to the issues tendered, in view of the other allegations, and which may be given in evidence thereunder, cannot be stricken out as scandalous and impertinent, where they are not stated in unnecessarily offensive language.

##### 2. SAME—RULE APPLIED.

In a bill by a stockholder against the corporation and its directors to enjoin the enforcement of a contract entered into by them by which, as alleged, the profits and earnings of the corporation were being fraudulently diverted from its stockholders and paid to one of their number as royalties for the use of a void and worthless patent, and to recover from such defendant sums paid him under the contract, which also alleged that he was practically insolvent, and asked that he be enjoined from transferring his stock in the corporation, further allegations that three others of the defendants, who were sons of such defendant, and with him constituted a majority of the directors, were corruptly influenced by him in their action as directors, that they had no business and were dependent on him for support, and were living in an expensive and extravagant manner at his cost, are of matters which are material, and may be proved in support of the other allegations of fraud and insolvency, and cannot be stricken out as scandalous and impertinent.

In Equity. Motion to strike from the bill of complaint on exceptions thereto, as scandalous and impertinent, the following:

"That the said sons of James A. Burden, respondents herein, are dependent entirely upon their father's bounty; that James A. Burden, Jr., is married

and has a family, and keeps up an expensive establishment, being a house in New York City, in the fashionable part of said city, and that the said Williams P. Burden and Arthur S. Burden also live expensively on their father's bounty, not being, as your orator is informed and believes, in any business or having any occupation. And, as your orator is informed and believes, the said Burden is practically insolvent, and has no means of repaying this sum or any sums to the Burden Iron Company; that the dividends coming to him from his holdings in the Burden Iron Company are not more than sufficient for the support of himself and his family, including his son James A. Burden, Jr., and his family, and the other two sons of the said Burden, all of whom live in extravagant and expensive style at James A. Burden's expense, having and maintaining at least two expensive residences in the city of New York and one or more country residences; and that, furthermore, your orator fears that, by the mere transfer or sale of the said Burden's shares of stock in the Burden Iron Company, the only dependence or reliance for the repayment of the said sums by the said Burden to the Burden Iron Company will be gone; and, in any event, the said shares of stock and the dividends derived therefrom are not more than sufficient, as your orator is informed, toward the maintenance of the said Burden and of the aforesaid persons dependent on him as aforesaid."

Robert L. Cutting (John R. Bennett, of counsel), for complainant.

Charles Neave (Austen G. Fox and William J. Roche, of counsel), for defendants.

RAY, District Judge. The bill of complaint charges, in brief, that the Burden Iron Company was organized June 30, 1881, for the purpose of taking over and conducting the business of the copartnership firm of Henry Burden & Sons, of which, at that time, the complainant, I. Townsend Burden, and the defendant James A. Burden, were the sole and equal copartners and owners. All the property of every name and nature belonging to said copartnership was duly transferred to the corporation, which became and still is the owner thereof. The complainant and the individual defendants herein, except Nicholas J. Gable, are stockholders in and directors of the corporation of which James A. Burden is the president, James A. Burden, Jr., is the vice president, John L. Arts is the general manager, and Nicholas J. Gable is the secretary. In and by the agreement pursuant to which said corporation was formed, it was agreed that I. Townsend Burden should take, own, and hold 998 shares, John L. Arts should take, own, and hold 2 shares, and said James A. Burden should take, own, and hold 1,000 shares, making in all 2,000 shares, which was the capital stock of the corporation. All the profits from the business of the corporation are to be divided equally between said James A. Burden and I. Townsend Burden. Said Arts is not to receive any dividend, income, or profit from the corporation, or its business, but in lieu thereof is to have and receive a salary to be fixed by the board of trustees of the corporation. The capital stock was \$2,000,000. The number of trustees was fixed at three, and James A. Burden, I. Townsend Burden, and John L. Arts were the original trustees. The two shares of the stock held by the said Arts were placed in his hands as owner to enable the company to be organized, three stockholders being necessary to the formation of such a corporation. At the present time James A. Burden is the owner and holder of 997 shares of the said stock, and the three sons of the said James A. Burden, the defendants

James A. Burden, Jr., Williams P. Burden, and Arthur S. Burden, each own one share, transferred to them on the books of the company without consideration by their father, said transfer having been made solely to qualify said sons as directors of the company, to the end that said James A. Burden might, through them, and by their votes as directors, control the corporation absolutely.

James A. Burden has at all times influenced, controlled, and dominated the board of trustees or directors of said company to such an extent that said board has acted and voted according to the will and under the direction and for the sole interests of the said James A. Burden, without regard to the interests of the corporation or of its stockholders as such, or of the complainant. By reason of this situation, said James A. Burden can either prevent action by the complainant or procure such action, and has procured such action as he desires. As showing this control of the corporation and of the directors, the bill of complaint charges:

"That the said sons of James A. Burden, respondents herein, are dependent entirely upon their father's bounty; that James A. Burden, Jr., is married and has a family, and keeps up an expensive establishment, being a house in New York City in a fashionable part of said city, and that the said Williams P. Burden and Arthur S. Burden also live expensively and on their father's bounty, not being, as your orator is informed and believes, in any business or having any occupation; that the said sons of James A. Burden are entirely under his dominion and control for the aforesaid and other reasons, and that they have voted, acted with, and conspired with their father in derogation of the rights and interests of the corporation and of your orator."

This quotation includes a part of the words excepted to by the defendants. The bill of complaint further charges that the board of trustees now consists of six members, including said James A. Burden and his said three sons. The bill of complaint then charges that more than five-sixths of the business of the Burden Iron Company consists in the manufacture and sale of horseshoes, and that said copartnership, subsequently the corporation, was and is the owner of machinery and improvements, covered by letters patent, for the manufacture of horseshoes, which passed from the copartnership to the corporation as owner, and which were used, operated, and enjoyed by it free from any cost or the payment of any royalty, down to and until the 5th day of January, 1898; that at that time the said James A. Burden set up the claim of ownership to certain of said letters patent, and through the means, mode, and manner of control aforesaid procured the board of trustees of the said corporation to make and authorize to be made, by its officers, a pretended contract between the said corporation and the said James A. Burden for the use by the corporation of certain mechanical devices, being alleged improvements on horseshoe machines, on which letters patent aforesaid had been issued; that the board of trustees went through the form of considering and thereupon fraudulently approved of and directed the secretary of the company to execute a contract with the said James A. Burden for the use of the devices covered by the said letters patent, and whereby it was agreed to pay said James A. Burden eight cents per keg for horseshoes manufactured by the use of said patented devices or any of them. The bill of complaint charges the mode and manner by which this



was done, and then alleges that under the said alleged contract there has been paid to the said James A. Burden more than \$152,000 of the money belonging to the corporation, which otherwise would have been available for distribution to the stockholders. The bill of complaint charges that the said payment was improvident, grossly excessive, unreasonable, and out of all proportions, even had it been proper to charge a royalty; that the use of these devices was injurious to the company, and that other devices of the same character, and just as good, or better, were open and free to the use of the public and of this corporation, and further charges, in substance, that the letters patent mentioned were and are void. The bill of complaint then charges that the letters patent referred to were taken out by the said James A. Burden to aid in the scheme of diverting the profits of the corporation to himself, and so secure to himself a larger proportion of the profits than he was entitled to. In short, the bill of complaint charges a fraudulent scheme to divert the profits and net earnings of the corporation from the stockholders entitled thereto to the pockets of said James A. Burden, and then charges a renewal of the said fraudulent scheme and contract by which a continued diversion of the profits and earnings of the corporation of the said James A. Burden is being carried on, and that the renewal and continuation of this alleged contract, and of this mode and manner of defrauding the complainant of his just share of the earnings of the corporation, has been procured and is being perpetuated by and through the control of the board of trustees or directors, exercised by the said James A. Burden. The bill of complaint then charges that irremediable injury will be done to the interests of the complainant if the sum or sums agreed to be paid under this fraudulent contract are paid to the said James A. Burden, and also charges that said James A. Burden ought to repay to the corporation the sum of \$150,000 already received by him through the fraudulent schemes aforesaid.

In support of these charges and allegations the bill of complaint then charges:

"And, as your orator is informed and believes, the said Burden is practically insolvent, and has no means to repay this sum or any sums to the Burden Iron Company; that the dividends coming to him from his holdings in the Burden Iron Company are not more than sufficient for the support of himself and his family, including his son James A. Burden, Jr., and his family, and the other two sons of the said Burden, all of whom live in extravagant and expensive style at James A. Burden's expense, having and maintaining at least two expensive residences in the city of New York and one or more country residences; and that, furthermore, your orator fears that by the mere transfer or sale of the said Burden's shares of stock in the Burden Iron Company the only dependence or reliance for the repayment of the said sums by the said Burden to the Burden Iron Company would be gone; and, in any event, the said shares of stock and the dividends derived therefrom are not more than sufficient, as your orator is informed, for the maintenance of the said Burden and of the aforesaid persons dependent upon him as aforesaid."

This is challenged by the exceptions as scandalous and impertinent.

The bill of complaint then says that James A. Burden is not and never was the inventor of any of the devices covered by the said patent, but that same were gotten up by the skilled workmen of the com-

pany, and that the expenses of experimenting and constructing said devices were paid by the company, and that said James A. Burden has caused the books of the company to be changed covering a period of nine years last past, so as to charge his personal account with such expenses. The bill of complaint charges that the suit is not collusive, and prays that the defendants be enjoined and restrained from paying to James A. Burden license fees, royalties, profits, income, or emoluments on account of said letters patent and devices, and that said James A. Burden be enjoined and restrained from receiving such license fees and royalties; that said letters patent be declared void; that James A. Burden has no exclusive right or ownership therein, and that the said company be declared the true and lawful owner thereof, or that the said company be decreed to have a perpetual shopright or license therein; that said James A. Burden make over said letters patent to the company, and that the resolution and contract of January 5, 1898, being a renewal above referred to, be declared fraudulent and void, and that said James A. Burden account for the moneys received by him thereunder, and repay the same to the company; that the defendants be removed from their offices as directors or trustees, and made to account for their management and disposition of the funds and property of the company, and in particular for the sums paid or authorized to be paid to the said James A. Burden.

If the allegations of the complaint, set forth with particularity, are true, the complainant has a good cause of action, and is entitled to some if not all the relief prayed for in the complaint.

It would seem clear that it will be competent to prove on a trial in support of these allegations that the sons of the defendant James A. Burden are and were directors or trustees of this corporation at the time mentioned in the bill of complaint; also that they as such directors were improperly and corruptly influenced and controlled by James A. Burden; and, if this be true, then the mode and manner and means by which they were so influenced to authorize, make, approve, and execute such fraudulent contract or agreement may be proved. If these things may be proved, they may and must be alleged. Hence, it will be perfectly proper and competent to prove that these sons, at the time of their action as directors, expected to be, and, since the making of the contract, have been, in the mode described, the recipients of at least a part of the proceeds of such illegal and fraudulent contract. It may also be alleged and proved that these sons of James A. Burden, in making and authorizing the contract, knew they were dependent on their father, and would receive a considerable part or some part of the net earnings of the company, to be illegally and fraudulently diverted from the complainant to the said James A. Burden. If these sons understood that they were to be compensated in this way for their fraudulent transactions as directors, and were induced to act fraudulently and corruptly by means of the fact that they were dependent on their father, and were willing so to act, and did so act in order to maintain an extravagant and expensive style of living, it is perfectly proper to allege such facts in the bill of complaint, and proof thereof will be competent on the trial. It is immaterial that their compensation for fraudulent conduct as directors was to come or that it does

come in this indirect manner. In substance and effect, the charge of the complaint is that these sons were and are living in an expensive and extravagant manner; that they have no means of their own; that they are dependent on James A. Burden, their father; that they knew these facts, and also knew their father had no means of his own to maintain them and the family of one of them in this style of living; that they were induced to make and did make and authorize this fraudulent contract and agreement for the purpose of diverting the net earnings and profits of the company from the stockholders, especially the complainant, to James A. Burden, and through him to themselves. It will also be competent to prove, and therefore it is proper to allege in the bill of complaint, that James A. Burden is in fact insolvent, and dissipates his own property as well as the moneys received under this fraudulent agreement in extravagant living, and in the support of his sons in the manner described, and as an indirect compensation for their fraudulent and corrupt action as directors of the company. This is especially true as bearing upon the question of injunctive relief.

It is claimed that the allegations of the bill of complaint excepted to are scandalous and impertinent. The court will be compelled to hear evidence bearing on all these subjects, and if the allegations are true, or witnesses will swear to their truth on the trial, it would be error for the court to refuse to admit the evidence. No crime is charged, and there is no reflection upon the moral character of the persons mentioned in the particular statements excepted to, except as necessary to charge the fraud complained of. Allegations in a bill of complaint may be impertinent without being scandalous. But here we have no digression from the material allegations of the complaint, and, if true, the statements excepted to are not only necessary allegations, but material to the matter in question.

For these reasons the exceptions cannot, under the authorities, be sustained. In 1 Daniell's Chancery Pl. & Pr. (6th Am. Ed.) \*347, \*348, \*349, it is said:

"Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous."

"There are many cases, however, in which the words in the record, though apparently very scandalous, are yet, if material to the matter in dispute, and tending to a discovery of the point in question, not considered as scandalous; for a man may be stated on the record to be guilty of a very notorious fraud, or a very scandalous action, as in the case of a brokerage bond, given before marriage, to draw in a poor woman to marry; or where a man falsely represents himself to have a great estate, when in fact he is a bankrupt; or where one man is personated for another; or in the case of a common cheat, gamester, or sharper about the town. In these, and many other instances, the allegations may appear to be very scandalous, and not fit to remain on the records of the court; and yet, perhaps, without having an answer to them, the party may lose his right. The court, therefore, always judges whether, though matter be *prima facie* scandalous, it is or is not of absolute necessity to state it; and if it materially tends to the point in question, and is become a necessary part of the cause, and material to the defense of either party, the court never looks upon this to be scandalous. Were it otherwise, it would be laying down a rule that all charges of fraud are scandalous, which would be dangerous. If, therefore, a bill is filed by a *cestui que trust* for the purpose

of removing a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, or to impute to him corrupt or improper motives, in the execution of the trust, or to allege that his conduct is the vindictive consequence of some act on the part of the cestui que trust, or of some change in his situation. In such case, however, it would be impertinent, and might be scandalous, to state any circumstance as evidence of general malice or personal hostility, without connecting such circumstance with the acts of the trustee which are complained of; because the fact of the trustee entertaining general malice or hostility against the plaintiff affords no necessary or legal inference that his conduct in any particular instance results from such motive."

"From what has been said before, it may be collected that, although nothing relevant can be scandalous, matter in a bill may be impertinent without being scandalous. Impertinences are described by Lord Chief Baron Gilbert to be 'where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question, as where a deed is unnecessarily set forth in hæc verba.'"

In *Wood v. Mann*, 1 Sumn. 506, Fed. Cas. No. 17,951, and 1 Sumn. 578, Fed. Cas. No. 17,951, it is held the best test to ascertain whether a matter be impertinent is to determine whether the subject of the allegation could be put in issue and would be matter proper to be given in evidence between the parties.

The allegations excepted to are not couched in unnecessarily offensive language. Whether these allegations be true or not is not now before the court. The question is, can the facts alleged and excepted to be given in evidence on the trial? This court is of the opinion that these facts may be proved in connection with the other facts alleged in the bill of complaint.

The effect of the evidence will depend quite largely upon the other evidence in the case. It may turn out from failure to prove other matters that these facts cannot be proved, but in the connection stated they are certainly neither scandalous nor impertinent. Nothing can be scandalous which is relevant. *Fisher v. Owen*, 8 Ch. Div. 645, 653; *Gleaves v. Morrow*, 2 Tenn. Ch. 592; *Goodrich v. Parker*, 1 Minn. 195. That which may have an effect on the question of costs is not scandalous or impertinent. *Desplaces v. Goris*, 1 Ed. Ch. 350.

An executor, called to an account, may say in his answer that some of the property is withheld from him under a forged deed possessed by the plaintiff, for his silence might prejudice him afterwards. *Jolly v. Carter*, 2 Ed. Ch. 209. See, also, *Sommers v. Torrey*, 5 Paige, 54, 28 Am. Dec. 411; *Rees v. Evans*, 1 Smith's Ch. Pr. (2d Am. Ed.) 567, note b. If the matter materially tends to sustain or establish the matter or point in issue, it is not scandalous. *Everett v. Prythergeh*, 12 Sim. 365, 367; *B. v. W.*, 31 Beav. 342; *A. v. B.*, 8 Jur. N. S. 1141; *Crocknall v. Jauson*, 11 Ch. D. 1. In case of doubt, the presumption is in favor of the pertinency of the matters alleged. *Leslie v. Leslie* (N. J. Ch.) 24 Atl. 1029. The test of impertinent matter is whether it can be put in issue and is admissible in evidence. *Woods v. Morrell*, 1 Johns. Ch. 103; *Miller v. Buchanan* (C. C.) 5 Fed. 366; *Wilkinson v. Dodd*, 42 N. J. Eq. 234, 7 Atl. 327.

In the last case cited, at page 244, 42 N. J. Eq., page 332, 7 Atl., the court said, adopting the language of Chancellor Kent in *Woods v. Morrell*, supra:

"The best test by which to ascertain whether the matter be impertinent is to try whether the subject of the allegation could be put in issue and would be matter proper to be given in evidence between the parties." "These principles must be my guide: Are the allegations excepted to material? Do they tend to establish the complainant's case? Are they pertinent to the main issue?"

It may be proved that James A. Burden is practically insolvent, and has no means of repaying the moneys fraudulently diverted or now being diverted. It will be proper to prove that the dividends coming to James A. Burden from his holdings in the company are not more than sufficient for the payment of his living expenses and the living expenses of those he actually supports, and who are dependent upon him for their support. It will be competent on the trial to prove that the defendants, James A. Burden and his sons, live in extravagant and expensive style at James A. Burden's expense, provided there is any evidence tending to show that these facts had any bearing on the actions of the sons as directors, and also as bearing on the financial responsibility of James A. Burden. The number of expensive residences maintained are allegations of fact tending to show that these sons do live in an expensive style. It is also proper to show, as bearing on the question whether or not an injunction should be granted, that there is reason to believe that said James A. Burden would be without any income whatever should he transfer his stock in this company, and that, therefore, the complainant would be without remedy should he be successful in the action. For the same reason, it will be competent to show that the dividends due James A. Burden are only sufficient for the maintenance of James A. Burden and the sons dependent on him. The language, "fears that by the mere transfer," etc., is not challenged as an insufficient allegation, and it may be said at this time that it is equivalent to an allegation that the complainant believes and has reason to believe, etc.

Recurring to the other language complained of, it is proper to say that we find substantially a repetition, but the repetition comes from the fact that first in the complaint the statement as to the mode and manner of living is in connection with the charge that these sons were corruptly influenced by the father, in their action as directors of the company, while later on the same charge, in substance, is made as bearing on the necessity for injunctive relief.

The attention of this court has been directed to a record in the Supreme Court of the state of New York, in an action there pending and heretofore tried and determined, wherein this complainant was plaintiff, and James A. Burden and the Burden Iron Company and John L. Arts and others were defendants. That action and the judgment therein, whatever may have been determined, is not *res adjudicata* here, as the actions are not between the same parties; and, again, an inspection of that record shows that the matters here in dispute and litigation were not in litigation there, except in part, and then not in such a manner as to involve a determination of the matters in controversy here. If that action is *res adjudicata* in this case, it must be pleaded as such, and cannot be considered in determining the validity of these exceptions.

Attention is called to the fact that in that action certain allegations of the complaint were stricken out. That action of the Supreme Court may have been proper in that case, but a comparison of the allegations excepted to here with those stricken out in the state court show that they are not the same in substance or in effect. Again, the rules of pleading are different under the Code of Civil Procedure of the state of New York from those prevailing in actions in equity in the Circuit Court of the United States.

It may be well in this connection to call attention to some of the cases decided in the courts of the state of New York under the Code of Civil Procedure:

"The true rule in respect to striking out irrelevant allegations in a pleading is that if the matter cannot be made the subject of a material issue, or affect the question of an injunction, or costs, or other relief to be granted, and will embarrass the opposite party and the court, it should be stricken out." *Martin v. Kanouse*, 2 Abb. Prac. 330.

"A motion to strike out matter as irrelevant should be granted only where no doubt of the irrelevancy exists, and there must be some evidence that the retention of the allegations would embarrass the defendant in his defense." *Lynch v. Second Ave. R. Co.*, 7 App. Div. 164, 39 N. Y. Supp. 1103.

"The test by which to determine whether the statements in a pleading are material or relevant is to inquire whether they tend to make or constitute a cause of action or defense. If they do so tend, they cannot be considered irrelevant." *Dovan v. Dinsmore*, 33 Barb. 86; *Clark v. Jeffersonville, etc., R. Co.*, 44 Ind. 248.

In *Davenport Glucose Man. Co. v. Taussig*, 31 Hun, 566, it was sought to strike out certain allegations in figures as to the debts and liabilities of defendants, and also statements of fraudulent representations made by them. The action was one for the claim and delivery of property, and the defendants were accused of having concealed their insolvency while purchasing the goods in question, and it was said by the court that the figures of the debts and liabilities of the defendants were—

"Essential facts bearing upon the allegation of insolvency, its fraudulent suppression, and the design in making the purchase under the circumstances disclosed. The courts have held that proof of similar representations to those alleged by the plaintiffs may be given in evidence for the purpose of establishing the general fraudulent design. And these representations are facts upon which the plaintiffs rely to establish the existence of the fraudulent intent and without which their case might be insufficient. They are not irrelevant, they are not redundant, and they are not frivolous. They are, as suggested, essential facts, in conjunction with others, leading to the truth of the conclusions stated, namely, that the purchase was made from the plaintiffs fraudulently, and with a preconceived design not to pay for the goods obtained. The defendants cannot be injured by the statement of them; on the contrary, it is quite clear that, being thus advised of the different elements composing the plaintiff's charge, they would be better prepared to meet it."

It may be that by careful redrafting the allegations excepted to might be condensed, and some words omitted, but it is well settled that a mere redundancy in stating a material allegation does not subject it to the charge that it is scandalous or impertinent.

This court has given the language complained of careful consideration in connection with the other allegations of the complaint, as allegations of this character should not be retained in a record of this

court unless essential to a proper statement of the alleged cause of action.

The exceptions cannot be sustained, and an order will be entered overruling the same.

**FRAWLEY, BUNDY & WILCOX v. PENNSYLVANIA CASUALTY CO.**

(Circuit Court, M. D. Pennsylvania. July 23, 1903.)

**No. 1.**

**1. FOREIGN CORPORATIONS—LEGALITY OF SERVICE—SUBJECTION TO LAWS OF STATE.**

Whether a corporation has subjected itself to the laws of a state other than that of its domicile, so as to be bound by service of process in such state in a personal action, made in accordance with its laws, is a question of general, and not of local, law.

**2. SAME—DOING BUSINESS IN STATE.**

To render service on a corporation, made in a state other than that by which it was created, binding upon it in a personal action, the corporation must have been actually and substantially engaged in doing business in the state, and the service must have been upon an agent so far representing the corporation in the state that he may properly be held, in law, an agent to receive such process in its behalf.

**3. SAME.**

A Pennsylvania insurance company wrote four accident policies on risks in Wisconsin, all of which were negotiated by correspondence, with the company, and not through the medium of any agent located in the state, or going into it for the purpose, and were issued and the premiums thereon paid at the office in Pennsylvania. *Held* that, even if such transactions could be considered a doing of business within the state at the time by the company, such business did not continue after the policies had been issued merely by reason of the fact that they were held by persons in the state; nor did the collection of a renewal premium on one of such policies through the cashier of a local bank, at the suggestion and for the supposed accommodation of the policy holder, constitute the doing of business within the state, so as to render the company subject to the jurisdiction of its courts.

**4. SAME—AGENT ON WHOM SERVICE MAY BE MADE.**

The collection by a Pennsylvania insurance company of a single renewal premium through the cashier of a bank in Wisconsin, at the request and for the supposed accommodation of the policy holder, did not make such cashier an agent of the company, representing it in the state, in such sense that service of process on him could bring the company within the jurisdiction of a court of that state, notwithstanding a state statute (Rev. St. Wis. 1898, §§ 2637, 1977) by which such agency is attempted to be created.

**5. JUDGMENT—WANT OF JURISDICTION—SERVICE OBTAINED BY TRICK.**

Plaintiff, a resident of Wisconsin, who was a policy holder in a Pennsylvania insurance company, desiring to obtain service on the company in Wisconsin in an action not connected with his policy, requested the company to send a receipt for a renewal premium to the cashier of a local bank, so that he might obtain it at the time of making payment; and it was so sent, with instructions to the cashier to collect the premium and deliver the receipt. Plaintiff paid the premium, and on the same day caused a summons in an action against the company to be served on the cashier, as agent; relying on a state statute which makes any person "who collects any premium for insurance" an agent of the company.

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¶ 2. Foreign corporations doing business in state, see note to *Wagner v. Meakim*, 33 C. C. A. 585.

*Held*, that plaintiff having induced the company to send the collection to the cashier for the sole purpose of bringing it within the state jurisdiction, the service so obtained by a fraud or trick was invalid, and the company was not bound by a judgment rendered thereon.

**6. SAME—COLLATERAL ATTACK.**

A corporation against which an action was commenced in another state by the service of a summons which was invalid to give the court jurisdiction is not bound to appear and move to set aside the service, but may stand on its rights and attack the judgment rendered when it is sought to be enforced against it.

At Law. Trial to the court without a jury by stipulation.

E. N. Willard, for plaintiffs.

W. S. Diehl, for defendant.

ARCHBALD, District Judge. This case, by agreement of the parties, was tried by the court without a jury, and the material facts are as follows:

**The Facts.**

(1) This action is brought on a judgment for \$2,025.85 recovered in the Circuit Court of Eau Claire county, Wis., February 12, 1902, by the plaintiffs, Frawley, Bundy & Wilcox, a firm of lawyers of the city of Eau Claire, against the defendant, the Pennsylvania Casualty Company, a corporation of the state of Pennsylvania, engaged in the business of accident insurance, on a claim for legal services and disbursements.

(2) The Wisconsin suit was begun by a summons issued January 20, 1902, and served the same day, at the city of Eau Claire, on James T. Joyce, as agent of the defendant company, by R. D. Whitford, the plaintiffs' attorney, who made, under oath, the following return thereto:

"State of Wisconsin, Eau Claire County—ss.: R. D. Whitford, being first duly sworn, says that he resides in said county and state; that on the 20th day of January, 1902, at the city of Eau Claire, in said county, he duly and personally served the within summons on the Pennsylvania Casualty Company, a foreign corporation, the defendant named in said summons, the same being then and there an insurance corporation not organized under the laws of the state of Wisconsin, by then and there delivering to and leaving with James T. Joyce, a resident and citizen of this state, personally—he, the said James T. Joyce, being then and there an agent of the said defendant, who collected and received a premium for insurance for and on behalf of said defendant, and aided and assisted in transacting other business for the same—a true and correct copy thereof."

(3) The defendant company had immediate notice of this suit, the copy of the summons served on Mr. Joyce having been at once forwarded by him by mail to the home office of the company, at Scranton, Pa., and there duly received; but there was no other service or notice of the summons, and no appearance was put in or answer made thereto by the company, whereupon judgment was entered by the court by default on the date and for the amount stated.

(4) At the time of the service of the summons as aforesaid, the defendant company was doing no business and had no agent or representative in the state of Wisconsin, other than as herein set forth. It had at one time insured the Chippewa Valley Electric Railway of Eau



Claire against damages from accidents to passengers and employes, and had had a number of claims to pay on that account. But the policy expired April 1, 1901, and was not renewed, and all claims upon it had been settled prior to January, 1902, when the plaintiffs brought suit. This policy was negotiated entirely outside of the state of Wisconsin, by correspondence and personal interview with the chief executive officers of the railway company at Boston, Mass., where they had their headquarters, and was issued at Scranton, Pa., and forwarded from there by mail to the president of the railway company at Boston, and the premium was paid by note dated and made payable at that city. About the same time an accident policy of \$5,000 was issued by the defendant to J. R. Harrigan, of Eau Claire, superintendent of the railway, and another of like amount, at the instance of Mr. Harrigan, to James T. Joyce, who was a personal friend. Still another was issued to Roy P. Wilcox, one of the plaintiffs, who was attorney for the railway. Harrigan's policy was a donation, but those of Joyce and Wilcox were paid for. They were not issued in Wisconsin, however, but were applied for by mail, and forwarded in the same manner from the home office in Scranton. The four policies mentioned were the only ones of the defendant ever in force in that state.

(5) The bill for which the plaintiff brought suit and obtained judgment was a disputed one. It had been presented to the defendant and payment refused; and, in consequence of this, Mr. Wilcox, after consulting with his partner Mr. Bundy, and looking up the law of Wisconsin as to what was sufficient to constitute an agency for the service of process in that state on a foreign insurance company, devised a plan by which, as he conceived, the plaintiffs would be able to sue the defendant company for their bill in the Wisconsin courts. He had, as we have seen, a policy of the defendant company on which a renewal premium was due December 30, 1901, of which fact he had received notice by mail from the secretary. In response to this he wrote, stating that he disliked to forward the money for a renewal without getting a receipt for it at the time (although the fact was that he had done so the preceding year, and his alleged reluctance was a mere pretense), and suggesting that, if the company would send the receipt to the cashier of some one of the banks at Eau Claire, he would pay such party upon its delivery to him. Among others mentioned was Mr. James T. Joyce, and in pursuance of the suggestion the renewal receipt was forwarded to Mr. Joyce by mail, with instructions to deliver it on payment of the premium called for. On receiving this communication, Mr. Joyce notified Mr. Wilcox to call, which he did, paying the premium and taking up the receipt. A few hours afterwards, on the same day, at the instance of Mr. Wilcox, and in pursuance of his plan, the summons was served on Mr. Joyce, as agent of the company; and he subsequently forwarded it to the company, as before stated, along with the premium collected, after first deducting from the latter an agent's commission.

(6) Foreign insurance companies, such as the defendant, are prohibited by the laws of Wisconsin from doing business in that state, except upon certain conditions, with which the defendant had not complied. It is also made a misdemeanor by the same for any one to act as agent

for any such insurance company without having first obtained a certificate from the insurance commissioner of the state; any one who collects a premium, or in any manner aids in doing so, being held to be an agent, unless he receives no compensation. All this was known to Mr. Wilcox when he suggested that the renewal receipt should be forwarded for collection to some one at Eau Claire, to whom he would pay on delivery.

#### The Law.

The right of the plaintiff to recover upon these facts depends upon the validity of the service of the summons in the original action. If the case is controlled by the Wisconsin law, it must be conceded that, aside from the trick practiced to obtain it, the service was good, and the judgment based upon it cannot be disputed. Rev. St. Wis. 1898, § 2637, subd. 9; <sup>1</sup> Id. § 1977; <sup>2</sup> State v. N. W. Endowment Ass'n, 62 Wis. 174, 22 N. W. 135; State v. U. S. Mutual Accident Ass'n, 67 Wis. 624, 31 N. W. 229; Firemen's Ins. Co. v. Thompson, 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335; Dixon v. Order of Ry. Conductors (C. C.) 49 Fed. 910. But the defendant is a Pennsylvania corporation, and not bound, therefore, by the laws of other states, except as by its acts it has subjected itself to them, and the question whether it has, is to be determined on principles of general jurisprudence, and not according to what may be held sufficient in any particular locality either by statute or judicial decision. Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. Except in matters of interstate commerce, a state may undoubtedly prescribe the conditions on which a foreign corporation shall be permitted to do business within it, and may include therein a provision with regard to the service of process on its agents. Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451. Where, therefore, a foreign corporation does business in such state, it will be presumed to have assented to these terms. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Merchants' Mfg. Co. v. Grand

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<sup>1</sup> Section 2637. Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice, aforesaid, shall be served, and such service held of the same effect as personal service on a natural person, by delivering a copy thereof as follows: \* \* \* (9) If against any insurance corporation not organized under the laws of this state, to the agent or attorney thereof having authority therefor by appointment under the provisions of sections 1915, 1953 or 1966-32, or to any agent of either such corporation who shall solicit insurance on its behalf or on behalf of any property owner or person desiring insurance, or who transmits an application for or a policy of insurance to or from any such corporation, makes any contract for insurance, collects or receives any premiums therefor, or adjusts, settles, or pays a loss for such corporation, or aids or assists in doing either or in transacting any business for the same, or on any person who advertises to do any such thing.

<sup>2</sup> Section 1977. Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation to all intents and purposes unless it can be shown that he receives no compensation for such services.

Trunk Ry. (C. C.) 13 Fed. 358; U. S. v. American Bell Telephone Co. (C. C.) 29 Fed. 17; Berry v. Indemnity Co. (C. C.) 46 Fed. 439. But it is essential in every case in which personal jurisdiction over such a corporation is claimed that there shall have been an actual and substantial transacting of business by it within the state, and the process by which jurisdiction is sought to be obtained must have been served on one who is truly representative of the corporation. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; *Mex. Cen. Ry. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *United States v. American Bell Telephone Co.* (C. C.) 29 Fed. 17; *St. Louis Wiremill Co. v. Consolidated Barb Wire Co.* (C. C.) 32 Fed. 802. The doctrine is thus authoritatively stated by Mr. Justice Peckham in *Conn. Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569:

"In a suit where no property of the corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the state; \* \* \* and, if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held, in law, an agent to receive such process in behalf of the corporation."

These jurisdictional facts the state necessarily cannot control, and it cannot, therefore, declare or prescribe in advance what shall be taken as the doing of business within its borders, nor what shall constitute a sufficiently representative agency. Both must be determined by the courts upon the facts as they arise, according to the principles of law which apply. We are not concerned, therefore, in the present instance, with what may be the law of Wisconsin, nor with the view in this regard taken by its courts. That state cannot extend its jurisdiction personally over nonresident parties, corporate or otherwise, which have never undertaken in fact to enter it. According to the statutes referred to above, the service of process on any person in Wisconsin who merely advertises himself as agent of a foreign insurance company, whether authorized to do so or not, is binding on the company—a position, which, if sustained, would put such corporations at the mercy of every arrant knave who saw fit to so declare that he represented them.

The authority of the court of Eau Claire county to enter judgment against the defendant company as it did depends, therefore, on the two questions: (1) Was the company at the time engaged in business in the state of Wisconsin? And (2) was Joyce such a representative of it that the service of process upon him must be held good? Both, as it seems to me, are to be answered in the negative. As to the first, the mere taking of the four accident policies which the company had at one time in the state can hardly be said to have been a transaction of business within it. These policies were all negotiated by correspondence with the company, and not through the medium of agents located in the state, or going into it for that purpose; and the business, whatever it was, was done at the home office, where the applications

were received and passed upon, the payment of premiums made, and the policies written and forwarded. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Marine Insurance Co. v. St. Louis Ry. (C. C.)* 41 Fed. 643; *Hazletine v. Fire Ins. Co. (C. C.)* 55 Fed. 743; *Romaine v. Ins. Co. (C. C.)* 55 Fed. 751; *Caesar v. Capell (C. C.)* 83 Fed. 403; *East. Bldg. & Loan Ass'n v. Bedford (C. C.)* 88 Fed. 7; *Neal v. New Orleans Ass'n*, 100 Tenn. 607, 46 S. W. 755; *West Mass. Fire Ins. Co. v. Girard Point Storage Co.*, 6 Pa. Super. Ct. 288; *People's Bldg. Ass'n v. Berlin*, 201 Pa. 1, 50 Atl. 308. But it is not necessary to determine that question here. Whatever had been done in that direction was ended. The Electric Railway policy had run out, and all claims under it had been adjusted and settled. The associated policy donated to Harrigan had in all probability also lapsed. The existence of the Joyce and Wilcox policies, and the collection of the premium on the latter in the way that has been described, is all that there is, therefore, on which to charge the defendant. But the mere existence of these two policies in the hands of persons resident in the state does not make out the doing of business within it by the company, with whom they were negotiated and by whom they were written entirely outside of it. The business, such as it was, was done and completed when they were issued. Otherwise the mere change of residence into the state by persons holding policies obtained elsewhere would be enough to establish the charge, and that will hardly be contended for. If this be so, the case is brought down to the single circumstance that the premium was collected by Joyce on the Wilcox policy. But it is well settled that a single, isolated act is not the carrying on of business by a foreign corporation, within the meaning of the law, whether the question arises under statutory provisions which prohibit it unless a license for the purpose shall first be obtained, or the transaction is sought, as here, to be made the basis of liability to legal process. It was so held with regard to the single act of making a contract within the state for the construction of machinery, there being no purpose to do anything further there (*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137); to occasional purchases by a foreign corporation within the state, no office being kept, nor any part of its general business operations carried on there (*Good Hope Co. v. Ry. Fencing Co. [C. C.]* 22 Fed. 635); to the purchasing of securities and accepting a mortgage upon property within the state (*Gilcrist v. Helena Co. [C. C.]* 47 Fed. 593); to the negotiation of bonds by the president of an Alabama company in New York City (*Clews v. Iron Co. [C. C.]* 44 Fed. 31); to the making of a loan to a citizen of the state, who contracts to repay it at the domicile of the corporation, securing it by a mortgage on land within the state (*Caesar v. Capell [C. C.]* 83 Fed. 403; *East. Bldg. Ass'n v. Bedford [C. C.]* 88 Fed. 7; *Neal v. New Orleans Ass'n*, 100 Tenn. 607, 46 S. W. 755); to the purchase of a note, or the taking of a mortgage for an indebtedness past due (*Commercial Bank v. Sherman*, 28 Or. 573, 43 Pac. 658, 52 Am. St. Rep. 811; *Florsheim Dry Goods Co. v. Lester*, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 162); to the single sale of its products by a foreign corporation, and taking a guaranty therefor (*D. & H. C. Co. v. Mahlenbrock*, 63 N. J. Law, 281,

43 Atl. 978, 45 L. R. A. 538); to an isolated loan within the state by a cashier of a foreign banking company (*Suydam v. Morris Canal & Banking Co.*, 6 Hill, 217); to the adjustment of a loss in New York on an insurance secured in Pennsylvania (*People v. Gilbert*, 44 Hun, 522); and to the settlement of a debt for goods sold on an order sent by mail (*New Jersey Steel Tube Co. v. Riehl*, 9 Pa. Super. Ct. 220). For further instances, see 13 Am. & Eng. Enc. Law, p. 869 et seq. In the face of these authorities, it cannot be successfully maintained that the single act of collecting a renewal premium through the cashier of a bank at the suggestion and for the supposed accommodation of the holder of the policy, such as we have here, constituted the transaction of business within the state, so as to make the defendant liable to the jurisdiction of its courts.

It is equally clear that Joyce was not an agent upon whom service of process to bind the company could be made. His agency was of the most casual and temporary character; being confined, as we have just seen, to the single purpose of turning over to Wilcox the renewal receipt, and receiving and transmitting the premium paid for it. He was a mere conduit—to use the expression of Judge Drummond in *Lamb v. Bowser*, 7 Biss. 372, Fed. Cas. No. 8,009—for whom the company was not responsible, outside of the one transaction in which he was retained. It would be a travesty, under the circumstances, to hold that he thereby became its accredited representative, actually standing for the time being for the corporation itself. Only by the narrow vision of the state law, by which the plaintiffs undertook to be guided, and upon which they now seek to stand, could any such claim be made for him. That the character of the agent must be thoroughly representative, in order to have the service efficient, is abundantly maintained by the authorities already cited. As declared in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, it is open to show in every such case “that the agent stood in no representative character to the company; that his duties were limited to those of a subordinate employé or to a particular transaction”—observations that are peculiarly pertinent here. For illustrative instances where the agency was or was not held sufficient, reference may be made to *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Block v. R. R. (C. C.)* 21 Fed. 529; *Mex. Cen. Ry. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; and *Maxwell v. R. R. (C. C.)* 34 Fed. 286. While differing in the result reached, they all agree to the principle stated in *Mutual Life Ins. Co. v. Spratley*, already quoted, that “the service of process must be upon some agent so far representing the corporation in the state that he may properly be held, in law, an agent to receive such process in behalf of the corporation.” Admittedly, there was no approach to anything of this kind in the present instance, and the attempted service must therefore fail.

But there is still another ground on which the service must be declared invalid. It was secured by a trick which the law will not countenance. The assumed reluctance of the plaintiff Wilcox to remit his money to the home office to pay for the renewal of his policy was made out of whole cloth. It was a mere pretense to entrap the company into doing something which, as he assumed, would make it liable

to suit in the courts of Wisconsin for the disputed bill of the firm. If his position was correct, that the collection of his premium through Joyce was the transacting of business by the company within the state, and made Joyce its agent, he thereby induced both the company and Joyce to violate the law of the state (Rev. St. Wis. 1898, § 1978); and Joyce, in undertaking to act as agent without a license, to commit a misdemeanor (Id. §§ 1976, 1977). But the company did not wittingly offend. Whatever was done was solely in response to the suggestion of Wilcox, and for his assumed security and accommodation, and it is therefore to be laid to his charge. Having enticed the company within reach of a summons in this way for the benefit of his firm—Mr. Bundy, another member of it, being also a party to the scheme—clearly the plaintiffs cannot retain the advantage thus fraudulently secured, to say nothing of the violation of law involved. It is said by Fuller, C. J., in *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608:

"If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process is there served, it is such an abuse that the court will, on motion, set the process aside."

The law is declared in the same terms by Lyon, J., in *Townsend v. Smith*, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793. In that case the defendant was induced to come from Chicago to Milwaukee on the pretense that the plaintiff wanted to advertise his hotel for sale in the defendant's paper, and desired him to examine the property, offering to pay his expenses if he would. This was held to be a fraud upon him, which the law would not sustain, "affecting as it did the integrity of the process of the court." The suggestion that Wilcox did no more than he was entitled to do, in requiring the receipt to be sent to some one who could deliver it to him contemporaneously with the payment of the premium, entirely misses the point. If that was all there was to it, there would, of course, have been no harm. It is the artifice that lay hid in it that was the offense. A fraud or trick is always put forward with a fair face. It would not succeed without it. In *Wood v. Wood*, 78 Ky. 624, the defendant, a teamster, residing in Kentucky, was induced to go into Tennessee, where he was served with process, by the representation that he could make a profit in hauling from a place in that state to one in Kentucky; and, as this was true, it was contended that there was no fraud. But it was said by Hines, J.:

"It is not the truth or falsity of the representation that constitutes the fraud. It is the concealed motive lying in the breast of the appellant, and which prompted him to make the representation."

And upon the general question of the liability of the defendant to the service it was further said:

"As he did not wittingly submit himself to the jurisdiction of the courts of Tennessee, but was induced by a device on the part of the appellant to go within the borders of that state, appellant will not be permitted to take advantage of his own wrong, and thus receive benefits that would not have accrued but for the fraud."

It may be argued that the defendant should have moved to set aside the service, and cannot attack the judgment collaterally, but I do not

so understand the law. *Wood v. Wood*, 78 Ky. 624; *Duringer v. Moschino*, 93 Ind. 495; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129. This course was open to the defendant, but it was not confined to it. Had it, indeed, applied to the Wisconsin courts, and been refused, it would possibly have laid itself open to the charge of having elected its remedy, and been held to have submitted to that jurisdiction. It certainly could not have gone on without doing so (*Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608), and would therefore have been compelled in the end to do just what it has done now—stand on its rights, and attack the judgment rendered, when sought to be enforced against it. That judgment was by default, and depends for its validity on the quality of the service of the summons, as well as its formal sufficiency, and having been secured, as it plainly was, by a trick or fraud, the whole proceedings are affected, and the plaintiffs are entitled to take nothing thereby.

Judgment is directed to be entered in favor of the defendant.

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UNITED STATES, for Use of HUDSON RIVER STONE SUPPLY CO., v.  
VENABLE CONST. CO.

(Circuit Court, N. D. Georgia. June 8, 1903.)

No. 1,488.

1. WITNESSES—EXHIBITS TO TESTIMONY—USE OF RECORDS AS MEMORANDA.

Copies of the records in the office of the engineer in charge of a government work, giving the measurements of masonry and the quantities of materials used therein, whether or not admissible as evidence in themselves in an action between private parties, may be used by the engineer as exhibits to his testimony, and referred to therein as the basis for the measurements and quantities testified to by him, whether the measurements were made by him, or by different subordinates and reported to him; and tables compiled from such records by the engineer, for the purpose of computing the total quantity of a certain material used, may likewise be so used and referred to.

2. CONTRACTS TO FURNISH BUILDING MATERIAL—DETERMINATION OF QUANTITY—STIPULATION TO ACCEPT ENGINEER'S ESTIMATE.

A contract for the furnishing of stone to the contractor for building government coast batteries provided that final settlement should be made "on final estimates rendered for said work by the engineer officer in charge." *Held*, that an estimate of the quantity of stone used, made by the engineer officer in charge from the measurements of the masonry in place and other records in his office, from which he computed the average quantity of stone used in a cubic yard of such masonry by what appeared to be a fair and practical method, was conclusive on the parties.

Action against Government Contractor to Recover for Materials Furnished. On exceptions to auditor's report.

Daniel W. Rountree, for complainant.

Hoke Smith and H. C. Peeples, for defendant.

¶ 2. See Contracts, vol. 11, Cent. Dig. §§ 1326, 1331, 1334, 1335.

NEWMAN, District Judge. This case is now before the court on exceptions to the report of the auditor to whom reference was made under an order, which, so far as is material here, was as follows:

"In this case it appearing to the court that the controversy in the case involves among other things the ascertainment of the actual quantity of stone delivered by the Hudson River Stone Supply Company to the Venable Construction Company, and it appearing to the court that the ascertainment of the facts in this regard in advance of the trial by jury will be of great aid to the court and jury in the hearing of the case:

"Counsel consenting, it is ordered that for the purpose of ascertaining the amount of stone so delivered, this matter is referred to Shepard Bryan, Esq., as auditor, to find and report the facts in this regard. Let the auditor's report show when and in what quantities deliveries of stone were made.  
\* \* \*

The Venable Construction Company had a contract with the government for the construction of certain gun and mortar batteries at Key West, Fla. It was necessary for the Venable Construction Company to have considerable stone in carrying on this work, and it entered into a contract with the Hudson River Stone Supply Company, on March 25, 1897, for approximately 36,000 cubic yards of stone—2,600 cubic yards being stone crushed and screened to pass through a three-eighths inch ring, and the balance through a one and one-half inch ring—and this stone was to be used to make concrete in constructing the gun and mortar batteries.

A provision in the contract between the Venable Construction Company and the Hudson River Stone Supply Company was as follows:

"It is mutually agreed between both parties hereto, that all measurements of stone shall be taken by U. S. government engineer on arrival of the vessel at Key West, and his certificate of the cubical contents shall be accepted to the number of cubic yards contained therein, in settlements between them. All freight to be paid according to said measurements, twenty per cent. (20%) in cash, and balance in New York or Baltimore Exchange, and the balance for stone thus delivered, on the 15th of each month, for all stone delivered the month previous, less 10% retained until completion of the contract.

"Final settlement to be made on final estimates rendered for said work by the engineer officer in charge, detailed measurements to be rendered parties of the second part, as each boat is measured and discharged."

The auditor in his report, after discussing the contentions of the parties, and of the evidence and facts of the case at some length, reaches a conclusion, which will be shown by extracts from his report, as follows:

"I have been very much puzzled in getting at the real truth in this case. The evidence of the experiments made has not been satisfying. The measurements made by both parties have been unsatisfactory. The theories presented by the plaintiff and defendant are so radically and extremely different, the plaintiff contending that the amount of broken stone in 32,440 cubic yards of concrete is about 10 per cent. more than the yardage of concrete, and the defendant contending that the cubic yardage of broken stone in the same amount of concrete is about 10 per cent. less than said yardage.

"After reading and considering all the testimony which has been offered, and after much reflection, I have reached the conclusion that, when broken 1½-inch stone is used to make concrete, there is no increase in the cubic yardage of the resulting mass. I am satisfied as to this point. I believe that there is no considerable decrease. It is true that the defendant's testimony tends to show that in one instance 100 cubic feet of broken stone made 108



cubic feet of concrete, and in another instance 100 cubic feet of stone made 111 cubic feet of concrete. This difference was accounted for by the difference in tamping. \* \* \*

"I have reached the conclusion that the amount of broken 1½-inch stone contained in 32,440 cubic yards of concrete in place in the fortifications at Key West, Florida, was 32,440 cubic yards. In my opinion, not enough sand and cement was added to entirely fill the voids; indeed, I consider this fact as thoroughly demonstrated by the testimony.

"As I have said before in this report, I do not believe that there was any increase in the mass over the number of cubic yards of stone used.

"I therefore find that the Hudson River Stone Supply Company furnished to the Venable Construction Company 32,440 cubic yards of broken inch and a half stone, and 382.5 yards of granolithic stone."

The real question in this case is as to how much of the broken stone went into a cubic yard of concrete, as contained in the gun and mortar batteries. The plaintiff contends that there was more stone than concrete, and the defendant contends that there was less stone than concrete. The materials used in preparing the concrete, and the proportions of the same, were as follows: One cubic yard of cement, two cubic yards of sand, and five cubic yards of stone. The plaintiff contends that when the stone, sand, and cement are thus placed together in a solid mass, and "tamped," as it is called, the sand and cement fill what are called "voids," that is, the space between the broken stone, and cause the stones to adhere more closely together, thereby making the cubical contents of the mass less than the stone would be if measured before such mixture. The defendant takes the contrary view, and claims that the mass is increased. The special master found, as has been shown from the extracts from his report given above, that a cubic yard of concrete contained a cubic yard of stone. The engineer officer in charge of the work at Key West, on behalf of the United States government, was J. M. Braxton. The testimony of Mr. Braxton was twice taken in this case, and the same was offered in evidence before the auditor. It is a little difficult to get at the exact ruling of the auditor about this testimony. Objection was made on behalf of the plaintiff to its admissibility in parts and as a whole, and special objection was made to the admissibility of certain tables attached to the last set of interrogatories. These tables were referred to by Mr. Braxton in his evidence as containing various measurements and quantities necessary to arrive at the amount of stone which went into the concrete. There seems to have been a difference in the character of the concrete; that is, what is called "concrete No. 1," "concrete No. 2," and "concrete No. 3." The tables attached to Mr. Braxton's interrogatories show the amount of concrete of each kind, and it also shows the number of what are called "skips," and the contents of the skips. These skips were used to convey the material to the batteries. The result of the whole testimony of Mr. Braxton, taking his answers to the interrogatories and the tables together, is that he fixed the total amount of stone which went into the 32,440 cubic yards of concrete at 29,147 cubic yards. The stress of the argument by counsel in this case has been directed to the question of the admissibility of this testimony of Mr. Braxton's, and the effect to be given it, if admitted.

Counsel for the defendant insist that the papers attached to Mr. Braxton's testimony are admissible as public records. Attached to the papers so exhibited is the following:

"I certify that the foregoing sheets are correct copies of the official records in the U. S. Engineer's office at Key West, Fla.

"Key West, Fla., April 16, 1902.

J. M. Braxton."

Counsel for plaintiff earnestly contends that these papers are not admissible as official records, and the question has been elaborately argued by counsel for both parties, orally and in briefs furnished to court.

There was also objection to these papers, called "official records," on the ground that they appear to have been made up from the notes of various inspectors assigned to different parts of the work, the work of each being entirely separate and distinct from the others, and the notes thus made being transcribed by clerks into books from which the record was taken; and, further, that Mr. Braxton did not himself make any of the counts or measurements, and therefore could not testify of his own knowledge as to the accuracy of the figures given.

In my opinion, it is immaterial whether these papers certified to by Mr. Braxton are admissible as official records or not. They are attached as exhibits to his testimony, and referred to by him in his answers to interrogatories as a part of his answers, and as giving the information sought to be elicited as to quantities, numbers, measurements, etc. It is a very ordinary form of taking testimony for a witness to attach a paper and to say the paper attached, marked "A" or "B," is a correct statement of the amounts, numbers, etc. The testimony of Mr. Braxton shows that he had general supervision over the work on the gun and mortar batteries, and this, as well as other evidence, shows that Mr. Braxton was the engineer officer in immediate charge of the work at Key West. It seems from his testimony that he had 18 inspectors; that separate inspectors were assigned to supervise particular portions of the work, and they made entries, statements, or memoranda in notebooks, showing what was done on the piece of work to which they were assigned. Mr. Braxton states that he did not personally make all the measurements, but, as chief inspector, he had to keep a general outlook on all the work going on, to see that specifications were being carried out, and he says: "It was my duty to submit at the end of each month certificates covering the work done by the contractors. I had to keep posted as to how calculations were made on which to base my estimate." Mr. Braxton made the estimates upon which the government settled with the Venable Construction Company.

It seems that the method which was adopted for ascertaining the amount of stone going into the gun and mortar batteries was based on the contents of skips, and the number of skips. A "skip" was a wooden box in which the concrete, mixed, was transported to the place of deposit. One skip was composed of one barrel of cement, four cubic feet, measured loose; eight cubic feet of sand, measured loose; and twenty cubic feet of stone, measured loose. Those were the component parts of one batch of Rosendale concrete. In further explanation of Mr. Braxton's method of arriving at the amount of

stone going into the gun and mortar batteries, a quotation is given from his testimony, as follows:

"The following is an estimate for concrete No. 1, which is referred to in specifications as 'Rosendale concrete.' The total number of skips placed in certain walls of mortar battery up to February 1, 1898, was 6,215. This is the record of the skips as entered into the government's official records kept by inspectors on duty at the mortar battery up to the above-mentioned date. The total number of cubic yards of concrete in the walls above referred to, into which these 6,215 skips were used, was calculated to be 5,083 cubic yards. This is the official measurement of the number of yards of concrete in the aforesaid walls, and which was the number for which the Venable Construction Company were paid by the government. From the number of skips given, and the number of cubic yards of concrete, it is found that one skip made 22.08 cubic feet in place. The amount of concrete was greater than the amount of stone used in each skip, 20 cubic feet of stone being required in one skip of Rosendale concrete, and the amount of concrete after this stone had been mixed with sand, cement, and water, and had been tamped into place, was 22.08 cubic feet."

He also gives other data, as follows:

"Concrete No. 2 in specifications is Portland concrete, required to be mixed in the proportions of one of cement, three of sand, and five of broken stone. The Atlas Portland cement was used for the greater portion of the work. One barrel of the Atlas Portland cement, measured loose, was found to contain 4.42 cubic feet. The amount of stone used for this mixture was 22.10, and 13.26 cubic feet of sand was used. This mixture was found to give 27.62 cubic feet of concrete in place. This was derived by calculating the amount of concrete in place from 452 skips. Alpha Portland cement was also used in concrete No. 2. One barrel of Alpha cement was found to contain four cubic feet, measured loose. With the Alpha cement there was used 20 cubic feet of stone and 12 cubic feet of sand. One skip of this mixture was found to make 25.47 cubic feet of concrete in place. This is based on record of small number of skips."

Some question was raised as to the skips not being properly filled, and, as to this, Mr. Braxton, in his testimony, says:

"Most of them were measured by others, and not by myself. I consider my knowledge as based on seeing the skips measured a great many times, seeing the proper lines put into the barrows or boxes, and having an eye, through all of the work, that the proper measurements were being given. I did not personally count the number of skips given. It is taken from the official records. The information is derived from the records and calculations made by myself and others, and the entries were made by myself and others."

It appears from what has been stated that the method of arriving at the amount of stone going into these gun and mortar batteries was by ascertaining the amount of stone contained in a skip, and then finding the number of skips going into a given quantity of concrete, and then measuring the whole amount of concrete, thereby determining how much stone had been placed in the walls. A portion of the concrete had been placed before this method of ascertaining the quantity of stone commenced, but the same calculation was applied to it as to the remainder of the concrete, for the purpose of ascertaining the amount of stone.

No question is made, as I understand it, as to the total quantity of concrete. It was put by Mr. Braxton, and fixed by the auditor, at 32,400 cubic yards. The only question is as to the quantity of stone contained in this concrete yardage. I have gone over this testimony

very carefully, and it seems to me it shows an honest and intelligent effort on the part of Mr. Braxton to ascertain and give the exact amount of stone going into these gun and mortar batteries. Of course, in such work it is utterly impossible for one man to count all the material, make all measurements, and see personally to every detail of the work. Mr. Braxton seems to have done what engineers in charge of large constructions like this always do. It was necessary for him to rely to a large extent upon the fidelity and correctness of his subordinates, and the exercise of proper care in the supervision of the work on their part. My conclusion is that Mr. Braxton's testimony was admissible, and that the auditor should have considered the same in determining the amount of stone going into this work. The total amount of this stone, as taken from Mr. Braxton's testimony would be, as I understand from the auditor's report, 29,147 cubic yards. If there be any slight variation from this, it can be corrected.

Mr. Braxton's testimony being admitted, the question is as to the effect to be given it. An extract has been given above from the contract between the Hudson River Stone Supply Company and the Venable Construction Company, in which it was agreed as follows: "Final settlement to be made on final estimates rendered for said work by the engineer officer in charge." It must have been intended by this provision, as the language is susceptible of no other construction, that the engineer officer in charge of this work at Key West should determine the amount of stone furnished by the plaintiff to the defendant, and that upon his estimate of the same settlement should be made by the defendant to the plaintiff.

It may be stated here that it was also agreed that measurements of stone should be taken by the United States government engineer on arrival of the vessel at Key West, and his certificate of the cubical contents should be accepted, as to the number of cubic yards contained therein, in settlements between them. It appears from the evidence, however, and does not seem to be seriously contested, that it was found impracticable to do this, as the engineer officer declined to make measurements and ascertain the quantity of stone in this way. The testimony on this subject is from Mr. S. H. Venable, and, being rather important, is quoted as follows:

"Q. Were you there when Mr. Ed. Mayer came as the representative of the Hudson River Stone Supply Company to represent them in the measurements? A. I was, sir. Q. About how long did he stay there? A. I think he was there possibly two or three weeks. Q. What was the result of his joint measurements with the representatives of the Venable Construction Company? Did you learn from him whether he agreed with their measurements, or disagreed with them? A. He agreed with them. Q. Now go on with what took place. A. Well, Mr. Mayer came down there— I think he got there over the Mallory line on Wednesday, and he was there two or three weeks. I am not sure he came on that line, however, but he was there two or three weeks, and he measured the boats with our engineers at the time—during the time he was there—and his measurements differed from the measurements sent by the Hudson River Stone Supply Company. I had a conference with him several times—in fact, he was there in my office—and I asked him about the measurements, and he stated that the engineer and himself had agreed upon the measurements; that is, the measurements that we reported to the Hudson River Stone Supply Company, which was less than the amounts that they had billed out to us. And, finally, I don't know why they sent for him, but

he finally went home. He notified me one evening that he was going to leave; that he couldn't see what good it would do for him to remain there, as our measurements seemed to be all correct."

It appears there was nothing left but for the quantity of stone to be determined by the engineer officer in charge by some such reasonable and practical method, as seems to have been adopted in this case. The effect to be given a clause such as that above quoted, agreeing to settle by the final estimate of the officer in charge of the work, has been clearly settled by the courts. In *Elliott v. Railway Co.*, 74 Fed. 707, 21 C. C. A. 3, decided by the Circuit Court of Appeals for the Eighth Circuit, Judge Sanborn, delivering the opinion of the court, says:

"A provision in a contract to perform work, or to furnish material, that the report of an engineer, inspector, or arbiter as to the amount and quality of the work done or material furnished under the contract shall be conclusive upon the parties to the agreement, is a legal and binding stipulation, and can only be set aside for fraud, or for such gross mistakes as imply bad faith or a failure to exercise an honest judgment. *Kihlberg v. U. S.*, 97 U. S. 398 [24 L. Ed. 1106]; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344 [27 L. Ed. 1053]; *Railway Co. v. March*, 114 U. S. 549, 553, 5 Sup. Ct. 1035 [29 L. Ed. 255]; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290 [34 L. Ed. 917]; *Lewis v. Railway Co. (C. C.)* 49 Fed. 708; *Williams v. Railway Co.*, 112 Mo. 468, 20 S. W. 631 [34 Am. St. Rep. 403]."

To the same effect is *Crane Elevator Co. v. Clarke*, 80 Fed. 705, 26 C. C. A. 100; also *Newman et al. v. U. S. (C. C.)* 81 Fed. 122.

In *U. S. v. Gleason*, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284, in the opinion by Mr. Justice Shiras (page 602, 175 U. S., and page 233, 20 Sup. Ct., 44 L. Ed. 284), it is said:

"Another rule is that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer of all or specified matters of dispute that may arise during the execution of the work, shall be final and conclusive, and that, in the absence of fraud, or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts." *Martinsburg & Potomac Railroad v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Chicago Santa Fé R. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917.

Unless, therefore, in this case it is shown that there was fraud, or mistakes so gross as to necessarily imply bad faith, the decision of the engineer officer in charge as to the amount of stone going into this work should be final and conclusive between the parties. There is nothing whatever in the facts appearing in this record to justify the conclusion that there was either fraud or gross mistake. On the contrary, it certainly shows an honest effort to arrive at the truth, and fails to show any gross mistake, even if any criticism can be made upon its entire accuracy. It must be true, therefore, that the final estimate and decision of Mr. Braxton, the engineer officer in charge, as to the amount of stone going into these gun and mortar batteries, furnished by the Hudson River Stone Supply Company, is final and conclusive between the parties.

It is deemed unnecessary to go into a discussion of all the evidence in detail, and the points so ably discussed by counsel on both sides of this case. The decision I have reached renders any further elaboration of the questions involved unnecessary.

In view of what has been said above, and the testimony of Mr. Braxton being admitted and given the effect stated, it is also unnecessary to consider the question so earnestly discussed by counsel as to whether the auditor's report is conclusive, or only *prima facie* correct; and as to whether the reference to him should be considered as a common-law reference, or a reference under the statutes of the state of Georgia.

The necessary result of all the foregoing is, that the exceptions to the auditor's report are sustained; Mr. Braxton's testimony is held to be admissible, and, when admitted, his evidence, embodying the tables attached to his interrogatories, contains a final estimate and decision as to the amount of stone furnished by the Hudson River Stone Supply Company to the Venable Construction Company; and under the provision of the contract between the parties, such estimate and decision is conclusive as between them on that question.

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THOMPSON et al. v. SCHENECTADY RY. CO. et al.

(Circuit Court. N. D. New York. July 16, 1903.)

1. FEDERAL COURTS—JURISDICTION—ANCILLARY SUIT.

A federal court has jurisdiction of a suit the purpose of which is to modify and correct one of its own decrees, without regard to the citizenship of the parties, and as incidental to such relief to grant an injunction to restrain a party from acting upon the decree as originally entered.

2. DEED—CONSTRUCTION—WARRANTY.

There is no implied warranty in a deed to real estate which renders the grantor a necessary party to a suit against the grantee affecting the title to a part of the property conveyed.

3. REAL PROPERTY—FRANCHISE—RIGHT OF WAY.

A franchise to operate a street railroad on a certain street is real estate, both at common law and by the statute of New York.

4. STREET RAILROADS—POWERS—ABANDONMENT OF LINE.

A grant to a street railroad company of the right to maintain a line of road on a certain street has no relation to its corporate franchise, and is not a franchise in such sense that it cannot be abandoned by the company by agreement with the property owners and the city without the consent of the state.

5. SAME—SUIT TO ENJOIN CONSTRUCTION OF LINE—PARTIES.

To a suit by property owners on a street to prevent the construction of a street railroad thereon, other property owners who consented to such building are not necessary parties.

In Equity.

Demurrer of Schenectady Railway Company and Central Trust Company to bill of complaint which seeks for relief the reviewing and revising of a decree of foreclosure heretofore made, so as to omit from the description of the property described therein Washington avenue, and decreeing that a certain agreement made by the receiver of the Schenectady Street Railway Company and the city of Schenectady and others be adjudged to have been assented and agreed to by all the property owners and bond owners of the Central

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¶ 1. Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

See Courts, vol. 13, Cent. Dig. § 801.

Trust Company, by the Schenectady Street Railway Company, by certain purchasers under the foreclosure sale in said foreclosure action, and by the Schenectady Street Railway Company, and that it be decreed that such agreement be approved by the court and binding upon all the parties and every one; also that the Schenectady Railway Company, its president, etc., be restrained from entering on any part of the above-mentioned portions of Washington avenue, and doing any act in the construction or in the operation of any sort of railroad upon, and from running any electric current through, any wire over any part of the said premises, etc.

Edward Winslow Paige, for complainants.

Marcus T. Hun, for Schenectady Ry. Co.

Butler, Notman, Joline & Mynderse, for Central Trust Co.

RAY, District Judge. The bill of complaint in this action has been before this court on a motion to vacate an order of Justice Wallace granting leave to file same, and also to strike such bill of complaint from the files of the court. The case is reported in 119 Fed. 634, where the facts alleged are quite fully stated, and reference will be had thereto without fully restating them here.

It is well to say, however, in brief, that the complaint alleges that the complainants own and are in the possession of certain premises on Washington avenue, in the city of Schenectady; that about February 24, 1886, the Schenectady Street Railway Company was incorporated as a street surface railway company, and, having obtained certain consents of the property owners, constructed a horse railway on State street and on Washington avenue in front of the premises of the complainants, and that until July 2, 1891, it operated the said railway with horse cars in the summer and sleighs in the winter; that thereafter, having consents, it changed to an overhead trolley, and operated its road on Washington avenue very irregularly with electric cars in the summer, and sleighs in the winter, until it ceased the operation of its road. The complaint then alleges that on the 1st of September, 1891, the Schenectady Street Railway Company made a mortgage to the Central Trust Company of New York to secure certain bonds therein described, which was duly recorded, and which conveyed the railway franchises and other property of the defendant railway company, described in said mortgage, as follows (then follows a description of the property along which said railway ran, including Washington avenue); that about August 15, 1893, one Williams filed in this court, the Circuit Court of the Northern District of New York, a bill against the Schenectady Street Railway Company, which is set out in full, in which action one John Muir was appointed receiver of said company, and entered into the possession of all the property of said Schenectady Street Railway Company. The complaint then alleges that October 10, 1893, the common council of the city of Schenectady took into consideration a petition for the abandonment of the said railway on Washington avenue, and thereupon the common council adopted a resolution that the running of cars over that portion of the said railway lying between the easterly side of Church street and Washington avenue, and on Washington avenue from its intersection with State street to the Mohawk river bridge, might be dispensed with until the 1st of June, 1894. The mayor of the city approved such resolution.

The running of the railroad on Washington avenue was then discontinued, and has never been resumed, except as hereinafter stated. December 14, 1893, the Central Trust Company filed in this court a bill of complaint against the Schenectady Street Railway Company for the foreclosure of the mortgage mentioned, and June 19, 1894, an order of this court was made appointing George W. Jones receiver of said company and of all its property and franchises. About September 1, 1894, a decree passed in that action. October 2, 1894, petitions were presented to the common council of the city of Schenectady by certain of the property owners on Washington avenue, and by George W. Jones as receiver of the Schenectady Street Railway Company, praying that the common council consent and authorize the said Street Railway Company to discontinue permanently the running of its cars on said portion of its road, and to remove and take up its track from Church street to the Mohawk Bridge, said company to remove its track at once, and relay the pavement as fast as the track was taken up. In said petitions it was expressly stated that it was understood and agreed that said action of the common council and of the Street Railway Company was not to affect in any way or prejudice in any way the franchise or any of the rights of said Street Railway Company, except as to the running of its cars from Church street down to the Mohawk Bridge. Thereupon the common council of the city of Schenectady adopted a resolution authorizing the railway company to discontinue permanently with the operation of its road between Church street and the Mohawk Bridge on condition that the track on said portion of said streets be promptly removed; that the pavement on said portion of Washington avenue be restored; and that the said receiver reimburse the contractor now repaving the said portion of said street for any extra expense for labor and material incurred by said contractor by reason of the removal of said track; in all other respects the license of the Schenectady Street Railway Company to be and remain unchanged, in full force and effect. That resolution was approved by the mayor of said city. The track on said Washington avenue and on the block of State street between Washington avenue and Church street was then directly taken up, and the pavements on both said streets restored, and it is alleged that this was done by said Jones as such receiver, and that there has been no railroad or track there since, except as stated. January 12, 1895, the special master in said foreclosure action reported that he had made a sale in said foreclosure action to Kobbe, White, and Batchellor. A decree was passed in the Williams action, and it therein appeared that Cravath & Houston represented all the bonds secured by said mortgage, and also said Jones as receiver. February 8, 1895, the court directed the carrying out of the sale made to Kobbe, White, and Batchellor, and pursuant thereto deeds were given to the purchasers by the special master, by Jones as receiver, and the Schenectady Street Railway Company, containing a description of the property as contained in the mortgage. It is also alleged that said Jones, receiver, turned over the control and management of all the mortgaged property to the defendant the Schenectady Railway Company February 17, 1895, and that since that date the said property has been possessed, controlled, and managed by this last-



named company, and it is also alleged that it appeared from the record that Cravath & Houston were counsel for the Schenectady Railway Company. The bill of complaint further alleges that the Schenectady Railway Company and its officers then knew of the hereinbefore mentioned agreement between Jones, as receiver, the property owners on Washington avenue, and the city of Schenectady that the road be abandoned on Washington avenue. The bill of complaint alleges also that April 4, 1902, the Schenectady Railway Company began to tear up Washington avenue and lay a railroad upon it, etc., and that the Schenectady Railway Company was organized by the purchasers of said property, Kobbe, White, and Batchellor, under the aforesaid sale and the laws of the state of New York pertaining thereto. In short, the bill of complaint alleges that with the consent and knowledge of the bondholders and holder of the mortgage and said receiver, and of the property owners on Washington avenue and the city of Schenectady, it was agreed, for a valuable consideration, that the operation of the Street Railway Company on Washington avenue at the places mentioned should be permanently discontinued, and that this agreement was executed and the road actually abandoned before the confirmation of said foreclosure, and that the purchasers under the sale had full knowledge of such abandonment and consented thereto, and that the present railway company, defendant, knew of such abandonment and agreement, and that, while in terms the road on said Washington avenue was foreclosed and conveyed under said decree in said foreclosure action, in truth and fact the abandonment ought to have been set up in that action and that portion of the road excepted from the sale and from the description in the decree.

The demurrer of the Schenectady Railway Company alleges that this court has no jurisdiction of the matters contained in the bill of complaint; that there is a defect of parties before the court to maintain this bill, as none of the parties to the original suit or decree are made parties herein; and that Kobbe, White, and Batchellor are necessary parties, they having purchased under said decree and sold to the present railway company. The Central Trust Company has been made a party. The demurrer also contends that the other owners of property on Washington avenue who signed the consents to the operation of the road on Washington avenue should be made parties. The demurrer also alleges and claims that the state of New York ought to be a party, and that this bill of complaint cannot be sustained, and does not state a cause of action, for the reason that the franchise of said company on Washington avenue granted by the state could not be abandoned without the consent of the state.

It seems clear to this court that it has jurisdiction of the matters contained in the bill. The foreclosure was had in this court, and the property was sold under and pursuant to a decree of this court. One contention is that too much was included in that decree of sale or in the description of property contained therein, and the main purpose is to correct that decree by this action by striking out the description of property, etc., so far as it relates to the property on Washington avenue. Clearly, no other court has jurisdiction by supplemental bill or original bill, or supplemental bill in the nature of a bill of review,

or any bill whatever, or by motion to correct the decree of this court. Other courts perhaps may restrain the construction of a railway under the alleged charter of the original company, but, as incident to the main relief sought in this action, it would seem clear that this court also has power to grant the relief and injunction asked. The parties being before the court upon the main issue, and all interests represented, this court must have power, as an incident of the action and to make its judgment effectual, to grant the injunction, if a case therefor is made out. The ground of demurrer that there is a defect of parties is untenable.

The facts so far as applicable are as follows: The Schenectady Street Railway Company became insolvent in 1893, and thereafter a receiver, one John Muir, was appointed by a federal court. Later an action of foreclosure was brought by the Central Trust Company in behalf of the bondholders, and by virtue of a decree of the federal court all the property, including in terms "all the franchises" (Demurrer Book, report of George W. Jones, Receiver, fols. 288, 289), was sold to three persons, Kobbe, White, and Batchellor, who in turn sold to defendant the Schenectady Railway Company. They in fact organized this company. One Jones was receiver in this action. While still such receiver, and during the pendency of the foreclosure, upon a petition of the owners of the abutting property on Washington avenue (plaintiffs or plaintiffs' predecessors in title in this suit), and with the consent of the common council of the city of Schenectady, a part of the tracks on Washington avenue were abandoned, and the company, or receiver, took up the rails and replaced the pavement as agreed.

Defendants contend that Kobbe, White, and Batchellor are parties in interest who must be joined in this equitable action. They argue that if it be decided that the right to run over the portion of Washington avenue in dispute be held to have been abandoned, according to complainants' contention, these vendors will become liable to respond in damages to their vendee, and therefore are necessary parties. Unfortunately for this contention, nothing appears to show by what sort of conveyance Kobbe, White, and Batchellor sold to the Schenectady Railway Company. It is elementary that a demurrer lies only as to facts appearing on the face of the pleading, and there are no implied covenants of title in a deed of real estate. "In the conveyance of real estate, if no covenants are expressed in the deed, there is not \* \* \* a warranty of title. If the deed contains no covenant, the purchaser is wholly without remedy." 3 Washburn, R. P. p. 447, c. 5, § 5, note 1. "A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not." 5 N. Y. Rev. St. p. 3579, "Real Property Law," § 216.

Now, this transfer from Kobbe, White, and Batchellor was one of real property; for a franchise, both at common law and by New York statute, is real estate, being classified as an incorporeal hereditament. 2 Wash. R. P. c. 1, p. 291, § 2, note 1, et seq.; 3 Kent's Com. (12th Ed.) p. 458; Laws N. Y. 1899, p. 1589, c. 712.

So, also, the right of way over the property of abutting street owners is an easement, and thus real estate. Citations supra. The court can-

not assume that the vendors gave a full covenant or warranty deed. Indeed, if there be any presumption, it is that they granted no more than they had a right to convey; for there is never an implication that an act is unlawful or *ultra vires*. It would be preposterous for the court, having before it the simple fact that a conveyance of realty had been made, to read into it a covenant of title. In its absence, how can Kobbe, White, and Batchellor possibly be interested in the outcome of the suit? In the absence of a covenant of title, it must be assumed for the purposes of this demurrer that they sold only such title as they themselves had, and therefore could not be made liable in any event.

The point that the right to run over a portion of Washington avenue could not be abandoned without the consent of the state is not well taken.

Counsel have fallen into error as to the meaning of the word "franchise." It may be true that a corporation cannot abandon its franchise—cannot commit suicide—without the consent of its creator, the state. But "franchise," i. e., the right to exist and perform certain acts, is a thing distinct from the property rights which the corporation when created may acquire from individuals. Assume this case: A corporation is chartered to construct and operate a railway between the cities of A. and B. That charter is its franchise, and, having been created, the railway company proceeds to acquire by purchase, or by exercise of the right of eminent domain, rights of way over the lands of individuals, one of whom is John Doe, located between A. and B. The company lays tracks and operates its trains over Doe's land for several years, and then decides to change the location of its tracks for a mile or two for the purpose of reducing grade. It takes up its tracks from Doe's land, uses it for no purpose, and in fact specifically notifies him that it has abandoned its right of way, and such abandonment is mutually agreed upon for a good consideration. Will it for a moment be contended that this proceeding is void because it involves the abandonment of a "franchise," and that, therefore, the state must be a party? Or, after the lapse of years, could the railway again lay rails over Doe's land, ousting him from the user, without again purchasing or acquiring by condemnation the right of way, upon the cynical plea that the "abandonment" was void for lack of consent by the state? If so, then no railroad company could take up a yard of its tracks, or change the location of the smallest of its buildings, without the consent of the state. But to state the proposition is to reduce the argument to an absurdity. In this case the property owners who granted rights of way by consents which were subsequently mutually abandoned are seeking to have such abandonment adhered to.

The "franchise," the charter granted by the state, is one thing; the property rights, including rights of way which the chartered body may acquire from private individuals, is quite another. These latter may be lost by acts of the corporation, and the approval of the state is not necessary.

There is no reason why the property owners who consented to the construction of the road on Washington avenue, and who do not complain of the action of the present company in constructing a road there,

should be made parties. If they acquiesce in such action, the company will not be molested by them. If they do not let them bring their action or join in this, they cannot consent for these plaintiffs who seek to protect their own rights and enforce the agreement of abandonment made by the parties named and approved by the city. It would be as reasonable to contend that all the inhabitants of the city should be parties.

It seems clear to this court that, assuming all the facts alleged in the complaint to be true, a cause of action is stated, and that the complainants are entitled substantially to the relief demanded, and that with the new parties brought in all necessary parties are now before the court.

The demurrer must be overruled, with costs. So ordered.

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In re WILLIAM E. DE LANY & CO. et al.  
(District Court, N. D. New York. July 22, 1903.)

**1. BANKRUPTCY—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—STAY.**

Bankr. Act July 1, 1898, § 11a, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], provides that a suit which is founded on a claim from which a discharge would be a release, and which is pending against the person at the time of the filing of a petition against him, shall be stayed until after an adjudication or dismissal of the petition, and, after the person is adjudged a bankrupt, the action may be further stayed until 12 months after the date of such adjudication, or until the question of discharge is determined, if within that time a discharge is applied for. *Held*, that where supplementary proceedings were begun to enforce a judgment not obtained within four months of the filing of the petition on a debt duly scheduled, and which would be barred by a discharge, and before hearing the debtor was adjudged a bankrupt, such adjudication did not affect the state court's jurisdiction of the supplementary proceedings, nor authorize the debtor to refuse to comply with the state court's order directing her examination, in the absence of an application to the federal district court for a stay of such proceedings.

**2. SAME—APPLICATION FOR INJUNCTION—STAY.**

An application to the federal district court to restrain the state court from punishing a bankrupt for contempt in failing to appear before a referee for examination might be treated as an application for a stay of such proceedings, no fine having been imposed, and it being evident that no actual contempt was intended.

**In Bankruptcy.**

This is a motion to continue an injunction granted by R. A. Gunnison, referee in bankruptcy, September 8, 1902, restraining Robert S. Parsons, as county judge of Broome county, N. Y., the Lippincott Glass Company, and their attorneys, from taking further action on an order to show cause, granted by said county judge, why the said Daisy A. De Lany should not be punished for contempt in not obeying an order to appear and be examined in supplementary proceedings in an action in the county court of said county granted on the return nulla bona of an execution issued thereon.

T. B. & L. M. Merchant, for the motion.  
Mangan & Mangan, for the bankrupts.

RAY, District Judge. On the 2d day of August, 1902, said Daisy A. De Lany was duly adjudged a bankrupt under and pursuant to the provisions of the national bankruptcy law. One of the claims

scheduled was that of \$32.28 in favor of the Lippincott Glass Company against said Daisy A. De Lany, being the amount of a judgment in favor of said company obtained in the city court of the city of Binghamton, Broome county, N. Y., on the 16th day of August, 1901. Pursuant to the laws of the state of New York a transcript was filed, and said judgment docketed in the clerk's office of the county of Broome, N. Y., on the 1st day of March, 1902; whereupon same to all intents and purposes became a judgment of the county court of said county.

On the 16th day of July, 1902, proceedings supplementary to execution were duly instituted in said action on said judgment, an execution having been returned unsatisfied, and the said Robert S. Parsons, as county judge of said county, duly made an order directing said Daisy A. De Lany to appear before Harry C. Walker, a referee duly appointed by such order, on the 24th day of July, 1902, for the purpose of being examined as to her property, etc., and also restraining her from disposing of her property. On said day said Daisy A. De Lany appeared by attorney, and the matter was duly adjourned to the 7th day of August, 1902. On that day said Daisy A. De Lany did not appear before said referee, having been adjudged a bankrupt on the 2d day of August, 1902, on her own petition and that of William E. De Lany. The date when the petition in bankruptcy was filed does not appear.

The said claim of the Lippincott Glass Company is of such a nature that it is dischargeable in bankruptcy. Thereafter the proceeding to punish said Daisy A. De Lany for contempt in not obeying said order of said county judge, by appearing for examination on the 7th day of August, 1902, was duly instituted, and this is the proceeding sought to be restrained by enjoining the said judge, said plaintiff, and its attorneys from proceeding further therein.

Proceedings supplementary to execution are proceedings in the action, so far at least as to be within the meaning and intent of section 11a of the national bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), which reads as follows:

"Sec. 11. Suits by and against Bankrupts. (a) A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition: if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

All proceedings in the state court might have been stayed by an order of this court had application been made to it and the facts presented. But no such application was made nor was such an order granted.

The county court of Broome county was not deprived of jurisdiction either of the person of Daisy A. De Lany, or of the subject-matter, an examination of said De Lany as to her property, by the pendency of the bankruptcy proceeding or the adjudication, although the filing of the petition in bankruptcy was a caveat to all the world, and in effect an attachment of her property, and an injunction against

all proceedings that might interfere therewith—all proceedings that would effect the due operation of the bankruptcy law. *Mueller v. Nugent*, 184 U. S. 1-14, 22 Sup. Ct. 269, 46 L. Ed. 405.

In effect, subdivision "a" of section 11 of the bankruptcy law operated as an injunction on the county judge of Broome county, the plaintiff in the action against De Lany (the judgment creditor) and its attorneys, and the referee, Walker, and they were bound to observe and obey it until after adjudication. On the 7th day of August the petition had been filed and an adjudication made, and the right of all creditors having provable and allowable claims to appear and examine the bankrupts in the bankruptcy court had become fixed, and the title to the property of said De Lany had vested or would vest in the trustee, when appointed, as of the 2d day of August, the date of adjudication.

Within the meaning of the bankruptcy act, this supplementary proceeding was a suit founded upon a claim from which a discharge would be a release, and proceedings to enforce such a claim, after adjudication, should be prosecuted in the court of bankruptcy having full and complete jurisdiction. But if the objection was not made before the referee in the supplementary proceedings he would report the fact of nonappearance to the court or judge, and the judge could grant an order to show cause why the debtor, she not appearing pursuant to the order, should not be punished for contempt. On the return of that order, would cause be shown why punishment for contempt should not follow by a presentation of the fact that in the meantime and before the time fixed for the examination the judgment debtor had been duly adjudged a bankrupt? Should this court allow such a proceeding to continue, and compel the bankrupt to take her chances of being fined for an alleged contempt, and, if fined, being compelled to appeal, and thus forced to litigate her rights in the state court? On the other hand, may a judgment debtor, under an order of the state court to appear and be examined as to her property, ignore such order entirely on being adjudicated a bankrupt? Should not the debtor apply for and obtain a stay of such supplementary proceedings?

Clearly, the proceedings in the state court are not superseded by the adjudication in bankruptcy. At most, such proceedings are stayed until after adjudication, and may be stayed until 12 months after the date of such adjudication, etc. Section 11, Act July 1, 1898. If not stayed, they continue, and the debtor, even though a bankrupt, may be compelled to observe and obey all orders of the state court lawfully made. This judgment was not obtained within four months prior to the filing of the petition in bankruptcy, and was in no way directly affected by the adjudication. See section 67f, Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, p. 3450]).

The order of the county judge of Broome county, N. Y., did not become void, but remained in full force and effect, notwithstanding the adjudication in bankruptcy, subject to a stay of proceedings thereon if granted by this court. This is true even if the proceeding be held to be an independent proceeding; that is, a proceeding inde-

pendent of the judgment and execution on which founded. What sanction of law is there for a judgment debtor who has been adjudicated a bankrupt to disregard and disobey the order of the state court having jurisdiction to make same? Is that the remedy? Is not the remedy an application to this court for a stay of all proceedings under and pursuant to such order; that is, for an order restraining the persons seeking to proceed under such order from taking further steps? This would seem to be the remedy provided by section 11 of the bankruptcy act. It will hardly do to hold that a person adjudged a bankrupt may thereupon disobey the lawful orders of a state court made before such adjudication, and, for anything that appears, before the petition was filed, and which order commands him or her to submit to an examination as to their property.

In this case no fine has been imposed for the alleged contempt. The judgment debtors made a mistake in not applying to this court for a stay of the supplementary proceedings instead of failing to appear for examination. But this may be regarded as an application to stay all proceedings on the judgment mentioned, including the supplementary proceedings, and proceedings founded thereon and connected therewith, to punish for the contempt, which evidently was not intended, the party evidently supposing that the adjudication in bankruptcy released her from any obligation to appear and submit to an examination.

The order will be that Robert S. Parsons, county judge of Broome county, N. Y., Lippincott Glass Company, and T. B. & L. M. Merchant, its attorneys, and their agents, servants, and successors, be, and are and each of them is, enjoined and restrained from taking any further proceedings on the judgment against Daisy A. De Lany in favor of said Lippincott Glass Company, docketed in Broome county clerk's office on or about March 1, 1902, or the proceedings supplementary to execution instituted before said county judge and founded thereon, or the proceedings pending to punish said judgment debtor for contempt in not obeying said order, for the space of 12 months from the day said Daisy A. De Lany was adjudged a bankrupt, or, if within that time said bankrupt shall apply for a discharge, then until the application for such discharge shall be determined.

This must be a warning, however, that such orders cannot be disobeyed.

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#### MCCABE v. AMERICAN WOOLEN CO.

(Circuit Court, D. Massachusetts. July 10, 1903.)

No. 1,271.

#### 1. NEGLIGENCE—PLACES ATTRACTIVE TO CHILDREN—CANAL—RAILINGS.

Maintenance of an unguarded canal, having precipitous banks, through a thickly settled portion of a town, to conduct water to defendant's mills, was not, on the allegations of the declaration in this case, such negligence as to sustain a recovery for the death of a child five years of age, who fell into the canal and was drowned.

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¶ 1. See Negligence, vol. 37, Cent. Dig. §§ 47, 55, 56.

James H. Rickard, Jr., for plaintiff.  
Whipple, Sears & Ogden, for defendant.

PUTNAM, Circuit Judge. This case is based on statutes of Massachusetts which are now represented by section 2, c. 171, p. 1544, of the Revised Laws of Massachusetts of 1902, as follows:

"If a person or corporation by his or its negligence, or by the gross negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than five thousand dollars, to be assessed with reference to the degree of his or its culpability or of that of its agents or servants, to be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin."

It was decided in the Circuit Court of Appeals for this Circuit, in *Boston & Maine Railroad v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, that the statutes of Massachusetts of this character are remedial, furnishing a remedy at civil law, so that the federal courts have jurisdiction under them.

Patrick F. McCabe was a minor at the date to which the pleadings in this case related. He was then a resident of Blackstone, in the county of Worcester. The declaration alleges as follows:

"That defendant is a corporation organized under the laws of the state of New Jersey, and a citizen of said state of New Jersey; that the defendant, on the 28th day of May, A. D. 1902, and for a long time prior thereto, was the owner of a certain tract of land, lying in said Blackstone, near the Blackstone river, which land was intersected by streets and highways, and around and near which ran streets and highways, and upon which the defendant maintained numerous dwelling houses, which it rented to many persons and families; that said land is situated in a populous portion of said town, and closely adjoining said land were many other dwelling houses occupied by many other persons and families, in one of which last-mentioned houses said deceased dwelt on said date, and had dwelt for a long time theretofore; and that many of the said persons so occupying the said dwelling houses of the defendant and the said other dwelling houses were children of tender years, as the defendant well knew, or by the exercise of due diligence might have known.

"And the plaintiff further says that upon and in said land of the defendant the defendant on said date, and for a long time theretofore, maintained an artificial canal or mill trench, the water to supply which was taken from said Blackstone river at a point above said land of the defendant, and flowed thence through and across said land, and across St. Paul street, so called, one of the highways above mentioned, in close proximity to said dwelling houses and to the house in which said deceased lived; that at the upper part of said canal or mill trench and near the place of the fatality herein-after set forth, the defendant maintained headgates, so called, through and under which the water in said canal flowed; that below said headgates, at the place where said fatality occurred, the banks of said canal or mill trench were steep and precipitous, and the water therein was deep and flowed with a swift current, by reason of all of which said canal or mill trench was dangerous to children who might be upon or near the banks thereof, as the defendant well knew, or by the use of due diligence might have known.



"And the plaintiff further says that, because of the location and character of said canal or mill trench, it was an object attractive and enticing to children, and constituted an allurements, inducement, and invitation to children to frequent the banks thereof for the purpose of amusement and play, and that the said children dwelling in the defendant's said houses and in the said other houses in the vicinity were in the habit of frequenting said banks for the purpose of amusement and play, all of which the defendant well knew, or by the use of due diligence might have known.

"And the plaintiff further says that by reason of the premises it became and was the duty of the defendant to maintain about and upon said canal or mill trench proper fences, coverings, or other safeguards to prevent children so frequenting said banks, or being thereon as a result of the defendant's said allurements, inducement, and invitation, from reaching the water in said canal or mill trench, and so to keep them from the danger of injury or death by falling into said canal; but that the defendant, wholly neglecting its said duty, negligently and carelessly failed to provide any such fences, coverings, or other safeguards, and permitted its said canal or mill trench to remain and be unfenced, unguarded, uncovered, and open, so that children from the defendant's said dwelling houses and from the said other dwelling houses in the vicinity could freely pass onto and across said land to said canal or mill trench, both directly from the defendant's said dwelling houses and from the said streets and highways which intersect and lie about said land.

"And the plaintiff further says that on said 28th day of May, A. D. 1902, said Patrick F. McCabe was a child of tender years, to wit, of the age of five years, and, being allured, enticed, attracted, and invited to said canal or mill trench as aforesaid, was, by reason of the said negligence of the defendant, upon the bank of said canal or mill trench, near said headgates, engaged in play, and while there, by reason of said negligence of the defendant, the said Patrick F. McCabe, while in the exercise of due care, fell into said canal or mill trench and was drowned."

The defendant demurred to the declaration, and also answered it, not waiving the demurrer. The plaintiff demurred to the answer. By agreement of parties the case was heard on both demurrers; it being stipulated that each party should have the benefit of his demurrer notwithstanding the condition of the pleadings in other respects, and that both demurrers should be heard and disposed of by the court. We will consider first the demurrer of the defendant, because, if that is sustained, it will not be necessary to go further.

The plaintiff relies on *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and *Union Pacific Railway v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. The latter case reaffirms *Railroad Company v. Stout*; but it may as well be laid out of the way, because it is difficult to determine whether it was adjudged on the authority of *Railroad Company v. Stout* or on the old rule with reference to pitfalls and other dangerous traps. The "burning slack" complained of in *Railway v. McDonald* was, indeed, an unguarded pitfall of a concealed, dangerous, and most reprehensible character. The opinion is a very long one, and it is not to be presumed that it received throughout the concurrence of all the Justices of the Supreme Court, or even of a majority of them. It falls within that class of opinions as to which what is not absolutely necessary to the conclusion must be regarded as dicta. For these reasons, we need not consider it further.

*Railroad Company v. Stout* has been expressly repudiated by the Supreme Judicial Court of Massachusetts in *Daniels v. New York &*

New England Railroad Company, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253. It has also been repudiated in New Hampshire, and it is doubtful whether it is regarded as law in any part of New England. However, we need not discuss the question whether we are bound by *Daniels v. New York & New England Railroad Company*, because that case is easily distinguishable from *Railroad Company v. Stout*. There is no doubt that *Railroad Company v. Stout* recognizes that the law requires certain care and caution with reference to children of tender age, even when they are trespassers, which would not be required with regard to adults; so that the result of that case would not have been as it was except for that distinction. What was there complained of was a turntable, which the opinion, at page 662, 17 Wall., and page 748, 21 L. Ed., says several boys had been at play upon "on other occasions," meaning other previous occasions, "and within the observation and the knowledge of the employés" of the defendant corporation. Also, on the same page, it refers to "the remoteness of the machine from inhabited dwellings." In the case at bar the canal in which the deceased was drowned was in the immediate neighborhood of inhabited dwellings, and apparently in the neighborhood of the place where his parents resided. The opinion in *Railroad Company v. Stout* does not directly affirm that this remoteness of the turntable was of consequence; but it states it, and the statement of it leads to one suggestion which essentially distinguishes *Railroad Company v. Stout* from the case at bar, to which we will refer again. Further, on the same page, the opinion points out that the turntable was out of repair. It says that there was on it "a heavy catch, which, by dropping into a socket, prevented the revolution of the table." It also says: "It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument." This catch weighed some eight or ten pounds, and had been broken off and not replaced. The plaintiff was injured by the revolving of the table, which the opinion says "could probably have been prevented by the repair of the broken latch." In view of these facts, the opinion continues to the effect that the jury might have "reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff." The opinion further observes: "The evidence is not strong, and the negligence is slight; but we are not able to say that there is not evidence sufficient to justify the verdict." All this leaves the inference that the case turned on the facts that the jury found that the corporation was negligent in not keeping in repair what it was usual to have on turntables of the kind in question, and that the injury would not have happened except for this negligence. In the present case, there is no allegation that it is usual to guard banks of either natural or artificial streams under the circumstances stated. Therefore, in two respects this case differs from *Railroad Company v. Stout*, namely: There is nothing to suggest that it was the duty of the defendant here to maintain a guard, or that it undertook to maintain one, and failed to keep it in proper order.

In another and more important particular the case differs from

Railroad Company v. Stout. We refer to what is suggested by the fact that the turntable there in question was remote from inhabited dwellings. In this connection we might undertake to sift out the various decisions, but it would be useless to attempt it. They present a great many phases, some of them going so far as to leave the impression that they were controlled less by regard to the rules of law than by sympathy for the sufferings of children and the inability of their natural guardians to care for them. The cases are fully grouped in Thompson on Negligence (1901) § 1024 et seq. While some of them hold the owners of real estate liable for unguarded pools of water, and unguarded "deep reservoirs", into which children have fallen while at play, yet there is certainly nothing in any decision among them of an authoritative nature, or in the principles which they properly develop, which requires us to go so far as the plaintiff demands in the present case. Railroad Company v. Stout and Union Pacific Railway v. McDonald both relate to something which was temporary, not entirely open to observation, and unexpected, and consequently of such a character that the proprietor of the land on which it was situated could not justly anticipate that the parents would be continuously cautioned against it, and thus advised to protect children from injury thereby. The case at bar, however, is essentially distinct in this particular. This canal was permanent, open, and plain to view, as much so as though it had been a natural stream, and suggests nothing whatever which would change the relations of the parties from what they would have been had it been a brook or a river. If the defendant is to be holden to this plaintiff for not especially guarding it, then the customs of the community must be changed throughout, because it is impossible to distinguish this canal, for the purpose of this case, from a river or a brook, a hay mow, an ox cart left in a farmer's yard, a high ledge, or a field trench, about either of which children may happen to be accustomed to play. We think, therefore, that this canal was an object of such a character that, both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto, as they easily could and ought to have done. Therefore, on account of the various distinctions which we have pointed out, and the reasons which we have stated, this suit cannot be maintained.

We have said that the defendant filed an answer, and that that answer was demurred to; but, as already suggested, we do not deem it necessary to enter into a full discussion of the questions thus raised. The answer sets up in substance the defense which was sustained by the Supreme Judicial Court of Massachusetts in *Grant v. City of Fitchburg*, 160 Mass. 15, 35 N. E. 84, 39 Am. St. Rep. 449, to the effect that the parents of the child allowed it to remain unattended. The statute under which this suit is based in this respect is the same as the statute under consideration in *Grant v. City of Fitchburg*, which was also, like this at bar, an action for the death of a child of tender age against the city of Fitchburg. The court, however, held that the inattention of the parents was a defense to the suit.

independently of the question whether or not the defendant was negligent. The inattention in that case was not of a more serious character than that alleged at bar, and is, therefore, in truth a determination by the highest local tribunal of the effect to be given to the expression "due care," found in the statute now under consideration. According to numerous decisions of the Supreme Court, *Grant v. City of Fitchburg* is, therefore, probably conclusive on us. However, we rest the case where it would stand independently thereof.

The demurrer of the defendant is sustained, the declaration is adjudged insufficient in law, and the defendant is to have judgment, with costs.

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In re FELSON.

(District Court, N. D. New York. August 19, 1903.)

No. 1,255.

1. **BANKRUPTCY—ORDER ON BANKRUPT TO TURN OVER PROPERTY—FINDINGS TO JUSTIFY.**

To justify an order directing a bankrupt to turn over money or property to his trustee, it must be found that he has such money or property belonging to his estate in his possession or under his control, which he has concealed and withheld from his trustee.

In Bankruptcy.

This is a proceeding in the nature of an appeal from an order made by John C. Tulloch, referee in bankruptcy, directing the bankrupt, Arthur M. Felson, to pay over to the trustee of his estate in bankruptcy, duly appointed, the sum of \$6,000.

Hastings & Gleason, for the trustee.

Rosenthal & Brown, for bankrupt.

Abbott & Dolan, for certain creditors.

RAY, District Judge. On the 24th day of June, 1903, the referee in bankruptcy made an order on the return of an order to show cause before him why the bankrupt should not pay over to H. Walter Lee, his trustee in bankruptcy, goods, wares, and merchandise of the value of \$20,000, or the proceeds thereof in money, which order, after reciting the adjournments and certain proceedings without finding or stating any facts whatever in relation to there being any money or property in the hands of the bankrupt, or in relation to his having concealed or disposed of any money or property since he filed his petition in bankruptcy, directs as follows: "Ordered that Arthur M. Felson, the above-named bankrupt, pay to H. Walter Lee, Esq., trustee of the above-named bankrupt, within five days from the service of a copy of this order upon the said Felson, the sum of six thousand dollars (\$6000.00)." This order is dated June 24, 1903, and signed by the referee. The referee made on the same day a memoranda of facts found by him, wherein and whereby he finds that July 21, 1902, the

|  |             |
|--|-------------|
| bankrupt had in his possession property and assets, consisting of cash, the sum of.....  | \$ 5,000 00 |
| House worth.....   | 1,400 00    |
| Stock and fixtures in store worth.....   | 5,400 00    |
| That after the 21st day of July, 1902, and between that date and the date when he was adjudged a bankrupt, December 29, 1902, he purchased new goods, and the same were delivered to him, of the value of..... |             |
|  | 23,000 00   |
| That the profits on sales of goods amounted to.....  | 1,150 00    |

|                        |             |
|------------------------|-------------|
| Making a total of..... | \$35,950 00 |
|------------------------|-------------|

|  |             |
|--|-------------|
| The referee further finds that the expense account of the store and personal outlay of the bankrupt between July 21, 1902, and December 29, 1902, was..... | \$ 1,000 00 |
| That the bankrupt purchased real estate in New York City aggregating.....  | 21,700 00   |
| That he paid the creditors during the said time .....  | 1,500 00    |
| Stock and fixtures on hand, worth.....   | 3,000 00    |

|              |             |
|--------------|-------------|
| Making ..... | \$27,200 00 |
|--------------|-------------|

|  |             |
|--|-------------|
| And leaving a balance unaccounted for..... | \$ 8,750 00 |
|--|-------------|

The referee then makes an arbitrary allowance of \$2,750 for possible minor payments and expenses, and says:

"Giving to the bankrupt the benefit of every doubt, and making full allowance for any minor payments made by the bankrupt or for a less amount of goods received since the 21st day of July, 1902, than the sum of \$23,000, which facts may not be fairly disclosed by the evidence, I find that the bankrupt has concealed or misappropriated property belonging to his estate in the amount of \$6,000, as set forth in said order."

The referee does not find or state when the petition in bankruptcy was filed, nor does he find or state that the bankrupt did not meet with other losses, or that there was not a depreciation in the value of this property, house, stock, fixtures, and stock purchased between July 21, 1902, and December 6, 1902, nor does he find or state whether or not the bankrupt purchased the goods referred to, and bought after July 21, 1902, on credit or for cash. The referee does not find that the bankrupt has any property aside from money in his possession or under his control hidden or concealed, nor does he find that the bankrupt has any money in his possession or under his control belonging to his estate in bankruptcy. In order to justify an order that the bankrupt pay over money or deliver property, it is not necessary that the evidence show clearly and distinctly that the bankrupt has the money or the property in his possession in such shape, or in such a location, that witnesses have seen it, and may therefore testify that the bankrupt actually has the money or property in his possession at some particular place. It is sufficient if the evidence discloses the fact that at a certain date the bankrupt had the property or the money in his possession, and has not lost the same by fire or other casualty, for which he is not

responsible, or has not expended the same in gambling or in some other manner. The referee does not find or state that this bankrupt has since the filing of his petition concealed property belonging to his estate in bankruptcy, or placed same in other hands, nor does he state that he finds that the bankrupt has in his possession or under his control, or within his reach, the sum of \$6,000, or any other sum.

See *Boyd v. Glucklich*, 8 Am. Bankr. R. 393, 116 Fed. 131, 53 C. A. 451, where it is held:

"A court of bankruptcy cannot lawfully order a bankrupt to deliver to his trustee money or property he has not got in his possession or under his control, and imprison him if he does not comply with the order, as that would be imprisonment for debt, and the order would not be relieved of that illegal and odious quality by calling it 'imprisonment for contempt.' \* \* \* A court of bankruptcy cannot sentence a bankrupt to imprisonment for debt, any more than any other court of the United States can do that thing; and what it cannot do directly it cannot do by indirection, under another name. It cannot, therefore, lawfully order a bankrupt to deliver to the trustee money or property he has not got in his possession or under his control, and imprison him if he does not comply with the order. Plainly, that would be imprisonment for debt, and the order is not relieved of that illegal and odious quality by calling it 'imprisonment for contempt.' The court that makes such an order is in contempt of the law and constitution, and not the bankrupt in contempt of the court."

In short, the findings of the referee are not sufficiently definite and explicit to justify the order, and the order must be reversed and set aside, with directions to the referee to make new findings of fact on all these subjects, and state whether or not the evidence shows, in his opinion, that the bankrupt has or had at the time the proceedings were taken, or at any time between the filing of the petition and the adjudication in bankruptcy, the sum of \$6,000, or any other sum, in money or property, in his possession or under his control, or within his reach, belonging to his estate in bankruptcy, which he has concealed and withheld from his trustee in bankruptcy. If the bankrupt has misappropriated property belonging to his estate in bankruptcy, the referee should state when the same was misappropriated, and, so far as possible, how.

An order will be entered accordingly, remitting the proceedings to the referee for further proceedings pursuant and in accordance with these directions.

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#### GANTRELL & COCHRANE, Limited, v. BUTLER.

(Circuit Court, S. D. New York. July 21, 1908.)

##### 1. LABELS—SIMULATION—INJUNCTION.

Where defendants, for the purpose of marketing their goods, used a label in such similitude to plaintiff's well-known label that it was at once calculated and intended to defraud both plaintiff and purchasers of the particular class of goods, and the differences in the labels were not such as would be recognized by ordinary inspection, plaintiff was entitled to enjoin the further use thereof.

##### 2. SAME—DIFFERENCES.

Conformity of one label to another sufficient to attract and deceive is not excused by ability to analyze the offending label, and point out

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¶ 2. Unfair competition, see notes to *Schener v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

differences which if known and recognized would avoid confusion, where the ensemble is sufficient to mislead the ordinary purchaser.

Wetmore & Jenner, for complainant.  
John Mulholland, for defendant.

THOMAS, District Judge. The simulation of complainant's label is obvious. It indicates intention to use complainant's reputation for the purpose of marketing defendant's goods. To attract attention, and to avert suspicion, or to confirm credence in his pretensions, defendant is using a label in such similitude to complainant's well-known label that it can be differentiated only by greater attention and comparison than is bestowed by the usual customer. The label itself used by the defendant speaks and declares at once that it is calculated and intended to defraud both the complainant and purchasers, and its continued use would not accord with the demands of ordinary honor in trade. Conformity of one label to another sufficiently to attract and deceive is not excused by ability to analyze the offending label and point out differences, which if known and recognized would avoid confusion. The ensemble does the mischief; the usual purchaser neither abstracts nor analyzes for the purposes of differentiation and judgment.

The motion for injunction is granted.

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JAMES P. SMITH & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. July 23, 1903.)

No. 2,805.

1. CUSTOMS DUTIES—CLASSIFICATION—FILLED BOTTLES.

Bottles are not provided for by the enumeration in paragraph 258, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), of "anchovies \* \* \* in bottles," or by the enactment in paragraph 276, Schedule G, § 1, c. 11, of said act, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), that "the dutiable weight of \* \* \* fluid extract of meat shall not include the weight of the package in which the same is imported," but, when imported filled with articles dutiable under said provisions, are separately subject to the duty provided in paragraph 99, Schedule B, § 1, c. 11, of said act, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633), for "glass bottles filled, not otherwise specially provided for."

Appeal by James P. Smith & Co., importers, from a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs on certain merchandise imported at the port of New York.

The articles in controversy consist of glass bottles, filled with anchovies and fluid extract of meat, which are enumerated, respectively, in paragraphs 258, 276, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151, 172 (U. S. Comp. St. 1901, pp. 1650, 1652), under which paragraphs the articles were classified by the collector. The bottles were separately assessed under paragraph 99, Schedule B, § 1, c. 11, of said act, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633), which relates to "glass bottles, \* \* \* filled or unfilled, not otherwise specially provided for, and whether their contents be dutiable or free." The importers contend that because said paragraph 258 provides

for anchovies "in bottles," and said paragraph 276 provides that "the dutiable weight \* \* \* of the fluid extract of meat shall not include the weight of the package in which the same is imported," these references to the containers of the merchandise constitute special provisions for the bottles, whereby they are removed from the operation of paragraph 99. The board overruled this contention in a brief opinion. The reasons for this action appear more fully from the board's opinion in another case on an analogous question (*In re Acker*, G. A. 4985), which reads as follows:

"SOMERVILLE, General Appraiser. The merchandise in question consists of glass bottles containing olive oil. Duty was assessed under the tariff act of 1897, as follows: (1) On the bottles at the rate of 40 per cent. ad valorem under paragraph 99, the pertinent part of which reads: 'Bottles, \* \* \* filled or unfilled, not otherwise specially provided for, and whether their contents be dutiable or free: \* \* \* provided, that none of the above articles shall pay a less rate of duty than forty per centum ad valorem.' (2) On the oil in the bottles at the rate of 50 cents per gallon, under the provision in paragraph 40, Schedule A, § 1, c. 11, 30 Stat. 153 [U. S. Comp. St. 1901, p. 1629], for 'olive oil \* \* \* in bottles, jars, tins, or similar packages.' The claim of the protestants is that no duty should have been paid on the bottles, on the theory that the assessment of 50 cents per gallon on the oil 'in bottles' covered all the duty intended to be imposed on the oil and the bottles; in other words, that said paragraph 40 constitutes a special provision for the bottles, thereby removing them from the application of paragraph 99, which, as will be noticed, is limited to bottles 'not otherwise specially provided for.' In the opinion of the board this contention is unsound. A similar question was decided adversely to the importers by the Supreme Court in the case of *Schmidt v. Badger*, 107 U. S. 85, 1 Sup. Ct. 530, 27 L. Ed. 328. The merchandise in that case consisted of ale and beer in bottles, assessed for duty under a provision for 'ale, porter, and beer in bottles,' a separate duty being collected on the bottles under a provision for 'glass bottles or jars filled with articles not otherwise provided for.' The provisions quoted appeared, respectively, in Schedules A, B, and G of section 2504 of the Revised Statutes. The court, in overruling the contention of the importers that the separate duty should not have been collected on the bottles, said (per Blatchford, J.): 'By section 2, c. 36, of the act of February 8, 1875 (18 Stat. 307), it is expressly enacted that no separate or additional duty shall be collected on the bottles in which still wines are imported. The additional duty on bottles in which other articles than still wines are imported is left undisturbed. It is manifest, we think, in view of the course of legislation by Congress, that an enactment that the duty on ale, porter, and beer in bottles shall be so much per gallon cannot be regarded as an enactment that there shall be no additional duty on the bottles, when there is another provision of law which imposes an ad valorem duty on bottles, not otherwise provided for, filled with articles.' The Circuit Court of Appeals for the Second Circuit, in the case of *United States v. De Luze*, 95 Fed. 971, 37 C. C. A. 344, held that bottles of a capacity of more than one pint, and containing champagne, which was assessed for duty under paragraph 243, Schedule H, § 1, c. 349, of the tariff act of August 27, 1894 (28 Stat. 525), which provided for 'champagne \* \* \* in bottles, containing each not more than one quart, and more than one pint,' were subject to a separate duty under the provision in paragraph 88 of said act for 'bottles, holding more than one pint, \* \* \* whether filled or unfilled, and whether their contents be dutiable or free, \* \* \* not specially provided for.' A like conclusion was reached by the board, on precisely the same question, in the case of *In re Pierce*, G. A. 2896. It appears by reference to the present act that among the provisions for merchandise 'in bottles' there are, besides said paragraph 40, paragraphs 241, 258, 264, 295, 296, 297, 300, and 301. In the five paragraphs last enumerated it is specifically stated that no additional or separate duty shall be assessed on the bottles. The absence of a like provision in the other paragraphs (including paragraph 40, now in question) indicates that where Congress intended that bottles should be excluded from the provision for filled bottles in paragraph 99 the intent has been plainly expressed, and the inference is



that where no such exception is made it was the legislative intention that the bottles should be dutiable under paragraph 99. Following the decisions cited, we hold that the bottles in question are not covered by paragraph 40, but are dutiable under paragraph 99, as assessed by the collector. The protest is accordingly overruled, the decision of the collector being affirmed."

F. W. Brooks, for importers.

C. D. Baker, Asst. U. S. Atty.

HAZEL, District Judge. The bottles are dutiable under paragraph 99, Schedule B, § 1, c. 11, of the tariff act of July 24, 1897, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], as the duty in each case upon the contents, under paragraphs 258, 276, Schedule G, § 1, c. 11, 30 Stat. 151, 172 [U. S. Comp. St. 1901, pp. 1650, 1652], is specific. The cases, therefore, to which attention is called (*Kauffmann Bros. v. U. S. [C. C.]* 99 Fed. 430, and *In re Johnson [C. C.]* 56 Fed. 822) do not apply.

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MEYER & LANGE v. UNITED STATES

REISS & BRADY v. SAME.

(Circuit Court, S. D. New York. February 20, 1900.)

Nos. 2,775 and 2,776.

1. CUSTOMS DUTIES—CLASSIFICATION—SALTED FISH IN WOODEN PACKAGES—REPUGNANT PROVISIONS.

*Held*, that the provision in paragraph 258, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), for "fish in packages containing less than one-half barrel," and the provision in paragraph 261, Schedule G, § 1, c. 11, of said act, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), for "fish, \* \* \* salted or otherwise prepared for preservation," are, as to salted fish (sardels) in wooden packages, equally specific, and that, under section 7 of said act, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), which provides that, "if two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates," the merchandise in question is properly dutiable at whichever of the rates specified in the two provisions is the higher.

Appeals by the importers, Meyer & Lange and Reiss & Brady, from a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs on certain importations at the port of New York.

The opinion of the board (*In re Meyer et al.*, G. A. 4160) follows:

Wilkinson, General Appraiser. The goods are sardels in salt, packed in wooden packages known as anchors, and one-eighth anchors and one-tenth anchors. They were assessed for duty at 40 per cent. under paragraph 258, Schedule G, § 1, c. 11, Act July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), and are claimed to be dutiable at one-half cent per pound under paragraph 260, Schedule G, § 1, c. 11, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), at three-fourths or  $1\frac{1}{4}$  cents under paragraph 261, Schedule G, § 1, c. 11, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), or at 30 per cent. under paragraph 258.

Paragraph 258 reads as follows, the four divisions being arbitrary:

"[1] Fish known or labeled as anchovies, sardines, sprats, brislings, sardels, or sardellen, packed in oil or otherwise, in bottles, jars, tin boxes or cans, shall be dutiable as follows: When in packages containing seven and

one-half cubic inches or less, one and one-half cents per bottle, jar, box or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, box or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, box or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, box or can; [2] if in other packages, forty per centum ad valorem. [3] All other fish (except shell-fish), in tin packages, thirty per centum ad valorem; [4] fish in packages containing less than one-half barrel, and not specially provided for in this act, thirty per centum ad valorem."

The importers contend that the words "other packages" under our second heading should be construed to mean "other measurements." While the diction is not clear, and a strict rhetorical construction might give some weight to the importers' claim, a reference to previous tariffs will, in our opinion, show that the words mean just what they say.

The corresponding provision of the tariff act of October 1, 1890, Schedule G, c. 1244, § 1, par. 291 (26 Stat. 586), was for "anchovies and sardines, packed in oil in tin boxes measuring," etc., "when imported in any other form, forty per centum ad valorem." This paragraph was exactly reproduced in paragraph 208, Schedule G, § 1, c. 349, of the act of August 24, 1894 (28 Stat. 523). Under neither of these acts was there any question as to the words "imported in any other form," and we believe it was the intention of Congress to make the same provision in the act of 1897. In each of the three tariffs the words, "if imported in any other form," or "if in other packages," are separated from the preceding provisions only by a semicolon. We construe the paragraph to provide 40 per cent. for the fish named when in other packages than bottles, jars, tin boxes, or cans, or if in any packages containing more than 70 cubic inches. The assessment of duty is affirmed accordingly.

On the trial in the Circuit Court the point was raised that, if the fish in question were not dutiable as assessed, they were then included with equal specifickness within the provision in paragraph 258 for "fish in packages containing less than one-half barrel, and not specially provided for," and that in paragraph 261 for "fish, \* \* \* salted, pickled, \* \* \* or otherwise prepared for preservation, not specially provided for," and that, therefore, their classification under these two provisions should be controlled by section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), which provides that, "if two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates."

Albert Comstock, for importers.

H. P. Disbecker, Asst. U. S. Atty.

LACOMBE, Circuit Judge (orally). Any suggestion that the 40 per cent. clause of paragraph 258 applies is disposed of by the decision of the Circuit Court of Appeals in the *Rosenstein Case*, 39 C. C. A. 122, 98 Fed. 420. As to the other proposition—that is, whether the articles should pay duty as "fish in packages containing less than one-half barrel, and not specially provided for," or under paragraph 261, as "fish, \* \* \* salted, pickled, \* \* \* or otherwise prepared for preservation, not specially provided for"—I am free to say that I am unable to determine between those two sections as to which is more specific. I find no satisfactory ground upon which to differentiate the two. Inasmuch as both of them end, "not specially provided for in this act," there is no help such as we would get from the absence of

that clause if it were omitted. I am forced to the conclusion that this is one of the few cases in the act where two or more rates of duty are, by the language used by Congress, made applicable to the same imported article. In such case, from the beginning of time, it used to be that the lower of such rates should be applied, until the advent of the last tariff act, by which it is required that the higher of the two rates should be applied. I do not know which is the higher of these two. I presume it is paragraph 261 in this case.

Mr. Comstock: I presume otherwise, but I cannot inform you specifically on that point now.

The Court: That being so, the decision of the Board of General Appraisers, which fixed it at 40 per cent., is reversed, and the court directs that the assessment be under whichever of the two paragraphs, 258 and 261, fixes the higher rate.

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UNITED STATES v. HAYNES.

(Circuit Court, S. D. New York. April 20, 1901.)

No. 2,888.

1. CUSTOMS DUTIES—CLASSIFICATION—WOOL TRAVELING RUGS.

Wool traveling rugs, which are not "portions of carpets or carpeting," are not included in the provision in tariff act of October 1, 1890, c. 1244, § 1, Schedule K, par. 408, 26 Stat. 598, for "rugs \* \* \* and other portions of carpets or carpeting, made wholly or in part of wool," but are dutiable under the provision in paragraph 392 of said act (section 1, Schedule K, 26 Stat. 596), for "all manufactures of every description made wholly or in part of wool."

Appeal by the United States from a decision of the Board of General Appraisers which sustained the protest of the importer.

This appeal was taken by virtue of instructions by the Secretary of the Treasury to the collector of customs at the port of New York. These instructions are published as T. D. 20,692, the pertinent portion of which reads as follows:

The department is in receipt of the decision, dated the 12th ultimo, of the Board of General Appraisers (not published), sustaining the protest, 77,152a-14,595, of Messrs. C. A. Haynes & Co. It appears that the merchandise was returned by the appraiser as wool traveling rugs, and duty was assessed thereon at 44 cents per pound and 50 per cent. ad valorem, under paragraph 392, Schedule K, § 1, c. 1244, of the tariff act of October 1, 1890 (26 Stat. 596), as a manufacture of wool, and that the principal claim in the protest is under paragraphs 407 and 408 of said act (section 1, Schedule K, 26 Stat. 598), where rugs are provided for *eo nomine*. The board in its decision states: "The contention here raised seems to be settled in principle by the decision of the Circuit Court of Appeals in *Ingersoll v. Magone*, 4 C. C. A. 150, 53 Fed. 1008. Following that ruling, we sustain the protest, claiming the goods to be dutiable at 50 per cent. ad valorem, and reverse the collector's decision accordingly." The department does not concur in the conclusions reached by the Board of General Appraisers in this case. In following the ruling in *Ingersoll v. Magone*, the board held the goods dutiable at 50 per cent. ad valorem, on the ground, probably, that they were rugs provided for *eo nomine*. The court decision referred to was under the act of March 3, 1883, which, in paragraph 378, c. 121, Schedule K (22 Stat. 510), after enumerating rugs and other articles obviously in the line of carpets or carpeting, proceeds

as follows: "And the duty on all other mats, \* \* \* hassocks, and rugs shall be 40 per centum ad valorem." Hence the court held the articles to come under the special provision for "all other rugs." The distinguishing feature of paragraph 408 of the succeeding act of 1890, in the opinion of the department, differentiates the case now presented from the one relied upon by the board. The provision for "other rugs" is dropped in the later legislation, and the paragraph reads, "mats, rugs, screens, covers, hassocks, bed sides, art squares and other portions of carpets or carpeting made wholly or in part of wool and not specially provided for in this act shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character and description." In the preceding numerous specifications of carpets or carpeting, none is found to characterize or apply to the rugs in question. These are travelling rugs, and, although the Board of General Appraisers does not find any fact other than that they were returned by the appraiser as wool travelling rugs, the essential fact appears in the protest that they are similar to those covered by G. A. 2069; that is, that they are composed of mohair and cotton, and are not portions of carpets or carpeting. If it is true that the merchandise in question is not carpets or carpeting, or is not of like character or description as the carpets or carpeting upon which duties are specifically imposed by paragraphs 399-407, inclusive, Schedule K, § 1, c. 1244 (26 Stat. 597, 598), then we must look elsewhere in the tariff for the appropriate provision. It may be found in paragraph 392, for "all manufactures of every description made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals." These considerations seem to fully justify an appeal to the Circuit Court, and you are therefore hereby directed to file an application for review of the board's decision.

W. Usher Parsons, Asst. U. S. Atty.

TOWNSEND, District Judge. The merchandise in question comprises wool traveling rugs, upon which duty was assessed at 44 cents per pound and 50 per cent. ad valorem, under paragraph 392 of the act of October 1, 1890, c. 1244, § 1, Schedule K, par. 392 (26 Stat. 596), as a manufacture of wool. The importer protested, claiming that the articles in question were dutiable as "rugs" *eo nomine*, under paragraphs 407 and 408 of said act (section 1, Schedule K, 26 Stat. 598). The Board of Appraisers sustained the protest of the importer. Subsequently the Treasury Department notified the collector of customs that said decision was not approved (T. D. 20,692), and I concur in the reasons therein stated, and therefore the decision of the Board of General Appraisers is reversed.

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#### MEYER v. UNITED STATES.

(Circuit Court, S. D. New York. April 20, 1901.)

No. 2,942.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—HEMSTITCHED LAWNS—COTTON CLOTH.

Hemstitched cotton lawns, made by subjecting cotton cloth to the processes of turning over the edges, drawing certain threads, and other manipulation, but not appropriated by these processes to any particular ultimate use, are held to have been advanced beyond the condition of "cotton cloth," and not to be dutiable as such under the "countable clauses" of Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule I, pars. 252-257, 28 Stat. 527, 529, but to be dutiable as "manufactures of cotton," under paragraph 264 (section 1, Schedule I, 28 Stat. 529) of said act.

**2. SAME—PARTLY-MADE WEARING APPAREL—LACES AND EMBROIDERIES.**

Certain robes or dresses, composed of cotton or other vegetable fiber, in part embroidered and in part made of lace, being so far advanced in manufacture as to be unavailable for other purposes than for completion into light dresses, are dutiable under Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule I, par. 258, 28 Stat. 529, as "articles of wearing apparel \* \* \* made up or manufactured wholly or in part," and not under paragraph 276 (section 1, Schedule J, 28 Stat. 530) of said act, covering "laces, \* \* \* embroideries, \* \* \* articles embroidered, \* \* \* and articles made wholly or in part of lace."

**3. SAME—GALLOONS.**

Certain articles which in a broad sense are trimmings, embroideries, and articles made of lace, but which in a specific sense are galloons, and are known as galloons, are dutiable under the provisions in Tariff Act Aug. 27, 1894, c. 349, § 1, Schedules J, L, pars. 263, 300, 28 Stat. 529, 532, for "galloons," and not under the provisions in paragraphs 276 or 301 (section 1, Schedules J, L, 28 Stat. 530, 532) of said act, for trimmings, embroideries, articles made of lace, etc., "not specially provided for."

Appeal by the importer from a decision of the Board of General Appraisers which affirmed the decision of the collector of customs at the port of New York in the classification of the importations in question.

Everit Brown, for importer.

Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge. There is practically no contest here as to the facts or the law, and the appellant's contentions have been sustained in other cases in the courts and before the Board of General Appraisers. The merchandise in question is dutiable under Act Aug. 27, 1894, c. 349, 28 Stat. 509. It embraces goods of three kinds:

First. Certain hemstitched lawns, made of cotton, assessed as cotton cloth under the so-called "countable clauses" of the tariff. The goods have been advanced beyond the condition of cotton cloth by manufacture, to wit, by turning over the edges, drawing certain threads, and other manipulation, but have not been appropriated by these processes to any particular ultimate use. They are dutiable, as claimed, at 35 per cent. ad valorem, under section 1, Schedule I, par. 264, 28 Stat. 529. In *re Mills* (C. C.) 56 Fed. 820, affirmed in *United States v. Mills*, 13 C. C. A. 692, 14 U. S. App. 711; and unreported cases, such as *Brown & Eadie v. United States* (No. 2,531) decided January 11, 1900.

Second. Certain robes or dresses partly made. They are composed of cotton or other vegetable fiber, and so far advanced in manufacture as to be unavailable for other purposes than completion into light dresses or robes; being cut, trimmed, etc., with that sole object in view. They are in part embroidered and in part made of lace, and so were assessed at 50 per cent. ad valorem, under section 1, Schedule J, par. 276, 29 Stat. 530. They are dutiable, as claimed, at 40 per cent. ad valorem under section 1, Schedule I, par. 258, 28 Stat. 529. In *re Mills*, supra; In *re Boyd*, 5 C. C. A. 223, 55 Fed. 599, 14 U. S. App. 94.

Third. Certain galloons. They were composed wholly or in chief value either of silk, or of cotton or other vegetable fiber, and are claimed to be dutiable at 45 per cent. ad valorem, under section 1,

Schedules I, L, pars. 263 or 300, 28 Stat. 529, 532. These paragraphs are without the qualification, "not specially provided for," that appears in section I, Schedules J, L, pars. 276, 301, 28 Stat. 530, 532, under which the goods were assessed at 50 per cent. ad valorem, and the former paragraphs are therefore controlling. These goods, while in a broad sense trimmings and embroideries and articles made of lace, are in a specific sense galloons. They come within the dictionary definition of that word, and also within the trade use of the same. They are dutiable at 45 per cent. ad valorem, as claimed. *Wotton v. United States* (C. C.) 84 Fed. 954; G. A. 4053.

The decision of the Board of General Appraisers is reversed as to said three kinds of articles which are identified by the evidence.

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AMERMAN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 25, 1900.)

No. 2,980.

1 CUSTOMS DUTIES—CLASSIFICATION—PAINTINGS—ENAMELED EWER AND TRAY.

Certain antique mythological paintings of great value and high artistic character, consisting of a ewer and tray made of copper, and enameled by a process not now understood, are not covered by the provision in paragraph 159, Schedule C, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 164 (U. S. Comp. St. 1901, p. 1642), for "sheets, plates, wares, or articles of iron, steel, or other metal, enameled or glazed with vitreous glasses," but are dutiable under paragraph 454, Schedule N, § 1, c. 11, of said act, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), as "paintings in oil or water colors."

Appeal by Amerman & Patterson, importers, from a decision of the Board of General Appraisers relating to an importation at the port of New York, where the assessment of duty by the collector of customs was affirmed by reason of the failure of the importers to make what the board considered would be the appropriate contention in their protest.

Hatch & Wickes, for importers.

WHEELER, District Judge. This importation consists of mythological paintings, containing many faces and figures of great beauty, done in very high art by Susanna Court, upon copper, in the form of an ancient ewer and tray, about 350 years ago, and valued at about \$14,000. They were assessed at 60 per cent., as decorated china, under paragraph 95, Schedule B, § 1, c. 11, of the act of July 24, 1897, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633). The importers protested that they should be assessed at 20 per cent., under paragraph 454, Schedule N, § 1, c. 11, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), for "paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for." The board held that they are specially provided for under paragraph 159, Schedule C, § 1, c. 11, 30 Stat. 164 (U. S. Comp. St. 1901, p. 1642): "Sheets, plates, wares, or articles of iron, steel or other metal, enameled or glazed with vitreous glasses."

The evidence seems to show that, although they were enameled, it was done in a manner not now known, and wholly different from that done with the "vitreous glasses" of or near the date of this tariff act. So this paragraph does not now seem to take them out of paragraph 454 by specially providing for them. A place among these common wares and utensils could hardly have been intended for them. They belong more naturally among the subjects of paragraph 454, as a similar paragraph was construed in *U. S. v. Perry*, 146 U. S. 71, 13 Sup. Ct. 26, 36 L. Ed. 890. The painting was done in water, according to the testimony of the expert witness on that subject; and historically it was done in water or lavender oil. They would fall within "the fine arts, properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material," as the first class of such works of art is defined in that case. The painted glass windows in that case were held to be taken out of the general provision for paintings by the specific provision for painted glass windows in another place. *United States v. Richard*, 99 Fed. 268, 39 C. C. A. 504, decided January 5, 1900, in the Circuit Court of Appeals of this circuit, seems to hold that the painted and framed tiles in question there came under a paragraph relating specifically to ornamented tiles, rather than under one relating to paintings in oil or water colors, not otherwise provided for. The materials of these articles are of insignificant value. The great value is due to the skill of the artist, as a painter, in the production and grouping of the colors and giving them a luster. They seem now, as works of high art, to come within paragraph 454, according to the principles of *Arthur v. Jacoby*, 103 U. S. 677, 26 L. Ed. 454, and *U. S. v. Perry*, before cited, and without going contrary to the principles of any case.

Decision reversed.

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#### HELLER & MERZ CO. v. UNITED STATES.

#### ROESSLER & HASSLACHER CHEMICAL CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 19, 1900.)

Nos. 2,633, 2,635.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—ACIDS—PHTALIC ANHYDRIDE AND TETRACHLORPHTALIC ANHYDRIDE.

Two coal-tar preparations, consisting of phthalic anhydride and tetrachlorphthalic anhydride, which, though not acids chemically, are commercially known as, and perform the functions of, acids, are free of duty under paragraph 473, Free List, § 2, c. 1244, Tariff Act Oct. 1, 1890 (26 Stat. 602), as "acids used for \* \* \* manufacturing purposes," and are not dutiable under paragraph 19, Schedule A, § 1, c. 1244, of said act (26 Stat. 567), as "coal-tar preparations."

Appeals by the importers from decisions of the board of general appraisers affirming the decisions of the collector of customs with regard to certain importations made at the port of New York.

The merchandise covered by these appeals was described in the decisions of the board as consisting of tetrachlorphthalic anhydride and of an article invoiced as phthalic acid. The former was found to be "a chemical compound, a coal-tar preparation not a color or dye, and not an acid." As to the latter

it was observed (G. A. 3952): "The so-called 'phtalic acid, distilled,' is in fact phtalic anhydride, a coal-tar preparation not a color or dye. It is used as one of the materials in the manufacture of certain coal-tar dyes. It is not an acid, but is produced from phtalic acid by distillation. It is known in the arts and in trade and commerce by the name of 'phtalic anhydride,' and sometimes as 'phtalic acid, anhydrous.' It is not known in trade and commerce as an acid, but it is commercially distinguished from phtalic acid, which is known in trade and commerce as an acid."

Albert Comstock, for importers.

Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question is phtalic acid, including a subvariety thereof known as "tetra-chlorphtalic acid," which is in fact a substance prepared from coal tar, and which was assessed for duty at 20 per cent. ad valorem under paragraph 19, Schedule A, § 1, c. 1244, of the act of October 1, 1890 (26 Stat. 567), as a preparation of coal tar not specially provided for, and claimed as free under section 2 of said act, par. 473, Free List, § 2, c. 1244 (26 Stat. 602), as "acids used for \* \* \* manufacturing purposes, not specially provided for." If the article is both an acid and a preparation of coal tar, it is free as an acid. *Matheson v. U. S.*, 18 C. C. A. 143, 71 Fed. 394, 38 U. S. App. 25. If it is commercially and substantially an acid, in that it performs the functions of an acid, then it is free as such, even though it be not technically an acid. *Schoellkopf, Hartford & MacLagan v. U. S. (C. C.)* 94 Fed. 640; *Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777, 38 L. Ed. 651. The evidence introduced before the board of appraisers shows that they were justified in finding that the article was not chemically an acid. The evidence as to commercial designation shows that this article is uniformly and generally known as "phtalic acid." Some of the witnesses say that it is known as "phtalic acid, anhydrous." This word "anhydrous," being merely an adjective designation, does not prevent the substance from coming within the commercial designation of an acid. The great preponderance of trustworthy testimony supports the contention of the importers that it performs the function of, and is commercially known as, an acid.

It appears that, although counsel for the importers seasonably entered his appearance and asked to be advised of all hearings before the board, five witnesses were examined as experts before said board without notice to said counsel in advance, and without his subsequent knowledge at any time prior to the decision by the board. This evidence is deprived of much of the weight to which it might possibly have been entitled, because the witnesses were not cross-examined, and no opportunity was afforded to test their competency or the relevancy of their testimony. In view of the fact that the evidence was introduced upon the question of commercial designation, it was especially necessary that the court should be informed as to the qualifications of said witnesses, in order to determine the weight to be given to their opinions. In the absence of such information, it would be unsafe to hold that commercial designation was proved by mere ex parte statements.

The decision of the board of general appraisers is reversed in both cases.



## R. J. WADDELL &amp; CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 20, 1900.)

No. 2,755.

## 1. CUSTOMS DUTIES—CLASSIFICATION—COMPOSITION PUMICE STONE—SIMILITUDE.

The article known as "composition pumice stone," consisting of ground pumice stone mixed with clay, in the form of bricks or cakes, is not dutiable under the provision in paragraph 97, Schedule B, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633), for "articles or wares composed wholly or in chief value of earthy or mineral substances \* \* \* not decorated," but, by virtue of the similitude clause in section 7 of said act, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), is dutiable under paragraph 92, Schedule B, § 1, c. 11, of said act, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1632), as being substantially similar in texture, material, and use to the "pumice stone, wholly or partially manufactured," therein enumerated.

Appeal by R. J. Waddell & Co., importers, from a decision of the Board of General Appraisers (G. A. 4145) which affirmed the assessment of duty by the collector of customs on certain merchandise imported at the port of New York.

The merchandise is known as composition pumice stone, and is a manufactured article, complete and ready for use. It consists of ground or pulverized pumice stone and clay mixed and pressed or molded into bricks or cakes of different sizes, shapes, and grades or qualities of texture or grain, depending upon the use for which it is intended—whether by painters, varnishers, polishers, cabinetmakers, marble workers, and others, in rubbing, smoothing or polishing the surfaces of wood, stone, marble, etc. Duty was assessed by the collector under the provision in paragraph 97, Schedule B, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633), for "articles and wares composed wholly or in chief value of earthy or mineral substances, \* \* \* not decorated." The contention of the importers is that the articles are properly dutiable under the provision in paragraph 92, Schedule B, § 1, c. 11, of said act, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1632), for "pumice stone, wholly or partially manufactured," either directly, or as being similar to such pumice stone, within the meaning of section 7 of said act, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), which provides that "each and every imported article, not enumerated, \* \* \* which is similar, either in material, quality, texture, or the use to which it may be applied to any article enumerated \* \* \* as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned."

Comstock & Brown, for importers.

D. F. Lloyd, Asst. U. S. Atty.

LACOMBE, Circuit Judge (orally). It seems to me that paragraph 92, Schedule B, § 1, c. 11, of the act of July 24, 1897, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1632], was not intended to provide for manufactures of pumice stone combined with anything else. It deals with "pumice stone, wholly or partially manufactured," and pumice stone "unmanufactured." I do not think this article is properly within the terms of that paragraph.

As to paragraph 97, in view of the decision of the Circuit Court of Appeals in *Dingelstedt v. U. S.*, 91 Fed. 112, 33 C. C. A. 395, I do not think the article could properly be classified there. But plainly and

clearly, under the similitude clause, it should be entitled to be assessed at the same duty as that imposed upon pumice stone, because in texture, in the material of which it is composed, and in its use, it is substantially similar to the "pumice stone, wholly or partially manufactured," of the paragraph in question.

Therefore I reverse the decision of the Board of Appraisers, and hold that the article is dutiable by similitude, the same as pumice stone manufactured.

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SANTAS NUT FOOD CO., Limited, v. FORCE FOOD CO. et al. SAME v. ELLSWORTH. SAME v. THE H-O CO. et al.

(Circuit Court, W. D. New York, December 13, 1902.)

Nos. 155, 156, and 157.

I. PARTNERSHIP ASSOCIATIONS—STATUTORY RIGHT TO SUE IN ASSOCIATION NAME—FEDERAL COURTS.

A limited partnership association organized under the statutes of a state, which expressly give it a legal entity, with the right to sue and be sued in its association name, may maintain a suit in such name in a federal court for infringement of a patent, or in any case where jurisdiction does not depend on diversity of citizenship.

In Equity. Suits for infringement of patent. On demurrers to bills.

Orel L. Herschiser, for complainant.

Samuel G. Metcalf and Abel I. Smith, Jr. (Fred L. Chappell, of counsel), for defendants.

HAZEL, District Judge. The complainant is a limited partnership association organized under and by virtue of the laws of Michigan. It brings this bill under that partnership name, averring infringement of a patent. The Michigan statute in question (section 10, p. 210, No. 191, Pub. Acts 1877, and subsequent acts amendatory thereof), as construed by the highest courts of that state, confers upon a limited partnership the unquestioned right to sue and be sued in its association name. *Rouse v. Cycle Co.*, 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794; *Staver & Abbott Mfg. Co. v. Blake*, 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798; 15 Ency. of Pleading & Pr. 1114. I do not think there is anything uncertain or doubtful in the statement contained in the bill upon which the jurisdiction of the court depends. The statute in unequivocal terms gives to a limited partnership association a legal entity, and as such it is authorized and empowered not only to hold property in its association name, but to sue and be sued under that designation. In short, it is given all the attributes of a corporation by the statute of the state which created it. Moreover, this is not a case where the jurisdiction of the court rests upon diversity of citizenship. Such jurisdiction vests in the court by reason of the alleged infringement by defendant of complainant's patent, and, as the right of complainant to sue in its association name is obtained directly from the statute creating it, I am of the opinion that it has a right to bring suit for infringement of patent in its limited

partnership name. The case of *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, and other cases announcing a similar rule, do not cover the question here presented. Irrespective of the interpretation which the courts of the state of Michigan place upon their limited partnership statute, I incline to the view that where a right to sue and be sued by an arbitrary name exists by express statutory enactment the federal courts will take cognizance of the suit, where it is clear, as here, that no diversity of citizenship is required to confer jurisdiction. Evidence may be given upon the hearing that the patent No. 558,393 was assigned to complainant. The allegation that it was assigned to the Sanitas Nut Food Company, Limited, a corporation of the city of Battle Creek, and not to the partnership, may be rectified by proper evidence on the hearing.

The demurrer is overruled, with costs, defendant having leave to answer within 30 days.

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UNITED STATES v. LUE YEE. SAME v. LUE GEE. SAME v.  
KEEN SHING.

(District Court, D. Vermont. August 10, 1903.)

1. CHINESE—PROCEEDINGS FOR DEPORTATION.

The decision of the proper customs or immigration officer adverse to the claim of a person of the Chinese race to nativity in the United States, and denying him entry, is conclusive in subsequent proceedings for his deportation for being unlawfully in this country.

Appeals from Decisions of Commissioner Ordering Deportation of Chinese Persons.

P. F. McManus, for appellants.  
James L. Martin, U. S. Atty.

WHEELER, District Judge. These appellants applied to the collector for admission into the United States as native-born citizens, and they were excluded. Soon after they were taken before a commissioner for being unlawfully in this country. The decision of the deputy collector in charge was shown, and the commissioner held it to be conclusive against their right to remain, and ordered them deported. The same decision has been shown here; but they claim it is not conclusive, and offer evidence of birth in this country. These decisions of customs and immigration officers to whom they have been by law committed have always by the Supreme Court been held conclusive in cases arising while the persons in question were within the custody or control of those officers, as to nativity, and all other questions involved. *Fox Yung Yo v. U. S.*, 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; *Lee Gon Yung v. U. S.*, 185 U. S. 306, 22 Sup. Ct. 690, 46 L. Ed. 921. Deportation proceedings now appear to be held to stand upon the same ground. *Chin Bak Kan v. U. S.*, 186

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121. Accordingly this decision of the deputy collector must be held conclusive.

Orders of deportation affirmed.

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UNITED STATES v. BORGFELDT.

(Circuit Court, S. D. New York. January 22, 1900.)

No. 2,898.

1. CUSTOMS DUTIES—CLASSIFICATION—UMBRELLA STICKS—PYROXYLIN.

Umbrella sticks of wood, having celluloid handles, that constitute the chief element of value in the articles, are more specifically provided for as "sticks for umbrellas," in paragraph 462, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1679), than as "articles of which \* \* \* any compound of pyroxylin is the component material of chief value," in paragraph 17, Schedule A, § 1, c. 11, of said act, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628).

Appeal by the United States from a Decision of the Board of General Appraisers. Affirmed on appeal, 105 Fed. 1005, 44 C. C. A. 686. Note in *Re Switzer*, G. A. 3983.

The merchandise consists of umbrella sticks of wood, with celluloid handles, the celluloid being the component material of chief value, and was classified by the collector of customs at the port of New York as "articles of which \* \* \* any compound of pyroxylin is the component material of chief value." The board reversed the decision of the collector, and held that the merchandise should have been classified as "sticks for umbrellas."

Charles D. Baker, Asst. U. S. Atty.

Everit Brown, for the importers.

WHEELER, District Judge. Paragraph 462, Schedule N, § 1, c. 11, of the act of July 24, 1897, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1679), provides for a duty of 40 per cent. ad valorem on "sticks for umbrellas, parasols, or sun shades, and walking canes, finished or unfinished," and paragraph 17, Schedule A, § 1, c. 11, Act July 24, 1897, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628), one of 65 cents per pound and 25 per cent. ad valorem on "articles of which collodion or any compound of pyroxylin is the component material of chief value." These are sticks for umbrellas, with handles of collodion constituting the chief value. Sticks for umbrellas are specific articles, and by that name seem to be taken, by 462, out of the general description of all articles of that composition in 17.

Decision affirmed.

## CARROLL et al. v. CHESAPEAKE &amp; O. COAL AGENCY CO.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1903.)

No. 486.

## 1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—ARRANGEMENT OF PARTIES.

The bill of plaintiff corporation alleged that it was engaged in the business of selling coal and coke; that it had contracts with defendant coal companies by which it was to take and pay for all their product at the mines, to furnish transportation, and to sell the same at prices fixed by the companies, receiving a stipulated sum per ton for its services; that by the terms of such contracts defendant companies were not liable for damages for failing to furnish coal or coke to plaintiff where such failure was caused by strikes; that in reliance on such contracts plaintiff had made contracts for the sale of large quantities of coal and coke, which could only be supplied from the mines of defendant companies; that the latter were prevented from furnishing the same by the wrongful and illegal acts of individual defendants, who were conducting a strike among the miners, and who, by intimidation and threats, prevented others from working in the mines. *Held*, that the bill showed such an interest in plaintiff as entitled it to maintain the suit in its own right for its protection independently of the coal companies, which, while properly made defendants, could not be aligned with plaintiff to defeat the jurisdiction of a federal court, their interests, while perhaps not adverse, being based on different rights.

## 2. INJUNCTION—RIGHT TO RELIEF—PARTIES.

In such suit, to enjoin the alleged illegal acts of the individual defendants, the plaintiff is the real party in interest, and not the defendant companies, who have no interest in plaintiff's contract rights which it seeks to protect.

## 3. SAME—SUFFICIENCY OF BILL.

While the allegations of such bill do not show that plaintiff has any interest in the coal or coke produced by the defendant companies until the same is delivered, they show rights in plaintiff, arising out of its contracts with such companies, interference with which by the individual defendants will result in irreparable injury to plaintiff, and which entitle it to equitable relief; it being further shown that such defendants are not financially responsible.

## 4. SAME—MISJOINDER OF DEFENDANTS.

Such bill is not demurrable for misjoinder of parties defendant, plaintiff having the right to require the defendant companies to do all in their power to perform the duty imposed by their contracts to operate their mines, and to prevent interference with such operation by their co-defendants, as well as to ask the aid of the court to restrain such unlawful interference.

Appeal from the Circuit Court of the United States for the Southern District of West Virginia, at Charleston.

See 119 Fed. 942.

This case comes up on appeal from the Circuit Court of the United States for the Southern District of West Virginia. The appeal is from a motion refusing to dissolve an injunction. The bill was filed by the Chesapeake & Ohio Coal Agency Company, a corporation of the state of New Jersey, against a number of corporations of the state of West Virginia, hereinafter spoken of as the "coal companies," and the Chesapeake & Ohio Railroad Company, a corporation both of Virginia and West Virginia, and also against a large

¶ 1. Diverse citizenship as ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

number of persons, citizens and residents of the State of West Virginia, hereinafter spoken of as, the "individual defendants." Also against W. F. Rend, a citizen of Illinois; against all the copartners in the Blume Coal Company, citizens and residents of West Virginia; G. W. Purcell and W. B. Wilson, citizens and residents of the state of Indiana; and John Mitchell, a citizen and resident of the state of Pennsylvania. The defendant Rend and the copartners in the Blume Coal Company are included in the term "coal companies," defendants. To this bill the individual defendants interposed demurrers; Purcell, Wilson, and John Mitchell claiming their privilege of suit in the districts of their residence. Their claim was allowed, the demurrer was sustained on this ground, and they were dismissed from the suit. All the other individual defendants filed a joint demurrer to the bill. The grounds of demurrer will be stated hereafter.

In order to understand the grounds of the demurrer, an inspection and statement of the allegations of the bill, or at least an abstract of the allegations, is necessary. The bill proceeds at great length. The complainant is now, and for many years last past has been, engaged in the business of selling coal and coke. A business starting from small beginning, but which now has assumed enormous proportion, amounting in the last coal year to 3,000,000 tons of coal and many hundreds of thousands of coke per annum. Its business is selling coal and coke mined and manufactured by the coal companies defendant. It has been so engaged from the development of these mines in all foreign and American business outside of the capes, and it is almost the exclusive agent in the sale of all coal sold inside the capes east of the mines. It confines its business to the selling of coal and coke mined and manufactured by the defendant companies. At great expense it has built up the business, and sells to consumers all over the world; its business being worth to-day not less than \$50,000 per annum. That the Chesapeake & Ohio Railroad Company owns the only means of communicating with the mines of the said companies, and is the only mode by which their products can be carried to market. That their mines are situated in what is known as the "New River Coal Field," located in the New River gorge or cañon, known as the "New River Coal Measures," the coal from which produces a very valuable and high grade of coke, and the coal from said mines is of the highest class steam coal known in the world, and so commands a market in not only this country, but in many European and South American countries. That it has contracts with all of the said coal companies, whereby it sells all the products of their mines and ovens at a price named by the owners of the mines, and becomes responsible to each of them for all deliveries made by each of them, respectively, on board the railway cars at the mines; paying for said coal and coke when so loaded upon the cars, whether sold or not, for a commission of 10 cents per ton. That the said coal companies are not required to deliver to it coal and coke when the employes in their mines are on a strike, or refuse to work. That, in order to sell coal and coke in large quantities, it is necessary to make contracts for deliveries reaching over the whole coal year, which in the eastern market begins on the 1st of April, and in the western market begins on the 1st of May. That it has already sold more than 2,000,000 tons of coal and several hundred thousand tons of coke, to be delivered during the present coal year; a part of this to the government of the United States for the navy, and a large quantity to foreign steamships, and railways and industrial institutions. To fill these contracts it must provide for the transportation of the coal and coke contracted for. For failing to fulfill contracts, for causes hereafter stated, it has already sustained a loss of at least \$50,000, and is threatened with greater losses. That, owing to the superior quality of the New River coal, it cannot substitute other coal in its place, except at enormous cost. That, in addition to its present and future losses upon its contracts, it is threatened with the entire loss of its business, which will be hopelessly destroyed, and in this way it would incur irreparable damage. That, since 7th of June, 1902, it has been unable to procure but a small amount of coal and coke, because very many, if not all, the employes of the coal companies have quit work, and all these mines, except one, have been idle since that time. The excepted mine has had its tonnage greatly reduced. If these coal companies had not been thus interrupted, their whole

products coming to complainant would have secured it in the fulfillment of all of its contracts.

The bill then at great length and in detail charges: That this cessation of work is due to a secret unincorporated association known as the "United Mine Workers of America." That the purpose of this association is the combination of all the mine workers in America, with a view of controlling the labor in the mines. That to this end the country is divided into districts, the territory covering the states of Virginia and West Virginia being known as "District No. 17." That this district is divided into subdistricts, or locals, which have been organized at the mines of every one of the defendant coal companies. That under the orders of the central organization, communicated to all their subdistricts or locals, the miners engaged in the mines of all the defendant coal companies went on a strike and quit work. Up to that time the miners and mine laborers in the services of these coal companies had been in the enjoyment of wages equal to or greater than that paid in any other coal fields in the United States, the same having been advanced from time to time as the market justified. They were getting good work, making good wages, and were happy and prosperous, and neither of them, individually or with any number of their fellows, complained to their employers on account of their compensation or the conditions and environments surrounding their employment. Not content with this, and as a part of the scheme and method of the organization, the subordinate officers, acting in collusion with the national officers of the organization, besides ordering the strike, they and the miners and mine laborers, members of the subordinate locals, used every effort by persuasion, force, and in many instances by intimidation and threats, to induce others to join with them in the strike. That these miners and mine laborers who have refused to work are now engaged in preventing others from working, and are materially supported and encouraged by their leaders. The complaint then goes on as follows:

"Eighteen. Complainant avers that there are a large number of persons who are willing to work for said defendant coal companies, and who quit work through fear, if they could do so, and be safe and secure against molestation and personal injury from said individual defendants and their confederates, members of said United Mine Workers of America, and that said defendant coal companies can employ and bring from other sections of the country an adequate number of persons to mine and ship their coal and manufacture and ship their coke, if they were assured that they would not be molested or personally injured by the said defendants and their said confederates, members of said organization; but the said individual defendants, members of said organization, and their confederates, also members of said organization, residing in the said New River coal fields, have combined and confederated together for the purpose of preventing all such persons from working in the said mines by the performance of such acts as will operate to accomplish this purpose, even to the extent of doing personal violence, and that the said individual defendants, together with their confederates aforesaid, have inaugurated and been carrying on a system of marching from one colliery to another of the said defendant companies in large bodies, making threatening speeches, and carrying on that sort of tumultuous gatherings and acting in such a menacing manner that they have terrorized and intimidated all persons living in said New River coal field, and who want to work, and all such persons as have been brought into said field by said defendant coal companies from other sections of the country have been scared and put in fear by reason of such conduct, and thereby prevented from working for said coal companies defendant. That they are moving about over said field in the nighttime and daytime in bodies from 200 to 500, gathering together at some places as many as 1,500 persons, using that sort of language, making that sort of demonstrations, and using language so violent that they have placed the whole country in terror, and that there is now throughout that coal field, particularly in the sections around the mines where there is being an effort of work, a reign of absolute terror among the people.

"It is openly charged by said individual defendants in their public speeches made in these large gatherings, in the hearing of persons who are willing to work, and among the people who may reside in the locality where such

meetings are held, that when the strike is over every man who refuses during said strike to join the said organization will be blacklisted, and unable to get work at any trade or occupation anywhere in the United States; and in many cases where persons are desiring to work, and are actually at work, the said individual defendants and their said confederates threaten, in case such persons go to work, or those who are at work do not cease working, that they will do personal violence to them. That on several occasions some of the employes of said defendant coal companies have been shot at from ambush, and driven from their work by reason thereof. That the residence of a justice of the peace living in said New River district, before whom certain cases of unlawful entry and detainer were tried, wherein certain of said coal companies were plaintiffs and members of said order of United Mine Workers were defendants, was recently burned, was set on fire at night and wholly destroyed, because he had decided the said cases in favor of the said plaintiffs."

This conduct upon the part of these individual defendants has interrupted and totally ceased the product of the mines, and, unless the court will interfere, the complainant will be destroyed in its business, will be compelled to lose many thousands of dollars, because of the inability of the coal companies to operate their property and deliver to the complainant the coal and coke called for by its contracts with them respectively, leaving the complainant without redress, because the coal companies are protected by the strike clause in their said contracts, and because each of the individual defendants is wholly insolvent.

The prayer of the bill is as follows: "Individual defendants above named and all other parties be enjoined, restrained, and inhibited from all acts of violence towards men laboring or desiring to labor in the said mines and upon the various plants of said defendant coal companies; and that said individual defendants and all others be inhibited, restrained, and enjoined from marching and parading across the properties of the said coal companies defendants, or either of them, or their assembling in large numbers near, about, or by the property of said coal companies defendants in such manner as to intimidate any person or persons at work or desiring to work for either of said coal company defendants, and that each and every one of said individual defendants and all other persons be enjoined, restrained, and inhibited from interfering with, molesting, or threatening the men in the employ of said defendant coal companies, or persuading them to quit their said employment, or in any way interfering with or disturb the said defendant coal companies in carrying on their business of mining coal, manufacturing coke, and delivering the same on railway cars for shipment to this complainant, by threats, menaces, intimidation, or in any other manner whatsoever. Your complainant further prays that the said defendant the Chesapeake & Ohio Railway Company be restrained from allowing the said individual defendants, or any other persons, from marching on or over its said right of way through or near by the premises and property of the said defendant coal companies in such numbers or in such manner as would tend in any way to intimidate or interfere with the employes of the said defendant coal companies, and from holding meetings on said rights of way where the same passes through the said defendant coal companies' properties; and also from allowing the said individual defendants, or any of their confederates, as set out in this bill, from riding their freight trains from colliery to colliery or point to point within said New River coal field to facilitate their unlawful assemblage in this bill complained of, and to the end that they may be accelerated in their purpose to prevent the said defendant coal companies from resuming work and operating their said mines. Your complainant further prays that each of the said defendant coal companies above named be enjoined, restrained, and inhibited from allowing the said individual defendants, or any other person or persons, from marching, assembling, or doing any act whatsoever on the lands owned or controlled by them that would tend to interfere with the working of the men now employed in the mines of the said defendant coal companies, or from interfering with such persons as may be upon their premises and express a willingness and desire to work for them in their said mines."



To this bill the individual defendants, as we have said, filed their joint and several demurrer. There are stated eight grounds of demurrer. They are: First. To the jurisdiction of the court below as a court of the United States. Second. To the jurisdiction of the court below as a court of equity. (a) Upon its face the allegations of the bill show a want of equity. (b) The complainant is not the real party in interest, but that the coal companies defendants are the real parties in interest. (c) That there is a misjoinder of parties defendants.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

Charles E. Hogg (S. C. Burdette, on the brief), for appellants.  
J. W. St. Clair and W. E. Chilton, for appellee.

SIMONTON, Circuit Judge (after stating the facts as above). The ground of objection to the jurisdiction of the court below as a court of the United States is that the coal companies defendants have interest in the subject-matter of the bill, which will properly align them with the complainant, and that, so aligning them, the said coal companies all being citizens of the state of West Virginia, there will appear a controversy on each side of which are citizens of the state of West Virginia. And for this these defendants rely upon *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70, and cases there quoted. The principle of these cases is that, where there is a cause of action in a case, and in that cause of action one of the defendants has precisely the same character of interest as complainant, the case cannot proceed in a Circuit Court of the United States if such defendant is a citizen of the same state as any of the codefendants. These cases do not apply here. The cause of action which complainant has against the individual defendants is very different from that which the coal companies may have against them. The prayer for injunction is based upon the allegations in the bill that the complainant is exposed to irreparable injury. The facts to sustain these allegations are that, having contracted to sell all the product of the coal companies defendants, and to guaranty such sales, the complainant, relying upon these contracts, had entered into other contracts for the delivery of coal and coke, amounting to more than 2,000,000 tons of coal and many hundred thousand tons of coke, deliverable in the coal year, to very many parties controlling large interests; that, owing to the actions of the individual defendants, this coal and coke cannot be mined and delivered. Consequently complainant would be compelled to break all of its contracts, especially as it could nowhere else obtain coal of the character it had contracted to deliver. Thus not only would it incur heavy pecuniary loss immediately, but its business would be utterly destroyed in the future. That is the gravamen of the bill, and upon this must stand the prayer for injunction and relief. Now, with the contracts made by complainant with the consumers, the coal companies defendants have no concern whatever. Nor have they any concern with the pecuniary losses met by complainant on these contracts, nor with the time or mode of their fulfillment. When they deliver coal and coke to the complainant, the price is fixed, and its payment is secured at all events. It is true that, if the coal companies do not deliver coal, or are pre-

vented from delivering coal, they suffer injury as well as the complainant. But it is an injury very different from that suffered by the complainant. The complainant suffers at once an irreparable great pecuniary loss by reason of the nonfulfillment of its contracts with the consumers. The coal companies suffer an interruption in their profits, a cessation of sales; but they have on hand their mines, from which coal has not been taken, and on the resumption of work they can recoup. It is only a postponement of sales and of profit and income, not an absolute loss. And in this respect there is no community of interest between complainant and the defendant coal companies. If, therefore, the bill had been so framed as to embrace the complainant and the coal companies as co-complainants, the Coal Agency Company seeking its relief because of its loss on its contracts, and the coal companies because they were deprived temporarily from income, the bill could be well objected to as multifarious. Besides this, the cause of action of the coal companies against these individual defendants would be for an invasion of, and highhanded trespass on, their property, interference with their laborers, and inducing them to quit work; the cause of action being the direct result of the conduct of the individual defendants. The cause of action of the complainant would be because of the indirect result of the action of the individual defendants—a case coming within that class of cases such as the case of *Scott v. Shepherd*, 2 W. Blackstone, 891, also reported in *Smith's Leading Cases*, vol. 1, p. 737, and the other cases quoted and discussed by the judge below in his clear and learned opinion, a part of this record. The principle of these cases is that, if one does an unlawful act directed against another, and the immediate consequence of the unlawful act does injury to a third person, he is responsible to the third person, although he never had in contemplation any injury to him. Wherever a man does an unlawful act, he is responsible for all the consequences. See *Griggs v. Fleckenstein*, 14 Minn. 81 (Gil. 62), 100 Am. Dec. 199; *Tarlton v. McGawley*, Peake's Nisi Prius Report, p. 270, quoted in the opinion below.

It is true that in one respect the complainant and the coal companies have a common interest, and that is in the uninterrupted operation of the mines; but, as we have seen, for wholly different reasons. The complainant has no share with them in the profits of their respective mines, nor have the coal companies any interest in the losses on the contracts of the complainant. The case may be illustrated by a proceeding on the part of a mortgagee to foreclose his mortgage on land subject to the lien of another mortgage. To such a bill, if the senior mortgagor seeks to foreclose the prior mortgage, all the lienholders subsequent to him must be made parties (*Bates on Federal Procedure*, § 359), and they can be made parties defendant. The interest of the two mortgagees in one respect are the same—both want their money by foreclosure and sale. Yet such a bill filed in this court has been and can be sustained, even if the subsequent lienholders and the mortgagor, defendants to the bill, are citizens of the same state. See, also, *Hotel Co. v. Wade*, 97 U. S. 20, 24 L. Ed. 917.

Besides this, the complainant is entitled to sell all the coal mined and coke made by these coal companies, and is interested in securing the largest quantity possible. It has a right to ask that the coal companies exhaust all means of securing a supply of coal. To this end it prays that the coal companies be restrained from permitting the individual defendants and any other persons from assembling, marching, or doing any act on their own lands which will interrupt the production of coal. The prevention of these unlawful acts is not within the power of the complainant, and cannot be successfully effected without the co-operation of the coal companies, and such co-operation will be more readily and successfully exercised if it meet with the sanction and be given under the mandate of this court. Even were it the case that no relief was sought against the coal companies, and that they have an interest in the result, still, if the complainant has grounds for relief against the individual defendants—a ground peculiar to itself, a cause of action that it can sustain—then these coal companies are not necessary parties to the bill, and it may be dismissed as against them, the action in the meantime proceeding against the individual defendants. *Wormley v. Wormley*, 8 Wheat. p. 450, 5 L. Ed. 651; *Removal Cases*, 100 U. S., p. 469, 25 L. Ed. 593.

The other grounds of demurrer go to the jurisdiction of the court as a court of equity: (a) Upon its face the allegations of the bill show its want of equity. (b) The complainant is not the real party in interest; the coal companies are the real parties in interest. (c) Misjoinder of defendants.

We will not take these up in their order, but will first inquire, is the complainant the real party in interest? As we have seen, the gravamen of the complaint of the bill is that the complainant, upon the faith of the contracts with the coal companies, had, upon its own responsibility, and at its own risk, entered into contracts with very many consumers of coal and coke for delivery during the coal year; that by reason of the action of the individual defendants the supply of coal was cut off or destroyed, and in consequence thereof great loss, present and future, has come upon the complainant. It complains of its loss, and seeks relief from it. It is true that in a sense the complainant is agent for the coal companies, and in a sense, as their agent, disposes of the coal; that by the terms of its contract with the coal companies, immediately upon the delivery of the coke and coal on the cars the complainant becomes liable for its price to the coal companies, and pays this price at all events. With the disposition of the coal, the parties to whom it is to be delivered, their solvency or insolvency, the time of delivery, and the consequences of nondelivery, the coal companies have no concern whatever. They do not contract with the consumers; they do not know the consumers; they are not informed of the names of the consumers; they **authorized** no contract with them. All these are the acts and **concern** of the complainant, made and assumed by it as its own contracts, for the nonperformance of which it is alone responsible. If, therefore, the complainant has any cause of action at all because of the loss thus occasioned to it, it has such right of action itself against

the individual defendants, and could not seek its remedy in the name of or through the coal companies, if for no other reason, because the loss for which they seek relief was no concern of the coal companies.

Is there equity in the bill? It is contended that the bill does not disclose any interest of the complainant in the mines or products of the individual defendants; that the complainant has no interest in the coal and coke until it is delivered on the railroad, when, and when only, its property interest in the coal and coke arises; and that the bill does not show any contract between the complainant and the coal companies to deliver coal, either as to time or quantity, only to sell such coal as it is delivered. It is impossible to read this bill of complaint without seeing that it is based on the fact that the complainant has a contract with each of the coal companies for the delivery to it of all the coal such company can mine. It must be remembered that the case of the complainant against the individual defendants is not on the contracts, nor for a breach of the contracts. It arises because of these contracts. So that the terms of the contracts and their conditions need not be set forth. It is enough if it appear that such contracts exist. The bill alleges that complainant has been engaged for years in selling coal and coke. That this business has been confined to selling the coal and coke produced by the coal companies defendants; that it is the only person who sells the coal and coke produced by them. The complainant has contracts with all of the coal companies defendants, and that under and by virtue of said contracts it has in this one year contracted to deliver to consumers in this country and elsewhere 2,000,000 tons of coal and several hundred thousand tons of coke. The bill and its prayer show that these coal companies were being operated, and that all their operations were suspended by the action of the individual defendants, and that the loss thereby occasioned to complainant is irreparable, because "the said defendant coal companies are not required to deliver to your complainant coal and coke when their employes in their mines are on a strike or refuse to work." Is not the inference from these statements irresistible that all the coal companies defendants were engaged in mining and manufacturing coal and coke; that they were bound to deliver to the complainant all the results of their operations; that, in consideration of and in reliance upon this, complainant had engaged in large contracts for delivery, and had assumed vast responsibility and is so exposed to great loss? Is it not also clear that the complainant has direct and immediate interest in the working of the mines and in the use of the ovens in the delivery of the coal and coke, even if it has no property in the coal and coke until it is actually delivered?

As to the misjoinder of parties defendants. As has been seen, the complaint of the bill is great loss to it by reason of the inability to receive coal from the mines of the coal companies. This inability arises from the fact that the mines are not worked. It is the duty of the coal companies to have the mines worked. That of the individual defendants not to obstruct this operation. Discharging their duty, the coal companies should exhaust effort in obtaining workers

for their mines, and in restraining and preventing the obstruction of the work. Non constat that the action of the individual defendants may not have been taken because of some acts of omission or commission on the part of the coal companies. At least complainant has the right to know about this, and the coal companies have the right to disavow and disprove it. Until this is done, the fault may lie with the coal companies and the individual defendants, with either or both. Besides this, as the case of the complainant is because of these contracts with the coal companies, it would appear that these companies are proper if not necessary parties.

The individual defendants have concluded at this stage of the case to rest their defense on the demurrer. They admit for this purpose the truth of the facts stated in the bill. Assuming, therefore, that these facts are true, that the individual defendants have either committed or sanctioned or encouraged the acts of gross violence and lawlessness contained in the bill, the court below had no alternative but to issue its injunction.

The decree of the court below is affirmed.

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BERWIND-WHITE COAL MIN. CO. v. MARTIN.

(Circuit Court of Appeals, Third Circuit. July 20, 1903.)

No. 6.

1. TRIAL BY COURT—GENERAL FINDINGS—REVIEW OF EVIDENCE.

Where a case is tried by the court without a jury, and the court, notwithstanding defendant's application for special findings of fact, found generally that the plaintiff was entitled to recover, the facts cannot be reviewed on appeal.

2. MINES AND MINING—COAL LEASE—ROYALTIES—DAMAGES.

Where defendant executed a coal lease by which it covenanted to pay a royalty of 10 cents a ton on all coal mined and shipped, and, except under certain conditions, to mine after the first year not less than 75,000 tons per annum, and as much more as practicable, paying royalties on the quantity named, whether mined or not, the royalty paid on coal not mined in any year to be credited on the excess, if any, above the minimum mined subsequently, and after the first year defendant abandoned the mine, plaintiff, on the expiration of the time covered by the lease, was entitled to recover for the whole period the minimum royalty specified and interest.

Acheson, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 114 Fed. 553.

Frank P. Prichard, for plaintiff in error.

Austin O. Furst and Rudolph M. Shick, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. This case was tried by the court without the intervention of a jury. Rev. St. U. S. §§ 649, 700 [U. S. Comp. St. pp. 525, 570]. The defendant presented a number of re-

quests for special findings of fact and conclusions of law, but the court, without passing upon them, found generally that the plaintiff was entitled to recover. There can be no question as to the entire propriety of this course. The statute expressly provides that the finding of the court on the facts may be general or special, and you can no more compel the latter than you can require a special verdict from a jury. It is true that in *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608, it is said that, "if the parties desire a review of the law involved in the case, they must \* \* \* get the court to find a special verdict which raises the legal questions"; but it is not to be understood from this that it can be exacted, all that is meant being that the court should be persuaded to do so. Neither is the alternative, which is there suggested, of presenting propositions of law, and requiring the court to rule upon them, of any greater obligation. The right to this has been asserted without success in a number of cases, and the practice must now be considered as settled to the contrary. *Insurance Company v. Folsom*, 18 Wall. 237, 21 L. Ed. 827; *Cooper v. Omohundro*, 19 Wall. 65, 22 L. Ed. 47; *St. Louis v. Western Union Telegraph Company*, 166 U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044; *City of Key West v. Baer*, 66 Fed. 440, 13 C. C. A. 572; *Consolidated Coal Company v. Ice Company*, 106 Fed. 798, 45 C. C. A. 638. The facts of the case are not, therefore, before us, and the only question open on the record is the one of damages.

According to the declaration, the plaintiff sues for certain unpaid coal royalties claimed to be due on an agreement of mine lease entered into with the defendant in January, 1891. A copy of the lease is attached, and shows that it was for the term of 10 years, with the option of renewing for a like term, and gave the defendant company the right to mine and dispose of all the coal in a certain vein underlying a tract of land in Cambria county, Pa., the defendant covenanting on its part to pay a royalty of 10 cents a ton on all coal mined and shipped, and, except under certain conditions, to mine after the first year not less than 75,000 tons per annum, and as much more as practicable, paying royalty on the quantity named, whether mined or not; the royalty paid on coal not mined in any year to be credited on the excess, if any, above the minimum mined subsequently. It was further averred that the defendant took possession under the lease, opened a mine in the vein, and began the mining and shipping of coal therefrom during the first year; but that during the next and subsequent years it neither mined nor paid for the minimum, nor any part of it. The plaintiff thereupon claimed the yearly royalty of \$7,500 for nine years covering the period from January, 1892, to January, 1901, inclusive, amounting to \$67,500, a credit of \$100 a year for seven years being allowed as the rent of a house and stable erected on the land. The trial judge sustained this claim in full, including interest, and gave judgment for the plaintiff for \$86,586.34. It is contended by the defendant that this was not warranted; that the action being for the breach of an executory contract, and the plaintiff having his coal still in place untouched, is not entitled to the royalty upon it as though it had been mined, but that a deduction must be made on account of it, and interest simply allowed on the annual installments

which he would have received if mining had been carried on, amounting to some \$17,000. The action is *assumpsit*, which, according to the state practice, covers also debt and covenant. It was treated by the court below as in the nature of the latter, and the stipulated annual installments of royalty as liquidated damages. It might equally stand as an action of debt, the obligation to pay being absolute, and the term ended; but, whichever way it be taken, the result is the same, the defendant being bound to pay in accordance with the agreement.

The absolute character of the obligation in such cases is well shown by the authorities. In *Bamford v. Lehigh Zinc Company* (C. C.) 33 Fed. 677, affirmed in 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215, the defendant took a lease for 10 years of an abandoned zinc mine and concentration works on a specified royalty per ton, agreeing to pay in any event an annual minimum of \$1,000. On taking possession and pumping out the water, it was found that the mine was practically destitute of ore, and payment was refused in consequence. On suit being brought for three years' rent, the defendant set up a failure of consideration, but judgment was given against it. "The motive for the contract," says Shipman, J., "was the hope of benefit which might arise to the defendant from the venture. The consideration for the undertaking to pay at least the sum of one thousand dollars annually was the use of a mine property and works of large cost and of doubtful value, but which might become of profit, and it received what it contracted for." In *Johnston v. Cowan*, 59 Pa. 275, the plaintiff granted to the defendants the right to mine fire clay, for which they were to pay him 12 cents a ton, and mine 1,250 tons annually, \$150 to be paid every six months, whether mining to that extent had been done or not. To a suit for four semiannual installments the defendants set up that they had never entered under the lease; but it was held that the right to mine was a privilege for which they were bound to pay whether they had availed themselves of it or not. "It is highly improper," says Thompson, C. J., "to call the fixed sums to be paid, in the event of the minimum of coal not being taken, liquidated damages. It is the alternative price to be paid in an event which it was foreseen might happen; not as damages, but in payment for the privilege." In *Kemble Coal & Iron Company v. Scott*, 90 Pa. 332, the defendants took an ore lease, and bound themselves to pay \$10,000 every three years after the first, whether ore to that extent was mined or not. Disappointed in their expectations in regard to the land, and after spending considerable money to reach the ore upon it, they ceased operations, and endeavored to give up the lease; but it was held that they were responsible for payment of the stipulated minimum. In *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236, there was a lease of coal for 10 years on a royalty of half a cent a bushel, 10,000 bushels to be mined or paid for annually. After seven years the coal seam got so thin that the lessees stopped mining, and, the lessors having brought suit at the end of the term for the three years unpaid, it was held that they were entitled to recover regardless of the question of the exhaustion of the property. This decision is somewhat qualified in *Boyer v. Fulmer*, 176 Pa. 282, 35 Atl. 235, but it is the doctrine of the English cases (*Marquis of Bute v. Thompson*, 13 Mees. & Wellsby, 487; *Jervis v. Thompson*, 1 Hurls. & Norm. 195; *Phillips v.*

Jones, 9 Simons, 519; Jeffreys v. Fairs, L. R. 4 Chan. Div. 448; Clifford v. Watts, L. R. 5 C. P. 577), and has the weight of authority elsewhere (Wharton v. Stoutenburgh, 46 N. J. Law, 151; Gilmore v. Ontario Iron Company, 86 N. Y. 455; Tod v. Stambaugh, 37 Ohio St. 469; McDowell v. Hendrix, 67 Ind. 513; Central Appalachian Company v. Buchanan, 73 Fed. 1006, 20 C. C. A. 33). It is also forcibly reasserted in the subsequent case of Lehigh & Wilkes-Barre Coal Company v. Wright, 177 Pa. 387, 35 Atl. 919, a bill to restrain the forfeiture of a coal lease, threatened on account of the nonpayment of royalties. By the terms of the lease an annual minimum of \$4,000 was to be paid whether a corresponding quantity of coal, at the rate per ton agreed upon, was mined or not. The lessees paid this for a number of years in advance of their mining, until, as it was shown, they had paid for more coal than was left in the land, on account of which they claimed the right to stop; but it was held that they must continue to pay, regardless of this, if they proposed to retain possession. As this was a bill in which equitable considerations, if any, are entitled to prevail, it is especially significant that the lessees were not permitted to escape from the strict terms of their bargain.

If, then, according to these cases, the defendant company was bound (as it undoubtedly was) to pay for the stipulated minimum quantity, year by year, as it accrued during the life of the lease (subject only to the contingencies with regard to faults and strikes there provided for), it is difficult to see why it is not answerable to the same extent now that the term is closed. Had suit been brought at the end of each year, there can be no question that the plaintiff would have been entitled to recover the \$7,500 which the company agreed to pay, and, repeating this year by year, he would have obtained in the aggregate every dollar that he now claims. How, then, can he be put off with less simply because he has waited and consolidated his demand so as to cover the whole period?

The suggestion that the plaintiff still has his coal is well disposed of in the case of Gilmore v. Ontario Iron Company, 86 N. Y. 455, which was a suit, the same as here, for unmined royalty. "It would be no answer to a demand for rent of agricultural land," says Folger, C. J., "that the tenant had let the land lie idle, and that all the elements of productiveness still lay in the soil unused; that those were what the tenant had bargained for, and they were yet there for the landlord. They are of value to the landlord only when used. He uses them, in effect, from year to year, through the tenant, and gets his profit from the use in the rent he receives. So here the ore gives no return until dug out and marketed. The plaintiff's method of doing this was to let the privilege of mining to the defendant, and reserving a portion of the profit in the royalty stipulated for. It may have been—it probably was—the most profitable method for him to adopt to make gain from his ore. Though the ore may remain, and not be lost to him, time has been lost to him in the process of having it turned into money. He has lost the enjoyment of the fruits of his property. \* \* \* He has failed to realize the profitable results he looked for, and had a right to look for, from the bargain he made." The same point was raised and discussed in Powell v. Burroughs, 54 Pa. 329, where the defense set up was that the unmined coal was



worth more per ton at that time than what the defendant had agreed to pay for it; but he was nevertheless held liable. "It can hardly be said," says Thompson, J., "that this plea was a ground of defense at law for a breach of the covenant sued on. It does not aver performance in any shape, nor does it show that it was contrary to law that it should be performed. If it be a plea at all, it is an equitable plea or defense. \* \* \* If sanctioned, it would be a panacea to heal every broken covenant where performance was stipulated for."

These observations apply whether, as stated above, the case be regarded as counting in debt, or in covenant as treated in the court below. The only difference is that in the latter the minimum royalties agreed to be paid are to be taken as liquidated damages; and, notwithstanding what is said in *Johnston v. Cowan*, supra, there is abundant authority to sustain this view. *Powell v. Burroughs*, 54 Pa. 329; *Wolf Creek Coal Company v. Schultz*, 71 Pa. 180; *Consolidated Coal Company v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; *Coal Creek Mining Company v. Tennessee Coal Company*, 106 Tennessee, 651, 62 S. W. 162. The defendant relies on *Lyon v. Miller*, 24 Pa. 392, and *Kille v. Iron Works*, 141 Pa. 440, 21 Atl. 666; but in neither of these was there any provision for the payment of a definite annual quantity whether mined or not, a most material distinction. *Ridgely v. Conewago Iron Company (C. C.)* 53 Fed. 988. In *Kille v. Iron Works*, moreover, judgment was given for the defendant on the merits, the court holding that the plaintiff was not entitled to recover, and the expression of opinion by Thayer, P. J., on the question of damages was, therefore, entirely obiter.

Our conclusion, therefore, is that the plaintiff is entitled to all that has been awarded him. It certainly would be most disturbing to the obligation of mine leases if we should hold, as we are urged to do, that the defendant company, after covenanting to pay a definite minimum royalty so unqualifiedly as it did, can only be required to settle for the difference after allowing for and deducting the uncertain value of the coal in place which it undertook to mine, and might have, but did not. Nor is this helped out by conceding interest on deferred payments, which, at the same time, in effect, it claims were not really due. If the fact that the plaintiff still has his coal suggests an equity—of which we are by no means convinced—it is sufficient to say that, this being an action at law, it cannot be worked out here. Finding, therefore, no error in the record, the judgment is affirmed.

ACHESON, Circuit Judge (dissenting). I am not able to concur in the affirmance of the judgment of the court below. The result reached, it seems to me, is unjust, and not warranted by the authorities. The case in its facts differs essentially from every case relied on to sustain the judgment. The coal vein which the plaintiff below leased to the defendant was undeveloped, and the defendant was to open a mine therein. The lease contained the following clause:

"And the said lessee covenants and agree to mine and ship from the premises aforesaid not less than 75,000 gross tons of coal per year (after the first year of this lease), and to pay royalty on 75,000 gross tons per year, whether mined or not, and as much more as is practicable, unless prevented by strikes, riots, or other unforeseen calamity, or by fire or water, or by

troubles or faults in the coal seams. And the said lessee agrees to pay to the said lessor ten cents per gross ton on all said coal mined and shipped."

The lease provided for monthly settlements for royalties. Soon after its date (January 5, 1891) the defendant took possession, and at large expense opened a mine, which produced in the year 1891 about 7,000 tons of coal. Near the end of that year marketable coal ran out. For several months thereafter the defendant continued to drive the entry through the bad material which the seam had developed, but, not being able to obtain marketable coal by reason of "troubles or faults in the coal seams," the defendant early in 1892 abandoned the mine. The defendant paid to the plaintiff the stipulated royalty on all the coal it had taken out. After the defendant had abandoned mining operations, the plaintiff, with the defendant's acquiescence, took possession of the mine, and during the remainder of the year 1892 carried on operations in the mine, endeavoring to find marketable coal. He claimed to have reached good coal eventually, and about the end of the year 1892 or beginning of 1893 requested the defendant to resume mining operations. The plaintiff did not demand this as a matter of right, nor did he by word or act signify that he regarded the abandonment of mining operations by the defendant as wrongful or without good cause. He made no demand for royalties, nor any demand whatever upon the footing of the lease. Apparently he acquiesced in the defendant's abandonment of mining operations as justifiable in the circumstances and under the terms of the lease. The first intimation he gave of his intention to hold the defendant to performance was after the expiration of the 10 years term of the lease. Then, on March 23, 1901, he brought this action. He sued to recover (and the claim was allowed) the sum of \$7,500 for each of the last nine years of the lease, with interest. The judgment in his favor was for the sum of \$86,586.34, which actually included \$7,500 and its interest for the year 1892, when, indisputably, marketable coal was not obtainable from the premises, and during most of which year the plaintiff was in possession of the premises, endeavoring to reach such coal.

The defendant below insisted there and contends here that the plaintiff, by his conduct and silence, had estopped himself from setting up such a claim as he sued for; that his course of conduct, both active and passive, had been such as to induce the belief that he had acquiesced in the defendant's abandonment of mining operations as justifiable, and that he did not intend to claim minimum royalties; that he had so misled the defendant that the latter had not taken steps to get out the 67,500 tons of coal involved in this suit while it had the right to do so, and that the plaintiff had thus secured to himself the whole of this coal. The defendant's position, in my judgment, was well taken upon the indisputable facts. By his course of conduct and intentional concealment of his purpose during a period of nearly eight years, the plaintiff lulled the defendant into a sense of security. In view of the circumstances, good faith required the plaintiff to move in assertion of this claim, or to make some sign of his purpose to assert the claim, before it was too late for the defendant to do anything to avert loss. There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. Dick-

erson v. Colgrove, 100 U. S. 578, 581, 25 L. Ed. 618. It is a well-recognized general principle that where, by the course of conduct of one party entitled to the performance of certain terms, the other party has been led to believe, as a man of average intelligence, that such performance will not be required until it has become too late to perform, or until to insist on performance would work material injustice, the person who has so conducted himself is barred from asserting the right he had. Bigelow on Estoppel (5th Ed.) 660. Equitable estoppel is available as a defense in an action at law. Kirk v. Hamilton, 102 U. S. 68, 78, 26 L. Ed. 79. Here the defense of estoppel arose upon the undisputed facts. It inhered in the case as a question of law, independently of the defendant's third point, which particularly brought this defense to the attention of the court. I think the defense of estoppel should have been sustained by the court below, and that the failure to do so is reviewable here.

Upon the question of the measure of damages the court below, it seems to me, erred. The plaintiff has recovered the full price of 67,500 tons of coal still in place, and which he now owns absolutely. This, I submit, is not right, under the peculiar facts of this case. The just measure of damages applicable here is the one laid down by the Supreme Court of Pennsylvania in the analogous cases of Cherry v. Miller, 1 Pittsb. Leg. J. 98, and Lyon v. Miller, 24 Pa. 392, and recognized in Kille v. Reading Iron Works, 141 Pa. 440, 21 Atl. 666. That measure of damages is compensation for the injury the plaintiff has sustained by the defendant's alleged breach of its covenant. In Cherry v. Miller the trial court instructed the jury that the stipulated royalty was the measure of damages for all the limestone the defendant should have quarried under his lease. In reversing the judgment the Supreme Court of Pennsylvania said: "This is certainly wrong, for it gives to the plaintiff more than a compensation for the injury, by giving him full payment for limestone that is still his own." In Lyon v. Miller, that court said: "The coal in the mine was certainly worth something. As matter of law the court was bound to consider it as possessing some value. It was, therefore, proper to direct the jury to ascertain the value, and to deduct it from the stipulated rate." These cases have never been overruled. They furnish, I think, the fair rule for the assessment of damages here, whether we regard the terms of the lease or the plaintiff's course of conduct.

The learned judge below thought that upon the question of the measure of damages this case was ruled by Powell v. Burroughs, 54 Pa. 329. But there the lessee had the right to terminate the lease on the 31st of December in any year by giving three months' notice, and he did not exercise that option, but held on to the premises. This was a controlling circumstance. A like distinguishing feature is found in Gilmore v. Ontario Iron Co., 86 N. Y. 455. In Timlin v. Brown, 158 Pa. 606, 28 Atl. 236, the court held that the contract was a sale and absolute grant of the coal in place, and not a license to mine. This, too, was the ground of the decision in Lehigh & Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919. But the contract involved in this case is a coal-mining lease. The defendant's right to mine expired at the end of the term, and the unmined coal now belongs to the plaintiff.

## SCHAUM et al. v. RIEHL et al.

(Circuit Court, E. D. Pennsylvania. August 14, 1903.)

No. 56.

## 1. PATENTS—CONSTRUCTION OF CLAIM—INFRINGEMENT.

Where a patentee has pointed out in his claims the precise construction that is to be regarded as his invention, by references to the drawings, his patent may properly be confined to such construction on an issue as to infringement.

## 2. SAME—SHUTTLE BLOCKS FOR LOOMS.

The Wagner patent, No. 473,563, for a shuttle-carrying block of a swivel-loom, claim 1, construed, and, as limited by the prior art, and by its own references to the construction of parts as shown by the drawings, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 473,563, for a shuttle-carrying block of a swivel-loom, granted April, 1892, to August Wagner. On final hearing.

E. C. Rhoads, for complainants.

E. H. Fairbanks, for respondents.

J. B. McPHERSON, District Judge. The subject-matter of this controversy is the infringement of the first claim of letters patent No. 473,563, granted in April, 1892, for an improvement in the shuttle-carrying block of a swivel-loom. The claim is as follows:

"(1) The independent shuttle-carrying blocks formed with downwardly-extending flanges,  $h^1$ , and horizontal flanges,  $h^3$ , said flanges being made integral with the blocks and inclosing the L-shaped recesses,  $h^4$ ,  $h^6$ , and said blocks having also vertical recesses formed in their fronts, in combination with pinions, J, journaled in the vertical recesses, and having their teeth extending into groove,  $h^6$ , and above the top of the block."

The inventor was August Wagner, a defendant in the present suit, by whom the patent was assigned before issue to the plaintiffs. He is now the foreman in the workshop of the other defendants, and in view of the facts that he was the original inventor, that he assigned the patent to the plaintiffs while in their service, and that he was employed by the Messrs. Riehl when the infringing blocks were made, it is argued that the defendants are estopped from denying the validity of the patent. The cases of *Marvel Co. v. Pearl* (C. C.) 114 Fed. 946, *Consolidated Rubber Tire Co. v. Finley Co.* (C. C.) 116 Fed. 638, and *Regent Mfg. Co. v. Penn Mfg. Co.* (C. C. A.) 121 Fed. 80, are cited in support of this proposition, but it need not be considered, if I am correct in believing that the defense of noninfringement has been satisfactorily established. But I think it proper to add that if I am wrong in this conclusion, and if the defendants are at liberty to question the validity of the patent in this suit, I should have no hesitation in deciding that the German patent to Brand, granted in 1886—to say nothing of any other patent—was a clear anticipation of the plaintiffs' device, so far at least as the claim under consideration is concerned.

Laying the matter of estoppel aside, therefore, and turning to the defense of noninfringement, I do not think a prolonged discussion of

¶ 1. See Patents, vol. 38, Cent. Dig. § 243.

the subject is necessary. It is manifest that the patent must be narrowly construed, both in view of the prior art, and for the further reason that the inventor was himself careful to limit his claims by reference to the drawings that accompany the specification. He has thus pointed out the precise construction that is to be regarded as his invention, and to this I think he may properly be confined. From this construction the block manufactured by the defendants differs in three particulars: It is made of a plurality of pieces instead of in one piece, it has a T-shaped recess instead of an L-shaped recess, and the flanges inclosing the recess are not integral with the block. Mr. Hains, the defendants' expert—a witness of unusual knowledge and experience in the department of textile fabrics and textile machinery—explains the differences more elaborately in the following words:

"The defendants' device consists of a shuttle block having the usual functional characteristics common to these devices, namely, as a supporting and guiding means for the small shuttles in swivel or narrow ware looms.

"Structurally considered, it is a composite block, formed of three separate pieces, namely, a face piece, a central piece, and a depending flange piece, all secured together by suitable screw connections. The face piece of the block is provided with recesses in which the usual pinions of the prior-art structures are mounted for moving the shuttles from block to block. The central piece is provided with a flanged upper portion, and is cut away below said flange for the accommodation and reception of the upper edge of the separate and detachable depending flange piece. The lower portion of the depending flange piece is substantially L-shaped, and a groove is formed, which, in its entirety, is of T shape, between the lower flanged edge of the depending flanged piece and the edge of the central piece. In other words, the block (the part corresponding to the block, H<sup>1</sup>, of the patent in suit, which is formed in one piece) is formed in two separate and distinct parts united by screws, and these parts are specially formed to permit adjustment of one part of the structure with relation to the other when the parts become worn. To permit of this adjustable characteristic, which is essentially desirable in these devices, the depending flanged piece has in its upper edge slots adapted to embrace the screw and tube connection which unite the three pieces of the block together, whereby provision is made for adjusting the depending flanged piece with respect to the central piece when the T-shaped groove formed by these separate pieces becomes enlarged or worn from continued use.

"When the groove which holds the shuttles and guides them in defendants' device becomes worn, the separate depending flange piece can be removed from the central piece, and a small portion of the upper edge of the depending flange piece shaved off, whereupon tightening of the screws which pass from the top of the center piece into the edge of the flange piece will draw the parts together, and the block assume perfect working conditions. This adjustment is altogether absent from the construction of the complainants' patent, or claim 1 thereof, and is one of the identifying features of defendants' shuttle block, which marks it as an advance in the art over the form of the solid or integral shuttle block of complainants' patent.

"The shuttle block of defendants is secured to supporting posts made fast to the lay beam or swivel shuttle beam, as the case may be, by means of screws passed through the axis of the pinions.

"The recesses formed in the shuttle block in defendants' structure, and the pinions for operating the shuttles mounted therein, are features of the prior art, and common as well in defendants' as in complainants' structures; but these portions of the device need no comparison, since they are taken bodily from the prior art.

"In summary, therefore, complainants' device of the patent in suit has as its identifying characteristic the integral formation of the block, with its depending flanges, whereas the identifying feature of the defendants' device resides in a totally different construction, wherein the block and flanges are

formed of a plurality of pieces, secured together in a manner to permit adjustment to vary the size of the supporting and guiding grooves.

"Claim 1 of the patent in suit calls for an integrally formed block having the downwardly extending flange,  $h^2$ , and the horizontal flange,  $h^3$ , made in one piece with said block, and together inclosing an L-shaped recess or groove.

"Defendants' structure lacks this element of the said claim, for the reason that the part corresponding to the block in complainants' claim 1 (being the central piece) has no groove forming flanges formed integral therewith. In fact, the flanges are produced in defendants' structure by a separate and distinct piece, adjustably secured to the central piece. This distinction is material, especially in view of the record, as disclosed by the file wrapper and contents, which shows that not until the claim was definitely restricted to a construction in which the integral formation of the block and flanges was included, did the Patent Office decide the claim definitive of anything over the prior art, as produced by the Patent Office search. Omitting from consideration also the German patent of 1886, which, as I have stated, is a clear disclosure of everything in the complainants' shuttle block, I find that the Mueller patent of 1877, for instance, shows a shuttle block having the flanges formed of parts separate and united together; the other elements of the claim being also present in such prior construction. Unless the integral formation of block and flanges is to be regarded as the device defined by claim 1, all novelty in such claim fails. This element of the claim does not mean a number of parts secured together to form a block with a suitable supporting and guiding groove for the shuttle. If so, it is found in the prior art devices, such as the Mueller patent. In making this statement of nonidentity between the construction of claim 1 and defendants' device, I have not considered the German patent of 1886, since that patent, in my opinion, negatives all novelty in the claimed structure, even with the integral formation of the block and flanges.

"Moreover, this difference in the structures of claim 1 and defendants' devices results in a most important difference in function, in that, by the separate and independent formation of defendants' device, adjustment of the sides of the groove is rendered possible, whereas in complainants' device of the patent in suit this is altogether impossible, and adjustment could only be had in the complainants' device by splitting the block, and in effect converting it into the device of defendants. In fact, the defendants' structure differs more from a structure defined by claim 1 of the patent than does the structure of claim 1 differ from the prior art."

In my opinion, nothing more need be added to this convincing explanation.

A decree may be entered dismissing the bill at the costs of the complainants.

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#### CAMPBELL PRINTING PRESS & MFG. CO. v. F. WESEL MFG. CO. et al.

(Circuit Court, E. D. New York. July 18, 1903.)

#### 1. PATENTS—INFRINGEMENT—APPARATUS FOR CASTING STEREOTYPE PLATES.

The Wood patent, No. 721,117, for an automatic stereotype printing plate casting and finishing apparatus, covers a power-driven machine for casting and finishing stereotype printing plates, the several operations in sequence being performed automatically. The purpose of the invention is to avoid the necessity of actually handling the parts for making the cast, as well as of handling the cast itself. Several of the claims contain no reference in terms to automatic operations; nor do the first claims in each of the related patents to the same inventor, Nos. 721,118, 721,120, and 721,121. *Held*, on motion for preliminary injunction, that such claims were infringed by a machine which embodies the same mechanism for the immediate dealing with the parts and the cast, and which differs from that of the patent only in that it is driven by hand, and the several operations are initiated by means of hand levers, instead of automatically.

In Equity. Suit for infringement of letters patent No. 721,117 for automatic stereotype printing plate casting and finishing apparatus, granted February 17, 1903, to Henry A. W. Wood, and the related patents to the same inventor, Nos. 721,118, 721,120 and 721,121. On motion for preliminary injunction.

Louis W. Southgate, for complainant.

Goepel & Niles (Paul Goepel, of counsel), for defendants.

THOMAS, District Judge. The bill charges that the complainant is the owner of four patents relating to apparatus for making stereotype printing plates, and that the defendants have infringed certain claims of said patents. The specifications of letters patent No. 721,117 state:

"This invention is directed to the rapid production of stereotype printing plates, and relates to a power-driven machine consisting of plate-casting mechanism combined with automatically operating devices for operating said mechanism to automatically cast stereotype printing plates. In combination therewith is also preferably arranged automatically operating finishing mechanism. By this invention many of the manual operations now necessarily incident to the ordinary methods of making stereotype plates may be dispensed with, and by the use of this machine accurately finished printing plates ready for immediate attachment to the cylinders of a printing press may be produced with great rapidity. \* \* \* The especial purpose of the invention is to do away with manual operation in the process of stereotyping after the matrix has been made up to the production of the finished plate."

There can be no serious contention that the defendants' machine does not infringe the complainant's device, unless it may be distinguished in this: that complainant's machine operates automatically, under the initial influence of mechanical power, while the defendants' machine is under the manual control of the operator: The defendants state the distinction as follows:

"There can be no pretense but that the alleged inventions of the patents in suit relate to the formation of stereotype plates by automatically operating mechanisms, operating in sequence, for the production of a finished stereotype plate. Taking the specifications in their entirety for what they undertake to disclose, this idea of automatic operation must be read into each of the claims of said patents, if the claims of said patents are to have any special significance over the state of the art. The corollary of this proposition must be that, if the several successive and sequential operations performed automatically by the machines of the patents in suit be performed manually by mechanisms always under the control of the operator, and never manipulated except at his immediate direction and under his impulse and force, as are the defendants' machines, then such machines or devices do not realize the alleged inventions of the patents in suit, and are outside of the scope of the claims thereof."

The defendants use the complainant's mechanism, except that the defendants drive their machine by hand, while the complainant drives its machine by power, which actuates mechanism that effects automatic operation. But the mischief to be corrected was the necessity of actually handling the parts for making the cast, as well as for handling the cast itself. In immediately dealing with the different parts and the cast, the defendants use mechanism that infringes that of the complainant, but the defendants use hand power for the purpose of causing such parts to perform their several functions.

In patent No. 721,117, claims 30, 31, 34, 36, 41, 44, 75, 83, and 166, there is no reference in terms to automatic operation. So as to claim 1, patent No. 721,118, claim 1, patent No. 721,120, and claim 1, patent No. 721,121. The defendants' position is that they may use the immediate mechanism employed by complainant for eliminating manual labor, provided the power be applied by hand, whereby the several processes are each effected by as many manual manipulations, and that there can be no infringement of the complainant's machine unless all the parts producing the result coact under the influence of mechanical power. Such a position does not seem maintainable.

The suggestion that the complainant's machine is highly organized may be true, but the defendants cannot disorganize it to such an extent as to apply here and there manual power, and yet escape the charge of infringement. The complainant's invention is without available suggestion of anticipation, and is of highest utility in the art to which it relates. The claims are broadly stated, and to broad claims the complainant is entitled. The defendants have copied the invention with the single limitation as above stated—that is, they disorganize complainant's machine so far forth as to interpose hand levers to operate the mechanisms; but the hand power thus conveyed to the several levers in substitution for mechanical power drives parts that infringe the parts of complainant's machine. The highest value of complainant's machine is not that it is driven by other than hand power, but that it secures final means for effecting a result, which means may be under the initial influence of mechanical power. In this way defendants secure the vital part of complainant's patent by discontinuing the energy by which its device is moved. If it be conceded that the complainant is limited to the means shown in its letters, yet the defendants wrongfully use such means, and thereby infringe complainant's patent, although they set such parts in motion by using equivalent hand levers, and thereby eliminate automatic operation.

Pursuant to these views, a preliminary injunction should be granted.

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### KIRK v. UNITED STATES et al.

(Circuit Court, N. D. New York. July 11, 1903.)

**1. FEDERAL COURTS—JURISDICTION—EXECUTION—COLLECTION—INJUNCTION.**

Where proceedings in the federal District Court of the Southern District of Georgia, on which an execution was founded, were void, the Circuit Court of the United States for the Northern District of New York had jurisdiction to restrain the marshal of the latter district from enforcing and collecting such execution from property owned by the resident debtor located therein.

**2. SAME—BAIL—FORFEITURE—COURTS—JURISDICTION.**

Where a recognizance was given by a nonresident defendant to appear and answer an indictment against him in the District Court of the Southern District of Georgia, on which a resident of New York was



surety, the court in which the indictment was pending had jurisdiction to forfeit the recognizance on the defendant's failure to appear.

**8. SAME—SCIRE FACIAS—EXECUTION—INJUNCTION—PENDENTE LITE.**

G., a resident of New York, was indicted in the federal District Court for the Southern District of Georgia for conspiracy against the United States. On being arrested in New York, proceedings were had by which bail was given before a United States commissioner in New York for G.'s appearance, on which complainant, also a resident of New York, was surety. Thereafter, on G.'s alleged failure to appear and answer the indictment, scire facias was issued on the bail bond by the Georgia court, which was never personally served on complainant, and after two returns of nihil the bail was forfeited, and an execution issued to the United States marshal in New York, who levied the same on complainant's property. *Held* that, since scire facias on a forfeited recognizance is to be regarded as an original process in a special proceeding, the validity of the proceedings for forfeiture was sufficiently doubtful to justify the court in issuing an injunction pendente lite restraining the marshal from enforcing the execution.

This is a motion for a rule or order enjoining the defendants, and each of them, during the pendency of this suit, from taking any proceedings whatever under and pursuant to the execution referred to in the bill of complaint, and which was issued upon a judgment and proceedings in the District Court of the United States for the Eastern Division of the Southern District of Georgia, and from in any manner attempting to collect the amount of the execution or any part thereof.

Kellogg & Rose, for complainant.

George B. Curtiss, U. S. Atty., for defendants.

RAY, District Judge. Prior to the 20th day of January, 1902, an indictment was found against one John F. Gaynor and others in the United States District Court for the Eastern Division of the Southern District of Georgia, and which indictment charged the said Gaynor and others with having unlawfully, knowingly, and feloniously confederated, etc., to defraud the government of the United States, and with having defrauded the said government of a large amount of money, contrary to law, pursuant to such conspiracy. The said John F. Gaynor is, and at all times, both before and at the time of finding such indictment and since, has been, a resident and an inhabitant of the county of Onondaga in the state of New York.

Said indictment having been found in said District Court, and the defendant Gaynor being a resident of the state of New York, in said state proceedings were taken to apprehend the said Gaynor and remove him to said district, where said indictment was found, for trial. He was arrested and charged with said crime, on oath, before John A. Shields, one of the commissioners of the United States, of the Southern District of New York, and an examination having been had before said commissioner, and the commissioner having decided that it appeared to him that the offense with which the said Gaynor stood charged had been committed, and that there was probable cause to believe the said Gaynor guilty thereof, the said commissioner held Gaynor to await the warrant of removal by the United States district judge; and the United States district judge for the Southern District of New York having heard application for said warrant of removal,

on the 28th day of May, 1901, issued such a warrant to the marshal for the Southern District of New York, by virtue of which it was directed that the said John F. Gaynor be removed to the Southern District of Georgia for trial in the District Court of the United States for the Eastern Division of the Southern District of said state of Georgia. The marshal of the said Southern District of New York took the said John F. Gaynor into his custody under said warrant, and said Gaynor applied for a writ of habeas corpus, but same was denied, and on appeal the order denying the writ was affirmed by the Supreme Court of the United States on the 6th day of January, 1902. The mandate of the Supreme Court was then filed in the Circuit Court, and the judgment of the Supreme Court on the 17th day of January, 1902, was made the judgment of the Circuit Court, and the said Gaynor, pursuant to the order of the said Circuit Court of the Second Circuit, surrendered himself to the marshal of said Southern District of the state of New York under said warrant for removal to Georgia for trial. Thereupon the said John F. Gaynor tendered bail for his appearance in Georgia and in said district for trial under said indictment.

Gaynor entered into a recognizance on the 20th day of January, 1902, before said John A. Shields as said commissioner, with one William B. Kirk, of Syracuse, N. Y., the complainant in this action, as surety, whereby they severally acknowledged themselves to owe to the United States of America the sum of \$40,000, separately to be levied and made of their respective goods and chattels, lands, and tenements to the use of the United States, if default should be made in the condition following, to wit:

"Now, therefore, the condition of this recognizance is such, that if the said John F. Gaynor shall personally appear at the Term of the District Court of the United States for the Eastern Division of the Southern District of Georgia, to be holden on the second Tuesday in February 1902, and from day to day and from term to term should the case be continued, and then and there to answer to such matters and things as have or shall be objected against him, and to stand to, abide and perform the orders of this Court, and not depart the said Court without leave, then this recognizance to be void, otherwise to remain in full force and virtue."

This was signed by John F. Gaynor, the defendant in said indictment, and by William B. Kirk aforesaid as surety, and same was signed and acknowledged in the Southern District of the state of New York before said Shields, a United States commissioner for said district, said Kirk, however, being a resident of Syracuse, in the Northern District of the state of New York. This recognizance was approved by Hon. E. Henry Lacombe, United States circuit judge for the Second Circuit. This recognizance was filed in the clerk's office of the United States District Court, Eastern Division, Southern District of Georgia, on the 22d day of January, 1902. The said Gaynor was then discharged in the Southern District of the state of New York, and was not removed to nor taken to, nor did he appear in, the said United States District Court, Eastern Division, Southern District of Georgia.

At the February term of the said District Court, Eastern Division, Southern District of Georgia, the said court ordered the said John

F. Gaynor to appear before the court on the 6th day of March, 1902, to answer to the charge then and there pending against him on indictments Nos. 322 and 371, of which said order the counsel of record of the said John F. Gaynor had due notice and the said John F. Gaynor had due notice.

At a District Court held in said Eastern Division of the Southern District of Georgia, begun on Tuesday, February 11, 1902, that being the second Tuesday of February of that year, an order was entered reciting that at the November term, 1899, of the said District Court, a true bill of indictment was found charging said Gaynor with having, within the Eastern Division of the Southern District of Georgia, on the 1st day of January, 1897, conspired to defraud the United States, and with having defrauded the government pursuant to such conspiracy, and in said order said indictment is referred to as having been numbered 322 upon the criminal dockets of said court. The said order also recites the recognizance so entered into by Gaynor and Kirk. Said order further recites that at the said February term, 1902, a true bill of indictment charging said John F. Gaynor and others with unlawfully, knowingly, and feloniously conspiring, etc., to defraud the United States, and with defrauding the United States accordingly, was found, and refers to the said indictment now on file in the Eastern Division of the Southern District of Georgia, and numbered 371 upon the criminal dockets of said court. The said order then recites that at the said February term of the said District Court for the Eastern Division of the Southern District of Georgia, on the 28th day of February, 1902, an order was made in the matter of both said indictments, docket number 322 and docket number 371, stating:

"The defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, charged as aforesaid, under bail for appearance before this Court at this Term of the Court in that behalf, are ordered by the Court personally to appear before this Court in the United States Court Room in the City of Savannah in the above stated matter, on Thursday, March 6th, 1902, at 10 o'clock A. M., then and there to stand to, abide and perform the orders of the Court in the premises."

This order was indorsed:

"District Court of U. S., Eastern Division, Southern District of Georgia. No. 371. United States vs. Benjamin D. Greene, et al. Indictment No. 371. Order to Appear. Filed February 28, 1902. S. F. B. Gillespie, Deputy Clerk."

March 6, 1902, an order was made, which in the heading refers to both docket numbers, and which recites the order of February 28th directing the defendants to appear on the 6th day of March, and also recites that March 6, 1902, in the said courtroom, the said Benjamin D. Greene and John F. Gaynor were duly called, but failed to appear or answer to their names when called, and also recites that their counsel then stated that they were unable to give any reason for the nonappearance of said defendants, and also recites that, the court having awaited their appearance until the hour for adjournment of court this day, and they being still in default, but their counsel asking until tomorrow before proceedings be taken to forfeit their recognizances:

"It is therefore ordered that said defendants, Benjamin D. Greene and John F. Gaynor, be given until 10 o'clock A. M. March 7th, 1902, to appear and abide the order of the Court, and that they do appear at that time at the said Court Room to abide the order of the Court in the premises."

This order was indorsed as a proceeding on indictment No. 371.

An order of said court was made on the 7th day of March, 1902, reciting the arrest of Gaynor and his commitment by Shields, United States commissioner, and the order for his removal, and the giving of said recognizance hereinbefore mentioned and its approval, and also reciting the condition of said recognizance, and then continues:

"Now on this 7th day of March, 1902, at the February term, 1902, of the said District Court of the United States for the Eastern Division of the Southern District of Georgia, the said John F. Gaynor, principal, being solemnly called to come into Court to answer said charge, and having been duly notified to appear before the Court on this day to stand to and abide the orders of the Court in the premises; and the said William B. Kirk, his bail, having been warned to present the body of his said principal whom he engaged to be present this day to answer said charge, and said parties respectively having wholly made default: It is, therefore, considered and ordered by the Court that the said John F. Gaynor and William B. Kirk forfeit their said recognizance, and that the United States of America recover against the said John F. Gaynor and William B. Kirk, jointly and severally, the sum of forty thousand dollars (\$40,000.00) the amount of their said recognizance so forfeited as aforesaid, unless at the next term of this Court they show cause why this order should not be made final. It is further considered and ordered by the Court that a scire facias issue against the said John F. Gaynor and William B. Kirk, and that the same be directed 'To the Marshal of the Southern District of Georgia, and to the Marshals of the United States' that the same may be served upon the said John F. Gaynor and William B. Kirk in whatever District they or either of them may be found. In Open Court this the 7th day of March A. D. 1902. Emory Speer, U. S. Judge."

Afterwards, at the said term of the court for the Eastern Division of the Southern District of Georgia, and on the 17th day of March, 1902, an order was entered referring in the heading and title to the indictments Nos. 322 and 371, and which states in substance that Gaynor having been required to appear on the 6th day of March, of which due notice was given, and that they having failed to appear on the 6th day of March, 1902, were thereupon, at the request of their counsel, directed to appear March 7, 1902, and that on the 7th day of March, 1902, said defendants were called and failed to answer, and recites that James D. Leary, the bail of the defendant Benjamin D. Greene, having been called upon to produce him and having failed so to do, and that William B. Kirk, the bail of the said Gaynor, having been called upon to produce him in accordance with his recognizance, and having failed so to produce him, the court entered orders forfeiting the said two recognizances. And said order further recites:

"And the said William T. Gaynor and Edward H. Gaynor having duly appeared before the Court and having pleaded to said indictments numbered 322 and 371, respectively, and this day being the time set for the jury trial on indictment No. 322 demanded by the pleas of the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, the said Benjamin D. Greene and John F. Gaynor were this day again called to come into Court to stand to and abide by the orders of the Court in the premises, and again failing to answer to their names, are adjudged still in default and the said James D. Leary, the bail of the said John F. Gaynor, were again this

day called upon to produce their respective principals in accordance with their recognizances and failed to produce them. It is thereupon ordered, adjudged and decreed, that the order of this Court made on the seventh (7th) day of March, 1902, adjudging the recognizances of the said Benjamin D. Greene and John F. Gaynor forfeited, be and the same is confirmed; and it is further ordered, adjudged and decreed that the scire facias, ordered in the said order of March 7th, 1902, to be issued, shall be issued by the Clerk of this Court and made returnable to the May Term, 1902, of this Court."

This order, which was made March 17, 1902, further recited that, as the ends of public justice would not be subserved by proceeding with the trial of the defendants William F. Gaynor and Edward H. Gaynor, the cases against them on said indictments numbered 322 and 371 be continued until the next term of this court.

Thereafter, and on the 17th day of March, 1902, an original writ of scire facias was issued out of the said District Court of the United States for the Eastern Division of the Southern District of Georgia, which recited the proceedings before mentioned and the recognizance, and commanded as follows:

"You are hereby commanded to make known to said John F. Gaynor and William B. Kirk that they and each of them be and appear before the Judge of the District Court of the United States in and for said Eastern Division of the Southern District of Georgia at a Court to be holden in the City of Savannah on the second Tuesday of May, 1902, that being the May Term, 1902, of said Court, then and there if they know or have anything to say for themselves why the said sums of money should not be levied for the said United States of America, to wit, the sum of \$40,000 of the goods and chattels, lands and tenements of the said John F. Gaynor, and the sum of \$40,000 of the goods and chattels, lands and tenements of the said William B. Kirk, to be levied according to the said recognizance if it to them shall seem expedient, and have you then and there this writ. Witness" etc.

"[Signed]

H. H. King, Clerk."

—And duly sealed with the seal of the court.

Upon this writ of scire facias appears the return of the marshal of said Eastern Division of the Southern District of Georgia, dated April 2, 1902, wherein he says:

"I hereby certify that after diligent search I am unable to find the within named defendants John F. Gaynor and William B. Kirk within my District for service of the within writ upon them."

The defendant was not then within the state of Georgia or said district, and the surety, the complainant in this action, William B. Kirk, was not then within said district or a resident thereof, nor within said state of Georgia nor a resident thereof, nor had he ever been within said district, nor did he have any property within said district.

On the 5th day of April, 1902, the said writ of scire facias was personally served upon William B. Kirk at Syracuse, in Onondaga county, state of New York, by C. D. MacDougall, United States marshal for the Northern District of New York, in which district said county is situated. The writ was served on Gaynor by leaving same with one Sarah Maloney, at Gaynor's residence in Fayetteville, in said Onondaga county, on the 7th day of April, 1902, Gaynor being absent from said district. The original writ of scire facias was dated and sealed March 17, 1902.

Afterwards, and on the 17th day of July, 1902, an alias writ of scire facias was issued out of said District Court of the United States for the Eastern Division of the Southern District of Georgia, which recited the proceedings aforesaid, and commanded that said matters and things be made known to the said Gaynor and Kirk, and that they and each of them be and appear before the judge of the District Court of the United States in and for said Eastern Division of the Southern District of Georgia at the court to be holden in the city of Savannah on the second Tuesday of August, 1902 (that being the August term, 1902), of said court, then and there if they know or have anything to say for themselves why the said sums of money should not be levied for the United States of America, to wit, the sum of \$40,000 of the goods, etc., of said Gaynor, and the sum of \$40,000 of the goods, etc., of said Kirk, to be levied according to the said recognizance, if it to them shall seem expedient, and "have you then and there this writ," etc. This was duly witnessed, signed, and sealed. The return of the marshal for said Eastern Division of the Southern District of Georgia states that after due and diligent search he was unable to find the said defendants Gaynor and Kirk, or either of them, within his district, for service of the said writ upon them. It does not appear that this alias writ was ever served upon Gaynor or Kirk.

Thereafter, and at the November term, 1902, of the said District Court of the United States for the Eastern Division of the Southern District of Georgia, and on the 12th day of January, 1903, the following was duly entered, with proper headings, viz.: In substance, that no cause having been shown by the defendants Gaynor or Kirk, surety, why the order of the court made March 7, 1902, and confirmed March 17, 1902, at the February term of the court, forfeiting the recognizance given by the said Gaynor as principal, and the said Kirk as surety, should not be made final, and no appearance, demurrers, pleas, or answers having been filed to the original writ of scire facias or to the alias writ of scire facias issued out of this court on said recognizance—

"It is considered, adjudged and ordered by the Court that the said orders and judgment of the Court forfeiting said recognizance are hereby made final, and that execution may issue thereon in favor of the United States of America, to be levied for the said United States of America, to wit; the sum of forty thousand dollars (\$40,000) of the goods and chattels, lands and tenements of the said John F. Gaynor, and the sum of forty thousand dollars (\$40,000.00) of the goods and chattels, lands and tenements of the said William B. Kirk, to be levied according to the said recognizance and judgment of forfeiture entered at the February Term 1902 of this Court as aforesaid; and that execution shall be directed to the Marshal of the United States for the Southern District of Georgia, the Marshal of the United States for the Northern District of New York, and to the Marshals of the United States. In Open Court, this 12th day of January 1903. Emory Speer, U. S. Judge. Alexander Akerman, Assistant U. S. Attorney."

Thereupon execution issued to the marshal of the Northern District of New York, who levied upon the real property of the surety, William B. Kirk, situate in the city of Syracuse, Onondaga county, state of New York.

This action in the Circuit Court of the Northern District of New York was then brought against the above-named defendants to perpetually restrain and enjoin proceedings on said execution, and to restrain and enjoin the collection of said alleged judgment.

The bill of complaint alleges the giving of said recognizance, and that same was executed in the Southern District of New York and there delivered, having been executed before the delivery to United States Commissioner Shields of said Southern District of the state of New York. The bill of complaint also alleges that both Gaynor and Kirk then were, and at all times since have been, residents of the state of New York, and that they nor neither of them have been within or submitted themselves to the jurisdiction of the Eastern Division of the Southern District of the state of Georgia.

The bill of complaint further alleges that in fact the said John F. Gaynor did on the 2d day of February, 1902, appear before the term of the District Court of the United States for the Eastern Division of the Southern District of Georgia, and that then and there the court took custody of the said John F. Gaynor, and ordered and directed that he should not depart from the limits of Chatham county, Ga., that being the county in which said court was being held; and the complaint alleges that the surety was thereby relieved from further obligation under the recognizance mentioned. The bill of complaint also alleges that the said Gaynor appeared regularly in said court of the Southern District of Georgia until an order was made by the court fixing the time of his trial on the indictment then pending for March 17, 1902, at which time he was directed to appear, and that before the time when he was directed to appear the order was made forfeiting and estreating the recognizance, and the complainant alleges that he was thereby released and discharged from the obligations of said recognizance.

The bill of complaint also alleges that the complainant Kirk never resided or was in the state of Georgia, either at the time said recognizance was executed or at any subsequent time, and that he did not appear or submit himself to the jurisdiction of said District Court of the Eastern Division of the Southern District of the state of Georgia, and that he was not served with said writ of scire facias, excepting at Syracuse, in the Northern District of New York, as hereinbefore stated.

The complainant alleges and contends that the record is such that it does not appear that the recognizance in question was forfeited or estreated; that it is so confounded and confused with another indictment that the record shows on its face that the proceedings were and are void.

The main contention is, however, that as the defendant Gaynor was a resident of and within the state of New York, and his surety Kirk was a resident of and within the state of New York, and the recognizance was executed within the state of New York, and in the Southern District thereof, before a United States commissioner of said district, even if the defendant failed to appear for trial or to answer what might be adjudged against him in the Eastern Division of the Southern District of Georgia, that the District Court of

said Eastern Division Southern District of Georgia could not and did not gain jurisdiction of the surety Kirk by personal service of said writ of scire facias outside the state of Georgia, and outside the district in which issued, and in the Northern District of the state of New York. The complainant contends that, while the District Court of the Eastern Division of the Southern District of Georgia had power to estreat the bond, all proceedings to enforce and collect the same thereafter must be instituted and prosecuted in the district in which the defendant Kirk resided and resides, to wit, in the Northern District of the state of New York, or in the Southern District of the state of New York, if said proceedings may be instituted in the district where the recognizance was executed. That personal service of said writ on Kirk in the Northern District of New York did not give jurisdiction to the District Court of the Eastern Division of the Southern District of Georgia. The defendants contend that this action cannot be maintained against the United States, but this contention is of little importance, as the United States has appeared and answered, as has the defendant Clinton D. MacDougall, as marshal of the Northern District of New York. The power and jurisdiction of this court to restrain the marshal, an officer of the government, from enforcing and collecting said execution, if the same and the proceedings on which founded are void, cannot well be questioned. See cases hereafter cited.

The main contention of the government is that when Kirk signed the recognizance, even though the act was done in the Southern District of New York, he entered into an obligation to produce his principal, Gaynor, in the District Court of the Eastern Division of the Southern District of Georgia, which recognizance was to be filed there, and that he thereby submitted himself to the jurisdiction of that court for all purposes, and that personal service of the writ of scire facias upon him at any place within the United States, or by two returns "nihil," was good and sufficient service and notice. This court is of the opinion, and holds, that it sufficiently appears from the record that the recognizance in question was duly forfeited and estreated, and that the District Court for the Eastern Division of the Southern District of the state of Georgia had power and jurisdiction to estreat such recognizance and declare it forfeited. If, however, as is alleged in the bill of complaint, Gaynor did appear as ordered and at the times ordered, and the trial was fixed for a day certain when the defendant was to appear, and the order estreating and forfeiting the recognizance was made prior to that time, it presents a serious question whether that court had power to make a valid order confirming the order estreating and forfeiting the recognizance made at a time when there was no default and when the court had no right to make such an order. If Gaynor was ordered and directed to appear on the 17th, and the surety had notice, then that was the time for him to produce the defendant, and, if he failed to produce the defendant in the indictment on that day, an order could be made forfeiting and estreating the recognizance because of such default, but this nonappearance or nonproduction of the defendant would not authorize the making of an order confirming an order estreating the



bond for the nonappearance or the nonproduction of the defendant on the 7th day of March, at which time the defendant was under no obligation to appear, and on which day the surety was under no obligation to produce him. Such an unwarranted proceeding could not be validated by any subsequent order of confirmation. It must be conceded that there is an inconsistency in the record itself. This contention presents a question of fact which can only be determined satisfactorily on the trial.

As to the other question raised in this case, there is but little doubt as to what the law in fact is. This court finds no case holding that a recognizance given in a certain district of one state, where the defendant and his surety reside and where the defendant is apprehended, for the appearance of the defendant in another district in another state where the indictment is found, may be collected or enforced against the surety by execution issued upon scire facias issued out of the District Court where the defendant was to appear, but which was not personally served on the surety in such district, but was served personally in the district where the surety resides.

It has been contended by the government that the scire facias proceeding in this case is not an original suit or proceeding, but a mere continuation of the criminal proceeding. The original proceeding was a criminal prosecution by the United States of America against John F. Gaynor and other indicted persons, whose names it is unnecessary to mention, except that Benjamin F. Greene was one. The proceeding was to punish Gaynor, the principal, for an alleged commission of a crime. When Gaynor failed to appear, and the court forfeited or estreated the recognizance, this was not a trial or conviction or punishment for a crime, but a step preliminary to independent proceedings authorized by law to collect a sum of money or a debt due to the United States under the terms of the recognizance entered into by Gaynor and Kirk, and this was a civil proceeding in its nature, although one arising under the criminal laws of the United States. Kirk, the surety, had no property in the state of Georgia. He was not a resident of that state, and could not in any case be sued there, in a civil action in the courts of the United States, unless found there and personal service had. If the government would prosecute him by or in an original action or proceeding, it must institute such proceeding in the district where he resided, or at least in the district where found and served. This could be done in either of two ways: On application to the courts in the Northern District of New York, possibly a writ of scire facias might issue; but in any event a civil action in the Circuit or District Court might be instituted to collect the penalty of the recognizance. This is the contention of the complainant Kirk. Is the contention well founded?

In *United States v. Payne*, 147 U. S. 687, 690, 13 Sup. Ct. 442, 37 L. Ed. 332, the Supreme Court held, without dissent:

"While a scire facias to revive a judgment is merely a continuation of the original suit (*Frierson v. Harris*, 94 Am. Dec. 223, notes), a scire facias upon a recognizance, or to annul a patent or for other similar purposes, is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annul a patent. *Winder v. Caldwell*, 14 How. 434, 443 [14 L. Ed. 487]; *United States v. Stone*, 106 U. S. 525, 535 [27 L. Ed. 163]."

It is immaterial that it is a case arising under the criminal laws of the United States (*Hunt v. United States*, 166 U. S. 424, 17 Sup. Ct. 609, 41 L. Ed. 1063); it is an original cause to enforce the liability of the surety upon his contract that at a certain time and place he would produce his principal (the alleged criminal) or pay the amount of the recognizance. This is substantially held by the Supreme Court of the United States in *Hunt v. The United States*, 166 U. S. 424-426, 17 Sup. Ct. 609, 41 L. Ed. 1063, where the court, per Gray, J., says:

"It is a suit to enforce the penalty of a recognizance taken to secure the appearance of the principal to answer the charge and to abide any sentence against him."

(The learned justice was speaking of proceedings by *scire facias* to enforce the penalty of a recognizance in a criminal case.)

In 2 Chitty's *Archbold's Practice* (Prentice) (Chap. 7, p. 1140) 1140, it is said:

"It [the writ of *scire facias*] is, however, considered in law as an action [citing authority], and when brought to repeal letters patent may in fact be an original writ returnable in chancery, or a judicial writ returnable in the superior court. The *scire facias* against bail on their recognizance, against pledges, in replevin to repeal letters patent, or the like, is in fact altogether an original proceeding."

In volume 19, *Encyclopedia of Pleading and Practice*, page 293, it is said:

"And there yet remains a second class in which *scire facias* proceedings are in the nature of an original action, and in some cases have been held to be in fact the commencement of an original action."

These proceedings of this character are then described, and at pages 305, 306, it is said:

"(c) On Forfeited Recognizances in Criminal Cases. (1) In General. Proceedings by *scire facias* for the purpose of enforcing forfeited recognizances in criminal cases are resorted to in the federal courts and in the courts of many of the states.

"(2) Nature of Proceeding. The purpose of a *scire facias* upon a forfeited recognizance is to give notice to the parties thereto to show cause why judgment should not be rendered against them for the amount of the recognizance.

"Original Action. A *scire facias* on a recognizance is, it seems, generally held to be in the nature of an original action, and some cases hold that a *scire facias* upon a recognizance of bail in a criminal case is to be regarded as an original writ and as the institution of a new suit."

See, also, 1 Saund. 71a, note; 2 Tidd, 1125-1150.

In *Niles v. Drake*, 17 Pick. 516, the court said, "A *scire facias* against bail is a new action," citing 6 Danes, Abr. 463; Co. Litt. 290b; Litt. § 505. Foster's *Scire Facias* says it is a new action when founded upon a recognizance. Foster's *Scire Facias*, § 13.

The better authorities also hold a proceeding by *scire facias* upon a forfeited recognizance in a criminal case to be a civil action. See cases cited, notes 4 and 5, p. 307, Enc. Pleading & Practice, vol. 19.

Indeed, it is difficult to understand what there is of a criminal nature in a proceeding to collect a sum of money of a surety in a recognizance given for the appearance of the defendant at the time and place fixed for his trial, default having been made. Does the surety become a criminal if the principal absconds and cannot be pro-

duced? Has the surety committed any offense punishable by any criminal statute? The surety cannot be arrested or imprisoned. He is simply bound in contract to pay so much money. The proceeding to collect the amount of the recognizance is not to punish an offense or to impose a penalty for the violation of any law. If the amount be collected and the defendant in the indictment be afterwards apprehended, he may be tried, convicted, and punished. It being an "original cause" and "a suit to enforce the penalty of a recognizance" in a criminal case, how can jurisdiction of the surety in the undertaking be obtained for the purpose of obtaining a personal money judgment and execution? Certainly there must be personal service within the district where the writ issues, or, what is more probable, the proceeding, whether by action or scire facias, must be commenced in the district where the surety resides. This court doubts the right to issue the writ in such a case from any court other than that where the recognizance is a matter of record. 19 Enc. Pleading & Practice, p. 296, and cases cited; 2 Chitty's Archbold's Pr. 1141. But this is not decided. Even if this is true, the fact that scire facias may not issue in the Northern District of New York confers no power to institute proceedings by scire facias in the District Court of the Eastern Division of the Southern District of Georgia against the complainant herein, who resides in the state of New York, and bind the surety by personal service of such writ in the state of his residence. Such proceedings are but one of two remedies, and an action on the recognizance may be brought in the district where Mr. Kirk resides. There is a remedy in the courts of the United States. That remedy is by an action.

In volume 19, Enc. of Pleading and Practice, pages 275, 276, it is said:

"A writ of scire facias must be properly served in the manner prescribed by law in order that a judgment may be rendered thereon, unless the want of service or the defects therein be waived. It may be laid down as a general rule that a writ of scire facias is to be served in the same manner as other process. \* \* \* There must, as a general rule, be personal service upon the defendant of a scire facias, or summons in the nature of a scire facias, at least where it is a remedy provided by statute unknown at common law, and of a merely personal character."

Congress may by law provide that process in any case be served personally anywhere in the United States, but it has not done so, and in the absence of a statute service must be had in the district where the defendant resides, or, in some cases, where found. *Toland v. Sprague*, 12 Pet. 300, 327, 328, 9 L. Ed. 1093; *Butterworth v. Hill*, 114 U. S. 128, 5 Sup. Ct. 796, 29 L. Ed. 119; *Bourke v. Amison* (C. C.) 32 Fed. 710.

By statute, final process, as execution, in favor of the United States, may be served in any state of the Union, but this has not been extended to original or other process. See *Toland v. Sprague*, supra.

In *Herndon v. Ridgway*, 17 How. 424, 425, 15 L. Ed. 100, the court said (citing *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093):

"The jurisdiction of the District Court over parties is acquired only by a service of process, or their voluntary appearance. It has no authority to issue process to another state."

In *United States v. American Lumber Co.*, 85 Fed. 827, 29 C. C. A. 431, 56 U. S. App. 655, it was held:

"The process of a Circuit Court of the United States cannot run beyond the court's territorial jurisdiction, and sending writs of subpoena ad respondendum without a district in which only they can be served, and to persons who are without power to serve them, are vain and futile acts."

That a writ of scire facias is a process, and the process by which the proceeding or suit is commenced against the surety (in cases of recognizance in criminal cases), where it is sought to enforce the liability of the surety by such a proceeding, cannot well be questioned. Does the surety in a recognizance in a criminal case, which recognizance is executed in New York state, where he resides and continues to reside, but is to be filed in the District Court of another state, as Georgia, where the indictment was found and is pending for trial, by entering into and executing such recognizance, submit himself to the jurisdiction of such District Court for the purpose of the collection of same, in case of default and forfeiture of the recognizance? Does he consent thereby that he may be proceeded against in Georgia; to go there and make his defenses, if any he has, and, if defeated, have execution against his property in New York? No such condition or agreement is found in the recognizance or is imposed by statute.

Conceding that "when the condition of an undertaking of bail is broken the penalty accrues, and the parties become absolute debtors to the obligee for the amount thereof, and they must be held liable to pay the same, unless they can show some matter legally sufficient to excuse the default" (*U. S. v. Van Fossen*, 1 Dill. 406. [Fed. Cas. No. 16,607]; *U. S. v. McGlashen* [C. C.] 66 Fed. 537; *People v. Quigg*, 59 N. Y. 83); still, thus far we have a debt or a conditional judgment, perhaps, but neither a final judgment nor a judgment absolute. In the scire facias proceeding properly instituted by due service, the defendant may appear and plead and have a trial of all questions or matters of defense, and the proceeding is but a suit to enforce the penalty of the recognizance (*Hunt v. U. S.*, 166 U. S. 424, 17 Sup. Ct. 609, 41 L. Ed. 1063), and differs from any other suit to enforce it only in the process by which commenced. Whether by subpoena or by writ of scire facias it is still a suit commenced by process, and if the surety has not voluntarily submitted himself to the jurisdiction of the court out of which the writ issues he must be served in the district where it issues. If he has already voluntarily submitted himself to the jurisdiction, why is service of the writ necessary at all? Clearly not to give jurisdiction, but to notify the surety of the pendency of the proceeding. If the scire facias proceeding "is a suit to enforce the penalty of a recognizance," it cannot be deemed commenced until the writ issues, and as it is the process by which the suit is instituted it must be served within either the district where the defendant resides or where he is found, or by substituted service in cases where substituted service is provided for. This is not such a case.

Concede that "a court with power to take a bail bond has jurisdiction of a scire facias proceeding to enforce the same" (*State v.*

Caldwell, 124 Mo. 513, 28 S. W. 4), as this bail bond was taken by a commissioner in the Southern District of New York pursuant to law and was approved there, it was in effect taken by the court of that district, and that court has jurisdiction of the scire facias proceeding to enforce the same. It was not taken in the District Court of the Eastern Division of the Southern District of Georgia. That court had no jurisdiction to take this particular recognizance, but the court in New York did have by virtue of a special statute.

In *United States v. Insley*, 54 Fed. 223, 4 C. C. A. 296, it was held that a forfeited recognizance such as this may be enforced by scire facias proceedings, but it is expressly stated that the writ or process must be "duly served."

By section 716, Rev. St. [U. S. Comp. St. 1901, p. 580], it is expressly provided that the Supreme, Circuit, and District Courts of the United States may issue writs of scire facias, but there is no provision that when issued in one district they may be served in another.

The case of *People v. Quigg*, 59 N. Y. 83, has no application here. That case arose under a statute of the state of New York providing for a summary final judgment upon a forfeited recognizance, and, the statute having been strictly followed and judgment entered, the court held that such provision entered into and formed a part of the undertaking of the surety, and that by executing the recognizance he consented, in case of default, that judgment might be entered and perfected in the manner prescribed by that statute, and that he waived any other process of law. But here we have no statute of the United States providing for a final judgment upon a forfeited recognizance in any other manner than that following a suit or a scire facias proceeding, in both of which cases the process by which the suit or proceeding is instituted must be "duly served." And due service means personal service within the district in which the process legally issues. Undoubtedly it would be competent for Congress to provide for summary final judgments without notice upon forfeited recognizances in criminal cases, irrespective of the residence of the surety in the recognizance, either at the time it was executed, or at the time of its forfeiture, or at the time of the institution of proceedings to enforce the liability, and for execution without notice, and in such case the surety would assent to that mode of enforcing his liability, but no such statute has been enacted, nor is that the common law.

*Elasser v. Haines*, 52 N. J. Law, 10, 18 Atl. 1095, does not substantially aid the defendants in this case. There the question was whether the New Jersey court would recognize and enforce against the defendant Haines a judgment obtained against him in the state of Pennsylvania, and which he had not moved to vacate, and from which he had not appealed. The judgment in question was obtained in the district court of the city and county of Philadelphia, in the state of Pennsylvania, on a forfeited recognizance in a civil action in the following manner: October 20, 1868, the defendant personally appeared in the said district court, and entered into the recognizance in question as surety for one Owens, and the condition having been

broken, the recognizance was duly forfeited. Thereupon a writ of scire facias was issued, and, defendant not being found, a return nihil habet was duly made, and thereafter an alias writ of scire facias was issued in said matter, and this also was returned nihil habet. Thereupon judgment was entered against the defendant according to the laws and the practice of the courts of the state of Pennsylvania. In the action in New Jersey the defendant pleaded that he was not a resident of the district in which said judgment was rendered when such writs issued and such judgment was entered, nor did he appear. He did not deny that he was a resident of the said district when he executed the recognizance or of the state of Pennsylvania at the times mentioned, nor that he went into open court in the district and entered into the recognizance. Two *nihils* being equivalent to service on all residents of the state of Pennsylvania, and that being the recognized law of the state, and defendant being a resident of the state, the service was good. Defendant consented to that mode of entering judgment when he entered into the recognizance. Says the court, page 18, 52 N. J. Law, and page 1098, 18 Atl.:

"The answer is that by the form of the procedure, of which the writs of scire facias formed a part, the consor voluntarily made himself a party to the proceeding. He went into court and confessed a debt, subject to a condition, with the knowledge that if he absented himself from the jurisdiction a judgment might be taken against him on the return of two unserved writs of scire facias. Such was the legal effect of the act done by him, and in intendment of law he was held to have assented to such effect. If, when he confessed the debt, he had expressly consented, in pursuance of a local statute, to the entry of a final judgment of this nature on the return of two unserved writs of scire facias, it is presumed it would not be contended that a judgment entered in accordance with such stipulation would not have been of unquestionable validity; and yet as he is chargeable with the knowledge, when he entered into this recognizance, that such result would obtain, according to the laws then in force, the tacit assent to such procedure wants but little of the force that would have resided in such supposed positive agreement."

There was a vigorous dissent in that case. But the holding in that case is contrary to the decisions in the state of New York. *Robinson v. Executors of Ward*, 8 Johns. 86, 5 Am. Dec. 327; *Kilburn v. Woodworth*, 5 Johns. 37, 4 Am. Dec. 321; *Fenton v. Garlick*, 8 Johns. 194. In the first case cited the action was on a judgment obtained in the state of Vermont, where service, not personal, was obtained according to the laws of that state, a mixture of substituted service and scire facias proceedings. Two "*nihils*" were returned to the scire facias, but defendant was not a resident of the state. The court said:

"At all events, there was no personal service or actual notice. And in the case of *Kilburn v. Woodworth* it is said that to bind a defendant by a judgment, when he was never personally summoned or had not notice of the proceedings, would be contrary to the first principles of justice. And whether the proceedings were valid, and according to the course of the court in the place where such judgment was obtained, or not, would make no difference, according to the case of *Buchanan v. Rucker*, 9 East, 192. The principle on which these decisions turn applies to the present case, notwithstanding *Ward* was sued as bail in Vermont. The proceedings against him there were in the nature of a new suit, and the bail might have had a good and substantial defense to make. There is, therefore, the same reason for his having notice

as in any other case. We are accordingly of opinion that the defendant is entitled to judgment."

The case of *Owens v. Henry*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837, would seem to settle the proposition that, while two returns "nihil" on successive writs of scire facias are equivalent to service when the defendant in the scire facias resides or is found within the jurisdiction of the court where the writ issues (*Brown v. Wygant & Leeds*, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284), and the proceeding is to revive a judgment, two successive returns "nihil" on two writs of scire facias are not equivalent to service where the defendant has left the jurisdiction of the court where the judgment was entered and where the writ issues, and is and resides in another state.

In *Owens v. Henry*, supra, O. recovered judgment in Pennsylvania against H. and F., both residents of that state. In 1865, H. removed to Louisiana and became a citizen of that state, and so continued until his death. In 1866 the judgment was revived by scire facias, the process being served on F. only. The judgment was again revived in like manner in 1871. In 1880, O. proceeded on the judgment against H. in the courts of Louisiana. He elected to stand on the scire facias proceedings of 1871. The Supreme Court of the United States held that the judgment had no binding force as against H. in Louisiana, for the reason that H. was not served with the process of scire facias, although there were two returns nihil, and had not voluntarily appeared. In the opinion of this court this case settles the principle that two returns nihil are not equivalent to service, except where the writ issues lawfully out of the court in the jurisdiction where the defendant resides. Service in this manner, to be good service, assumes that the defendant resides within the jurisdiction of the court issuing the writ, but cannot be found. In such case two returns nihil are equivalent to personal service, but two returns nihil are not service when the defendant does not reside within the jurisdiction of the court issuing the writ. If this be true in a case for the recovery of a sum of money, where judgment was lawfully issued in the first instance on personal service, and the proceeding is to revive a judgment, how much more ought it to be true in a case where the scire facias proceeding is an original suit, or in the nature of an original suit, and the defendant does not reside within the jurisdiction of the court issuing it, and neither resided nor was within the jurisdiction of that court at the time the recognizance was executed or default thereon taken or when the writ issued.

In *Owens v. Henry*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837, the court, in concluding its opinion, said, citing cases:

"Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of nihil, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori*, for the same reason. *Thompson v. Whitman*, 18 Wall. 457 [21 L. Ed. 897]; *Pennoyer v. Neff*, 95 U. S. 714 [24 L. Ed. 565]; *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287 [11 Sup. Ct. 92, 34 L. Ed. 670]; *Steel v. Smith*, 7 Watts &

S. 447; *Evans v. Reed*, 2 Mich. N. P. 212; *Hepler v. Davis*, 32 Neb. 556 [49 N. W. 458, 13 L. R. A. 565, 29 Am. St. Rep. 457]."

It is contended by the defendants that the Circuit Court of the Northern District of New York cannot interfere by injunction with the judgment of the court of the Eastern Division of the Southern District of Georgia, as that is a court of co-ordinate or concurrent jurisdiction, having equal power to grant the relief sought by injunction.

The complainant in this action is a resident and an inhabitant of the state of New York, where he owns real estate. The alleged judgment was obtained and entered of record in the District Court of the Eastern Division of the Southern District of the state of Georgia. Execution thereon, which, if the judgment is valid, may run to any state in the Union, was issued and delivered to the marshal of the Northern District of the state of New York, and he, under the authority thereof, has levied upon and proposes to proceed and sell, for the benefit of the United States, this real estate of the complainant. The complainant alleges that the judgment upon which such execution was issued is absolutely void; that the court had no power to enter it. It is hardly necessary to say that if the judgment is void the execution thereon is also void. If the execution is void, then Clinton D. MacDougall, the marshal of the Northern District of New York, has no right or power whatever to levy upon and sell the real estate of the complainant in this action situated in the state of New York, where the complainant resides. The complainant cannot be compelled in any such manner to go to the state of Georgia and into the District Court of the Eastern Division of the Southern District thereof, and move there in that court to set aside the judgment. He had no legal notice of the proceedings which resulted in such judgment. In that action or proceeding he did not submit himself to the jurisdiction of that court, and it is not a case where the alleged defendant therein, the complainant in this action, is under any obligation whatever to proceed in that court. He has the right to invoke the protection of the Circuit Court of the United States in the district where he resides, and where his property wrongfully and illegally levied upon, and proposed to be sold, is situated. He has the right, in the district of his residence and where the subject-matter of the litigation is situated, to defend himself and his property against an unwarranted and an illegal seizure and sale of his real estate on process issued by the District Court in another state. This is an action by the complainant to protect and defend his property situate in this district—the Northern District of New York—against the illegal and unwarranted acts of the marshal. If the execution in the hands of the marshal is void, then that officer has no right to take any action under it. If the complainant would protect himself and protect his property, he must have these illegal acts restrained, and it is hardly reasonable to say or contend that he may maintain such an action against the marshal in the District Court of the Eastern Division of the Southern District of Georgia, where neither of the parties reside.

If the execution in the hands of the marshal of the Northern District of New York, and by virtue of which he has levied upon and pro-



poses to sell the real estate of the complainant, is void, then the marshal is a trespasser. He assumes to act as marshal, and in execution of a process issued out of one of the courts of the United States. The right of action is given by the laws of the United States which make the marshal responsible for trespasses committed by him in his official character. *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Texas & Pac. Railway v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. A suit against a marshal of the United States for acts done in his official capacity is a suit arising under the laws of the United States. *Sonnentheil v. Christian M. B. Co.*, 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492. The complainant in this action is under no obligation to lie still until his property has been sold and his title clouded. He may restrain, in a court of competent jurisdiction, all these illegal acts, and prevent either a sale of his property or any act that will cloud the title. A suit in equity, under some circumstances, may be maintained to set aside a void judgment, and of course to set aside an execution thereon, or to restrain the collection of a void judgment. *First National Bank v. Cunningham* (C. C.) 48 Fed. 510; *Pac. R. of Nev. v. Miss. P. R. Co. et al.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *N. C. R. Mill Co. v. St. L. O. & S. Co.*, 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565.

It is urged that this complainant is not entitled to equitable relief for the reasons that Gaynor, the principal, did not appear for trial, as required, but fled to Canada, where he is now sojourning, defying extradition, and that by so doing he escapes justice. But this action in equity has nothing to do with the apprehension, extradition, and trial of Gaynor. The United States is entitled, in an appropriate action in the proper jurisdiction, to collect the penalty of the recognizance entered into by Gaynor with Kirk as surety for his appearance, etc., in the Eastern Division of the Southern District of Georgia. But such collection must be made in due form of law through the instrumentality of a court having jurisdiction, and the surety must, on due notice, have his day in court in the proper jurisdiction, to present his defense, if he has one. How far the confused record made as to the time when Gaynor was in fact required to appear for trial may be explained, the court cannot now decide. Ordinarily the record in such a case cannot be contradicted, but here we have a confusion of statement that possibly may be subject to explanation by oral evidence.

This court does not decide that the alleged judgment is void, or that the execution now in the hands of the marshal of the Northern District of New York is void and may not be enforced, but from the foregoing considerations is forced to the conclusion that there is such serious doubt that the injunction pendente lite asked should be granted restraining Clinton D. MacDougall, as marshal of the Northern District of New York, from taking further proceedings to enforce or collect the execution until the trial and decision of this action on the merits. On the trial all the facts will appear fully. An order

to that effect will be drawn and entered when settled. Same will be settled before me on five days' notice, and each party will submit to the other a proposed order.

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KNOTT v. EVENING POST CO. et al.

(Circuit Court, W. D. Kentucky. July 20, 1903.)

1. CORPORATIONS—ASSETS—TRUST FUND.

While the capital stock and property of a corporation are regarded as a trust fund for the payment of its debts, they are not a trust fund for the payment of stockholders on dissolution.

2. SAME—LIQUIDATION—RECEIVERS.

Under Gen. St. Ky. § 561, authorizing a corporation, on termination of its charter by lapse of time, to continue its business for the purpose of closing its affairs, the fact that a corporation, just prior to the termination of its corporate existence, for the purpose of liquidation, passed a resolution appointing a certain trust company as a liquidator, and providing for the sale of the corporation's property and assets, in the absence of fraud, did not constitute a ground for the appointment of a receiver at the instance of a dissenting minority stockholder.

3. SAME—STATE AND FEDERAL COURTS—CONFLICTING JURISDICTION—DISTRIBUTION OF ASSETS.

Where, in an action by a stockholder in the state court against the corporation, the only relief which could have been granted on the case made by the complaint was an order requiring an inspection of the corporation's books, and after the institution of such action another suit was instituted in the federal court by a creditor of the corporation, alleging its insolvency, and in such action a receiver of the corporation was appointed, who rightfully acquired possession of the corporation's property before a receiver had been appointed by the state court in the stockholder's action, the federal court, having first acquired jurisdiction of the res, would not surrender the property to the receiver appointed in the state court, for distribution.

Humphrey, Burnett & Humphrey, for complainant.

Helm, Bruce & Helm, for defendants.

Dodd & Dodd and Kohn, Baird & Spindle, for petitioner Louisville Trust Company, receiver.

EVANS, District Judge. The Evening Post Company, a corporation, was organized under the provisions of chapter 56 of the General Statutes of Kentucky on the 1st day of May, 1878. By its articles of incorporation it was to continue in existence for a period of 25 years, namely, until May 1, 1903. The complainant, a citizen of Missouri, holding the past-due notes of the company for \$6,000, brought a suit at law against it in this court for the recovery of a judgment thereon. The company having confessed the indebtedness and its nonpayment, judgment was rendered accordingly, and soon afterwards an execution of fieri facias which issued thereon was returned nulla bona. This action in equity, in the nature of a cred-

¶ 3. Conflict of jurisdiction between federal and state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.

See Courts, vol. 13, Cent. Dig. § 1407.

itors' bill, was instituted on May 27, 1903; and on the following day, upon the motion of the complainant and by the consent of the defendants, Lewis C. Humphrey was appointed the court's receiver, and was directed, as such, to take possession of all the property of the Evening Post Company, which was accordingly done by him on that day. That property, before the issual of the execution, had been placed in the hands of the defendant the Columbia Finance & Trust Company, as liquidator, under a plan for winding up the affairs of the Evening Post Company, adopted on April 30, 1903, by the almost unanimous vote of its stockholders at a meeting held for that purpose. On the 28th day of June, 1903, the cause was referred to the master, to advertise for, ascertain, and report to the court the debts proved against the company. On the 6th day of July, 1903, the master made a partial report, showing the names of the creditors who up to that time had proved their claims, and the amounts of the latter, which aggregated \$119,163.51. The gross indebtedness, when all the claims shall be proved, will probably increase that aggregate to \$120,000 or over.

At this stage of the proceedings in this court, the Louisville Trust Company, alleging itself to be the receiver of the Evening Post Company, appointed by the judgment of the Jefferson circuit court, chancery branch, First Division, rendered June 27, 1903, in the action therein pending of Bruce Haldeman and others, executors of the will of W. N. Haldeman, deceased, against the Evening Post Company and others, presented, and was given leave by the court to file, its intervening petition herein; and, having filed it, the said trust company thereupon moved this court for an order directing its receiver, Lewis C. Humphrey, to turn over to the state court receiver all the property of the Evening Post Company in his hands, and based this motion upon the ground, stated generally, that the state court, in the proceedings therein pending, had first acquired jurisdiction over the assets and property of the Evening Post Company, and the consequent right to adjudicate all questions relating to its administration and distribution among the parties entitled to share therein.

The application thus made raises the question of which of two courts of concurrent power shall control the administration and distribution of the assets of the Evening Post Company. Such conflicts are always somewhat embarrassing, not, perhaps, because either court is at all tenacious of its rights, or especially anxious to perform the labors required, but rather because litigants become embittered, or imagine that one court will take a view of the law more favorable to one than to the other of the parties in interest. The courts themselves, with the fullest respect for each other, and with a natural tendency to abdicate rather than to seize upon burdens, must consider merely what are the rights of the court and the litigants under the established principles of law applicable to such cases. With nothing but the highest respect for the state court in this instance, coupled with the fullest determination to yield to it everything that established principles of law demand, I enter upon the consideration of the very interesting, though perhaps not novel, questions involved.

Accompanying the intervening petition of the Louisville Trust Company, the receiver appointed by the state court, is a transcript of the record in the case of Haldeman's executors against the Evening Post Company, the Columbia Finance & Trust Company, trustee of the Evening Post Company, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott, and Laura G. Boyle, defendants, the last five of whom are called in the petition "individual defendants." This suit in the state court was commenced on May 12, 1903. The petition therein is too long to be copied in full in an opinion, but in substance it avers the following facts, and nothing more, namely, that in June, 1898, their testator, W. N. Haldeman, acquired 48 shares of the capital stock of the Evening Post Company, which at his death came to their hands as part of the assets of his estate; that the capital stock of that company—\$60,000—was divided into 600 shares, of \$100 each, which were claimed to be owned by certain of the defendants, as follows, namely, Richard W. Knott, 427 shares; J. M. Atherton, 65 shares; Laura G. Boyle, 50 shares; John R. Knott, 5 shares; and Eugene Q. Knott, 5 shares—besides the 48 shares owned by the plaintiffs; that under its charter the corporate existence of the company expired May 1, 1903; that the individual stockholders named, other than the plaintiffs, had for years been the officers and directors of the company, and had operated it as their own private property, without any meeting of the stockholders or election of directors; that being informed about April 25, 1903, that the charter of the company was about to expire by its own terms, the plaintiffs repeatedly demanded, both verbally and in writing, the right, as stockholders, to examine and inspect the books and affairs of the company, but that they were always absolutely and positively refused the right and opportunity to do so; that they demanded repeatedly, and were as often refused, a statement of the assets and liabilities of the company, and full data respecting the same; that a meeting of the stockholders was called by the defendant for April 30, 1903, which they attended, and that over their protest the stockholders adopted a resolution in the following language:

"Whereas, the charter of the Evening Post Company will expire on the first day of May, 1903; and, whereas, it has become necessary to have all the assets of every character of the company sold for the purpose of paying its debts and distributing the surplus, if any, among the stockholders; and, whereas, it is impossible to properly advertise and sell said property by the 1st of May next; therefore, be it resolved: First. That the Columbia Finance & Trust Company be, and it is hereby, appointed liquidator of the affairs of the corporation, with directions to operate for the use of the stockholders the affairs and business of said corporation as they have been operated until the property can be properly advertised and sold, and the possession thereof delivered to the purchaser. Second. That prior to the said sale the liquidator shall cause to be made for the use of the stockholders a comprehensive statement of the assets and liabilities of the corporation, and furnish said stockholders with a copy of said statement. Third. That the said liquidator shall, in its advertisement, specify the nature of the articles to be sold, and shall make such sale for cash, to be paid on the delivery of possession, and shall require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price, which the liquidator shall hold and credit upon the purchase price when the sale is consummated, or, if for any reason it shall be set aside, return to the bidder. If the said bidder to whom the property is knocked down shall fail at once to deliver to the liquidator the

certified check as herein provided, the liquidator shall immediately resell the property, and refuse to receive bids from said former bidder. Fourth. Said liquidator may, in his discretion, employ an auctioneer or other agent necessary or proper to be used in the sale of the property. Fifth. Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ such agents and persons as may be necessary to properly, conveniently, and economically operate the property, and keep an account of all its expenses, and take vouchers therefor. And after the property has been fully administered it shall make out a comprehensive account of its acts and doings, and shall furnish a copy thereof to each of the stockholders. Sixth. The said liquidator shall from the proceeds of the sale of the property pay all debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights."

The petition further alleged that on April 30, 1903, the said liquidator qualified as such; that the plaintiffs renewed their demands to it, and that it also has denied and refused to grant any of them; that they do not know and are not advised as to any indebtedness of the company, nor how it was created or secured, nor are they advised of the assets of the company; that they can only obtain such information from the books of the company, which are under the control of the individual defendants, who positively refuse to allow the plaintiffs any access thereto or any statement of their contents; that they are informed and believe that the defendants are still conducting and operating the business of the company, and at great loss and expense; that they have the right to inspect at reasonable times the books and affairs of the company, and to ascertain its financial condition, and that they are wrongfully denied that right by the defendants, who also refuse to give them any statement of the financial condition of the company, or of its assets and liabilities; that the liquidator is advertising and calling upon all the creditors to present their claims, properly proved, by June 1, 1903; that they are advised that the individual defendants have taken over to their own use and are now using all of the property and good will of the company; that in law and in equity and in good conscience they are entitled to an inspection of the books and affairs of the company, but, though often demanding it, they are always refused; that the assets of the company are, or should, in right and law and equity, be of the value of \$60,000, at least, and that the maximum liabilities under the charter should not be over two-thirds of that sum, or \$40,000; that they do not know and cannot state what either the assets or the liabilities of the company are, other than the capital stock; that, notwithstanding the charter fixed the maximum limit of indebtedness of the company at \$40,000, yet the total indebtedness exceeds \$109,000, and that the individual defendants constitute all, or nearly all, of the creditors of the company; that the books of the company show, or should show, the extent, character, and origin of the indebtedness, and the nature of the transactions out of which they grew, and that without an inspection of the books and papers of the company they cannot ascertain the facts, nor whether the debts are valid and binding obligations of the company, and that notwithstanding the individual defendants are managing the affairs of the company, and have the custody of its books and papers, they refuse plaintiffs all access to them, and all information from them, and

all right and opportunity to inspect them; that to the end that the affairs of the company may be wound up and liquidated, and that they may be fairly dealt with according to law, an inspection of the books is necessary; that proper information to this end cannot be derived from a mere copy of the books and papers, nor from the conclusions and statements of an accountant or bookkeeper; that the individual defendants claim to be all the creditors of the company, and the complainants know of no one else who claims to be a creditor thereof, and they are all called upon to set up and prove their demands, to the end that the affairs of said company may be liquidated and settled in that suit; that it is impracticable and impossible to have a fair, just and proper accounting and settlement of the business and affairs of the Evening Post Company, except in that suit, and that, in view of the persistent conduct of the defendants therein, the plaintiffs will not and cannot be informed or advised of the assets and liabilities of the company until the defendants are compelled to furnish such information, and to allow the plaintiffs to inspect and examine the books, accounts, and affairs of the company; that the individual defendants are claiming and insisting that there is a great value attached to the good will, name, and the operative plant of the Evening Post Company, including the telegraphic and other correspondence facilities built up, acquired, and established by it, which would be endangered and probably lost if the publication of said newspaper by it were abandoned, and that, in order to preserve it and to get the benefit of it, the defendants' claim that the newspaper should be operated pending the closing up and liquidation thereof, to the end that its good will, name, and facilities aforesaid may be sold to the best advantage, but the plaintiffs state that they are not informed and have no means of knowing as to what the value of the good will, name, and facilities aforesaid are, nor as to whether there is any value thereto, and that they cannot have or form an opinion touching the same without a full and free inspection of the papers, documents, books, and accounts of the Evening Post Company. The prayer of the petition is in this language:

"Wherefore, the premises considered, the plaintiffs pray for a settlement of the accounts of the Evening Post Company, and of the Columbia Finance & Trust Company as liquidator thereof, herein, and that this cause be referred to the commissioner of this court to audit, state, and settle the accounts of the Columbia Finance & Trust Company as trustee or liquidator of the affairs and business of the said Evening Post Company; that a full, true, and correct accounting of the business and affairs of the said Evening Post Company, and of the liabilities against the same, be ascertained and reported, and the assets sold and disposed of, and distributed amongst the parties thereto according to their respective interests. Plaintiffs further pray that pending this action, and until the final liquidation of the affairs of the Evening Post Company, and the sale of its plant and assets, that the court herein determine as to whether or not the affairs of the said Evening Post Company should be continued in operation, and, if so, that the operation of the said plant be conducted under and subject to the orders of the court herein. And the plaintiffs further pray that a mandatory preliminary order be entered herein, commanding and directing the defendants, and each of them, to allow the plaintiffs reasonable access to, and an examination of, the books, papers, documents, and affairs of the said Evening Post Company, including all documentary information in connection therewith which is in the possession of the defendants, or any of them. And the plaintiffs further pray for their costs herein expended, and for all such proper and equitable relief as the nature of the case may demand."

It appears also from the transcript accompanying the intervening petition that the Evening Post Company and the individual defendants on May 23, 1903, filed an answer to the petition in the state court, in which they expressly denied many of its material allegations, and, contesting the rights claimed by the plaintiffs, among other things urged, and at the argument they insisted, that the purpose of the plaintiffs was to acquire information which would benefit their own publications, viz., the Courier-Journal and the Times, at the expense of their competitor, the Evening Post, but, while the last-named matter could be given such weight as might be thought to be proper by the state court to which it was addressed, it seems to be quite immaterial upon any issue before this court. It also appears from the transcript that the Columbia Finance & Trust Company on May 23, 1903, filed its answer in the state court proceeding, and much significance seems to be attached to the fact that it therein states that it submits itself to the jurisdiction of the court, and that it will, of course, obey all its orders, although at the same time it protests that it will be burdensome and unnecessary to subject the corporation to the costs and expenses of winding up its affairs in a judicial proceeding. Undue importance should not be given to this submission to the jurisdiction of the court by the answer of the liquidator, because, at last, its general language must be confined and limited to the scope of the plaintiffs' petition, when fairly ascertained.

Upon a preliminary hearing the learned judge of the state court ruled that the plaintiffs were entitled to inspect the books, etc., of the corporation, and on the 4th day of June, 1903, appropriate orders to that end were made to enforce that right. However, when the persons against whom those orders were directed were applied to, it was developed that they no longer had any control over the books, because previously thereto, viz., on May 28, 1903, they had all been turned over to the receiver of this court pursuant to its orders. On the 27th day of June, 1903, on the motion of the executors of W. N. Haldeman, the state court appointed the receiver who has made the motion we are now considering, for an order requiring this court's receiver to turn over to the state court's receiver all the assets, etc., of the corporation, not at all for the inspection of the books, but altogether for the purpose of having those assets administered and distributed by the state court. I have been at pains to state accurately the averments of the petition in the state court suit, including even its repetitions, in order that we might certainly get its full scope, and give it effect accordingly. While the prayer of the petition is much broader, the real scope of the pleading—the subject-matter of the suit—must be determined by such of its averments as present a valid basis for the relief asked, for it cannot be that any relief can be properly granted, except such as may logically follow if the averments of the pleading are true—that is to say, such as may be appropriate to the case made by the petition.

Upon an application of this character, the proceedings in the state court, upon which its receiver bases his claim, are certainly open to inquiry so far as it may be necessary for the court applied to, to ascertain the merits of the application, for, if it acted upon mere sug-

gestion only, it might do palpable injustice to the rights of litigants. Proceeding upon this view, and industriously endeavoring to ascertain the full scope of the litigation in the state court, I have not been able to find such averments in the petition of Haldeman's executors as would authorize any relief, except that of an inspection of the books, papers, and affairs of the Evening Post Company. That relief seems to be absolutely all that the plaintiffs therein could legitimately obtain on the case made by their pleading. With the claim to that relief this court has neither disposition nor right in the slightest degree to interfere. It is only because it is asked to surrender property in its possession, and which has been seized at the suit of creditors, to the end that it may be subjected to their demands, that we look into the proceedings of the state court at all, for otherwise our examination of them might be unauthorized. While, as I think, the scope of the petition in the state court was limited to the claim of the plaintiffs to examine the books, etc., it is insisted that the prayer broadens that scope; but it seems to be a sufficient answer to this to say that the rights of a litigant must be measured not alone by his prayer for relief, but by the case made by the facts stated in his pleading.

It is also insisted that the petition shows that the resolutions appointing the liquidator created a trust, and the liquidator a trustee, and that the petition, to the end that the trust should be enforced and the affairs of the corporation wound up, called upon the defendants and all others who are creditors to prove their debts, so that the affairs of the company might be settled in that suit. Do these matters afford any grounds for surrendering the corporate assets to the state court receiver?

While the capital stock and property of a corporation are regarded as a trust fund for the payment of its debts, it can hardly be maintained that they are a trust fund for the payment of stockholders. Their right is ownership, and the trust-fund doctrine does not reach them. It is to be remembered that the plaintiffs in the case in the state court are stockholders, and nothing more; that they own 8 per cent., and no more, of the capital stock; that they do not allege that the corporation is insolvent; and that their petition does not claim that they are entitled to the appointment of a receiver, nor to a seizure of the corporate assets, upon any ground whatever. Their demand—possibly a most reasonable one—was to inspect the books, etc., so that they could understand the condition of the company in which they had an interest. The corporate existence of the company was on the eve of expiration, and a very large majority of the shareholders desired either to reorganize so as to continue the business, or else in some way to secure as large a price for its assets as possible. While the 25 years expired May 1, 1903, yet section 13 of chapter 56 of the General Statutes of Kentucky, and section 561 of the Kentucky Statutes, which is an amendment thereof, fully authorize the corporation to continue to act, though only for the purpose of closing up its business. No precise mode for doing this is prescribed, and probably was not at all desirable; but all corporations, in all stages of their existence, must act by agents, and in this instance,



in order that the business of the corporation might be closed, it, at a full meeting of its stockholders, adopted the plan of having it done by a responsible trust company as an agent, called a "liquidator," selected by themselves. This company was an agent merely to perform the legitimate work and duty of closing up the business of the corporation. While, in a general way, all agents are trustees, an appointment of one does not make the corporate assets a trust fund in this case, any more than would the appointment every day of corporate agents constitute them trustees, in such a sense as to put all the corporate assets into the shape of trust funds, to be administered in equity, unless other most material circumstances arise. Ninety-two percent. of the stock was voted in favor of the plan adopted in this case, while only 48 shares, owned by Haldeman's executors, voted against it. The authorities all agree that when one buys the stock of a corporation he impliedly agrees to submit to the rule of the majority, and that, if the acts done by a majority are intra vires and without fraud, they are binding. *Dudley v. Kentucky High School*, 9 Bush, 576; *Cook on Corporations*, § 684; *Clark & Marshall on Private Corporations*, § 628. Hence we can see no reason why, as between the shareholders in this case, the plan adopted was not entirely permissible, especially as it was evidently supposed to be an expeditious and inexpensive way of accomplishing the desired result. To permit 8 per cent. of the shareholders to defeat this plan would be to give control to a small minority, rather than to a large majority; and that, too, in a case where, at least on its face, no perceivable wrong to any one appeared to inhere in the plan adopted. Of course, the chancellor may well be applied to by any shareholder, whether in a minority or not, to prevent the destruction or injury of any of his rights by wrongdoing, but no right of his is violated by merely outvoting him upon a matter fairly within the rights of those who do it. An appeal to the courts in such a case can generally only be made when fraud or some violation of law or of the rights of some person in interest can be alleged. As nothing of that sort can be fairly said to be charged in this instance either against the liquidating agent or the corporation, unless it be the refusal of inspection of the books, it seems too clear for further argument that there is nothing charged in the petition of Haldeman's executors which would in any way entitle them to have the state court seize the corporate assets. It might be that under some circumstances a court of equity could remove an unfaithful trustee by a direct proceeding for that purpose, but while it might do that, and appoint another in his stead, it would not necessarily follow that it could seize the corpus of the trust fund because an agent has been unfaithful. Nor could such seizure be justified by any mere failure or refusal to allow an inspection of books. But here there can be no claim, and there is none, that the liquidating agent was corrupt or unfaithful. As before remarked, no express mode for closing the business of corporations is prescribed by the statute. That matter is wisely left to those most interested to do it in such way as may suit them, subject, of course, to the right of any one to go into court if his rights are violated. But I conclude that there is no fact alleged in the state court

proceeding which would give that court any right to seize the property of the Evening Post Company, nor to give any relief except that of inspecting the books, etc.—a right of the executors of Mr. Halde-  
man, which that court alone, in the then aspects of the case, could determine. And it is certain that nothing else was attempted, and that no seizure was made until after the property of the corporation was all in the hands of the receiver of this court.

But even if these views be unsound, the case goes far beyond this phase of it. The complainant in the creditors' bill filed in this court was not a shareholder, but a judgment creditor. Creditors are to be cared for before the stockholders who owe them. The complainant creditor, a citizen of Missouri, on behalf of himself and all other creditors of the corporation, exercising a right plainly given him by the laws of the United States, in the regular way, applied to this court for the protection and enforcement of his rights before it appeared that any stockholder was doing more than seeking to obtain information as to the status of the affairs of the corporation. In due and orderly course, and by the proper and legitimate processes of the court, the property of the debtor was seized for the purpose of satisfying the demands of its creditors one month before the state court appointed its receiver, and this court has ever since had it in due course of administration.

As already indicated, the petition filed in the state court, even if we disregard the answer thereto, and assume its averments to be true, does not state facts which would authorize a court of equity to seize the corporate assets at the instance of a stockholder, nor did the pendency of that suit per se create a lien thereon, nor, indeed, was anything done or attempted in the state court which brought the assets of the corporation within the grasp of the law, either actually or potentially, within the meaning of those terms as used in cases where there is a conflict of jurisdiction, until some weeks after those assets had been placed in the hands of the receiver of this court. After that was done, though no receiver had been asked for in plaintiffs' petition, the state court receiver was appointed on their motion.

Stated broadly, the question to be determined is this: Which of the two courts, under the facts stated, first acquired jurisdiction over the assets of the Evening Post Company? I mean over the assets, and not merely over the corporation, for the purposes of securing the relief to which the stockholder was entitled on the facts stated in the petition—a distinction most important to be remembered. Was it the state court, in the stockholders' suit, where no receiver was originally asked for, and where the real relief sought by a mere stockholder was the right to look at the books, or was it this court, where in a judgment creditor in a direct proceeding first caused a judicial seizure to be made of the property itself in order to subject it in due course to the corporate debts? Put in another form, the question might be this: Does anything appear from the record of the proceedings in the state court which would, notwithstanding the undisputed facts appearing from the record in this court, entitle the stockholder to insist that the rights first obtained by a judgment creditor

should be subordinated to those of the mere stockholder? It is insisted that the authorities unanimously hold that, where the same subject-matter is brought before different courts of concurrent power, the court which first acquires jurisdiction, and especially the first which either actually or potentially acquires jurisdiction or control over any property which may be involved or seized, is entitled to decide every question, and that comity requires the other court to yield. Undoubtedly this general proposition is as true as it is elementary, but it has frequently occurred to me, in investigating this and similar questions, that in no class of cases is it more necessary to remember what was said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257, and cited by Chief Justice Fuller in delivering the opinion of the court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759. The language referred to was this:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841, an attachment issued from the state court had been levied on property of a defendant some time before he went into bankruptcy, and the assignee in bankruptcy afterwards applied to the state court to turn over to him the property thus levied upon; but the Supreme Court held that he was not entitled to have it done, because before the bankruptcy proceeding was instituted another court had seized the property by its processes, and then had it in its custody. It may be observed that the bankruptcy law then in force was different from the present statute, but the same result would necessarily still follow if an attachment should be levied more than four months before an adjudication. *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393, was a case where there were conflicting claims of title to certain lands in Wisconsin, and some of those claims were being litigated in the state court, when the complainant filed a bill in equity in the federal court to quiet his title to the land, and enjoin one of the defendants from proceeding in his case previously pending in the state court about the same land. The Supreme Court held that this could not be done. It is rarely the case that one court can enjoin proceedings in another. In *Taylor v. Carryl*, 20 How. 586, 15 L. Ed. 1028, a vessel had been seized under an attachment issued from the state court, when a libel was filed against it in the federal court by seamen who claimed wages, and the vessel was sold under the judgment of each court. When the question was brought before the Supreme Court, it held that, as the state court first seized the vessel, it could not be divested of its power over it by the subsequent proceedings in the federal court, even if the case was one in admiralty, and that the purchaser at the sale under the judgment of the state court acquired the title

as against the purchaser under the judgment of the federal court. In *Shaw v. Lyman* (C. C.) 79 Fed. 2, the question appears to have been whether the pendency in the state court of a suit between the same parties on the same cause of action was a bar to a creditors' bill in the federal court to fix the personal liability of directors and stockholders in a corporation. The court answered it in the negative. *Owens v. Ohio Central R. Co.* (C. C.) 20 Fed. 10, presented a case of several applications to different courts by different parties for the appointment of a receiver for the same railroad; and, each court having acted, Judge Jackson, in West Virginia, held that that receiver should be preferred who was appointed in the suit in which process was first served. In *Shields v. Coleman*, 157 U. S. 169, 15 Sup. Ct. 570, 39 L. Ed. 660, it was held that a Circuit Court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court, and cannot rightfully take the property out of the hands of the receiver so appointed by the state court. In *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 33 L. Ed. 399, it was held that, when a state court had entered upon the trial of a criminal case of which it had jurisdiction, a federal court would not interfere by writ of habeas corpus. In *Hitz v. Jenks*, 185 U. S. 155, 22 Sup. Ct. 598, 46 L. Ed. 851, the controlling question, as stated by the court, was whether the sale of land under a deed of trust stands in the way of its redemption by a party in interest upon payment of the debt secured by the deed of trust, and the court answered the question in the affirmative. The questions decided in the very recent case of *Messrs. Watts & Sachs*, 23 Sup. Ct. 718, 47 L. Ed. —, can have no application to this case, although it is true that in its opinion the Supreme Court remarked that, as the assets of the bankrupt under the bankruptcy law belonged to the trustee, comity seemed to require that the state court should have promptly turned them over to that officer, notwithstanding the pendency of the litigation in that court. In the case of *Mutual Reserve Fund Association v. Phelps*, 103 Fed. 515, it was supposed by this court that the appointment of the state court receiver was void, as having been made without jurisdiction, under the Kentucky practice, and therefore that the case was not covered by section 720 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 581], forbidding injunctions against proceedings in a state court, but the court of superior jurisdiction thought otherwise. Yet these, together with the case now to be mentioned, are the authorities mainly relied upon by the counsel of the state court receiver, and also, indeed, by the learned judge of the state court, as the basis of the conclusion reached by him in the opinion delivered in that court. That other case is *Farmers' Loan & Trust Co. v. Lake Street R. Co.*, 177 U. S. 51, 20 Sup. 564, 44 L. Ed. 667, in which it appears that the Farmers' Loan & Trust Company on January 30, 1896, filed in the federal court its bill as trustee to enforce a mortgage executed by the railroad company. Subsequently, but on the same day, the railroad company brought its suit in the state court to remove the trust company as trustee, upon certain grounds alleged in its bill. A petition was filed for the re-

removal of the case to the federal court, but the state court refused to do it. Subsequently the transcript was filed in the federal court, and a motion to remand the case was overruled. However, the state court proceeded in the cause, and rendered its decree in favor of the plaintiff, and from that decree an appeal was prosecuted to the Supreme Court of the United States. That court, waiving the questions of the right of removal, held that the state court had erred in enjoining the Farmers' Loan & Trust Company from acting as trustee, and in enjoining it from proceeding in the suit in the federal court. In the opinion in this case may be found general expressions which could be cited in support of either side of the present controversy.

Coming now to the consideration of the question from the standpoint of the judgment creditor and of the receiver of this court, it is difficult to see how their contention is antagonized by the cases of *Peck v. Jenness*, *Taylor v. Carryl*, or by *Shields v. Coleman*, or, indeed, by any of the cases cited on behalf of the state court receiver, although in some of them there is the general statement of the doctrine that the court first getting jurisdiction is entitled to control the litigation. The three cases last named would, indeed, seem quite strongly to favor the contention of the side opposed to the state court receiver's motion. In *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322, it was held that, where real estate is in the custody of a receiver appointed by a court of chancery, a sale of it under an execution issued on a judgment at law from another court is illegal and void. In *Freeman v. Howe*, 24 How. 451, 16 L. Ed. 749, the marshal had levied an execution issued from the federal court on certain railroad cars, which were afterwards taken out of his hands by the sheriff under a writ issued in a replevin suit instituted in a state court. It was held that this was entirely irregular, and on page 455, 24 How., 16 L. Ed. 749, the court said that:

"According to the course of decision in the case of conflicting authorities under a state and federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process?"

The doctrine of this case again came under review in the case of *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. There the plaintiff brought her action of replevin in the state court against a deputy marshal of the United States who had levied upon the property in question under an execution against one Adolph Heyman. Judgment having been rendered against the deputy marshal, he sued out a writ of error to the Supreme Court, which reversed it, and at page 180, 111 U. S., 4 Sup. Ct. 357, 28 L. Ed. 390, through Mr. Justice Matthews, said:

"The principle is that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some

court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."

In *Moran v. Sturges*, 154 U. S. 274, 14 Sup. Ct. 1019, 38 L. Ed. 981—a case in which the general question was elaborately discussed—the Supreme Court, speaking through Chief Justice Fuller, said:

"It is a rule of general application that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process of another court."

The court, in its opinion, also referred to the case of *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815, as strongly supporting the same doctrine. It may be remarked that this doctrine is also sustained by the case of *Hazelrigg v. Bronaugh*, 78 Ky. 62.

In *Heidritter v. Elizabeth Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729, it was held that where proceedings in rem are commenced in a state court, and analogous proceedings in rem in a court of the United States against the same property, exclusive jurisdiction for the purposes of its own suit is acquired by that court which first takes possession of the res.

In the case of *Opdyke & Calhoun v. St. Louis & Southeastern Ry. Co.*, brought in this court in 1874, the precise question involved in this case was discussed perhaps as elaborately and fully as in any case of the kind in which the question ever arose. One Horner had obtained in the state court at Henderson, Ky., a judgment against the railroad company for damages for personal injuries. An execution thereon having been returned nulla bona, Horner instituted an action in equity in the state court, under section 474 of Myers' Code, to subject the assets of the railroad company to its payment. In his petition in that case he expressly prayed for the appointment of a receiver. Certain trustees under mortgages also intervened in that suit, and asked the same relief. Notice was given that on October 19, 1874, a motion for the appointment of a receiver in the action would be made; but the judge of the court, being detained by an obstruction to steamboat navigation, could not reach Henderson on that day, and the respective counsel agreed upon a future day for hearing the motion. With full knowledge of these facts, *Opdyke & Calhoun*, the trustees under another mortgage, on the next day, namely, on October 20, 1874, filed their bill in this court, alleging default in the payment of certain interest coupons, the insolvency of the railroad company, and the inadequacy of its property to pay the mortgage debt, and themselves prayed also for the appointment of a receiver. The railroad company entered its appearance on that date, and filed its answer, and with its consent a receiver was at once appointed by this court. Thereafter a receiver appointed by the state court made an application to this court similar to the one now being heard. The case was most elaborately argued before Judge Emmons and Judge Ballard, on one side by such counsel as the present Justice John M. Harlan, Ashbel Green, W. S. Opdyke, and others, and on the other side by such able lawyers as Harvey Yeaman, S. B. Vance, Gov. Thos. E. Bramlette, and others. After the most mature consideration the application of the state court's receiver was denied upon the ground that, though the action in the state court was first instituted, this court had in fact first appointed a receiver, and had thereby first acquired

possession of the property to be administered. Having been myself of counsel in that case, and most actively engaged in the litigation, I am able to state the facts with perfect accuracy, although in those days written opinions were not so frequently filed as they are now, and none was filed in disposing of that question.

In *Griffiths v. Mt. Sterling Coal Road Co.*—a case almost identical with the one just mentioned, and wherein the receiver of the state court attempted to seize property in the hands of the previously appointed receiver of this court—my learned predecessor, Judge Barr, made a similar ruling upon similar grounds.

In *Powers v. Bluegrass B. & L. Ass'n (C. C.)* 86 Fed. 705, Judge Lurton, sitting in this court, passed upon a case which cannot be distinguished in principle from the one now before us. There it was shown that a suit touching the same subject-matter was already pending in a state court, but it appeared that the property of the corporation had not been taken into judicial custody. In his opinion the learned judge, after remarking, as I do also in this case, that it could be no disrespect to the state court if this court simply maintained its own jurisdiction, and no more, said (page 707):

"The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by the process of another court, is well settled."

He therefore reached the conclusion that there was nothing in the fact of the previous pendency of the suit in a state court, unaccompanied by a seizure of property, which should prevent the appointment of a receiver, and one was accordingly appointed. A general assignment had there been made by the directors of a perfectly solvent corporation without the authority of the stockholders, and while it was thought entirely possible that this act was voidable, at least, because it was not authorized by the stockholders, nor provided for by the Kentucky law, still it was supposed that it could be ratified by the stockholders. And so it may be remarked that while section 561, Ky. St., may not expressly authorize the appointment of an agent called a "liquidator," still, to use the language of Judge Lurton, the stockholders might adopt it "as a mode of liquidation within the general powers of the corporation."

*Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, is instructive upon the question, and so also are the cases of *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257, *Watson v. Jones*, 13 Wall. 674, 20 L. Ed. 666, and *The Lottawanna*, 20 Wall. 223, 22 L. Ed. 259.

The question we are considering has usually been discussed in cases where the right to control or administer property was involved, and the principle to be deduced from the decisions seems manifestly to be this: Wherever suits are pending in two or more courts of concurrent powers, in each of which, at the instance of different plaintiffs, it is sought to control or to subject to the demands of creditors the same property, that court alone has the right to do so which first gets the property within its grasp by some recognized mode of judicial seizure, and that, too, without regard to the question of which suit was first instituted. The mere priority of commencement of litigation is not, but the priority of judicial seizure is, the test of ju-

jurisdiction over the res in all cases where property is the subject of contention. This test is simple, direct, and practical, and draws a line which is palpable. It is of easy solution, and cannot be open to serious mistake. Being established as the true test, it obviates the need of any resort to mere theories, and leaves the court which in fact, and presumably always properly, brought the property itself in gremio legis, to administer or control it to the exclusion of all other courts, and without leaving open the possibility of unseemly wranglings with any person who may have been disappointed in his later efforts. Some test must be recognized by all, and the palpable and practical one of first judicial seizure is not only convenient but wise.

It has never been doubted that a second suit brought by the same plaintiff against the same defendant on the same cause of action in courts of the same sovereignty would be defeated by a plea in abatement, but this is not, unless in a very remote sense, upon the ground that the court in which the first suit was brought acquired jurisdiction to the exclusion of all others, but is primarily upon the ground that a defendant should not be vexed by two such suits at the same time. Where the two suits, however, are in courts of different sovereignties, the rule does not apply, according to the doctrine of the courts of the United States (*Gordon v. Gilfoil*, 99 U. S. 169, 25 L. Ed. 383), though the Kentucky courts seem to follow a different rule (*Wilson v. Milliken*, 103 Ky. 165, 44 S. W. 660). But the general rule is everywhere limited to suits between the same parties upon the same cause of action. It neither has nor can have any reference to suits by different plaintiffs against different defendants upon different causes of action, although the suits may be nearly related, and may ultimately seek to subject the same res. Where different individuals, acting upon the right plainly possessed by each to choose a forum, go into different courts to enforce different rights against the same property, we have a case which calls into play and operation the principles upon which the pending motion must be determined. It is in such cases that what is called a "conflict of jurisdiction" arises, and in which the doctrine of judicial comity must have sway. That comity, being based upon common sense, should not be manifested in mere courteous surrenders of what somebody else asks, but should, as the word implies, be a recognition of the just rights of another court, as those rights may be ascertained upon established principles. It does not ordinarily depend upon the question of which suit was first brought, nor upon priority of service of process, for these matters may, from the nature of the litigation, affect only the question of jurisdiction over the person, and which, per se, cannot concern litigants in other causes in other courts. Where different plaintiffs lawfully choose different forums to enforce different rights, the question of priority of service of process so as to give jurisdiction of the person of the defendant would be abstract and immaterial as to the suits of third parties, unless property was seized; but, if the same property is seized by the process of both courts, then, as only one of them can control it, some test must be found for ascertaining which of them shall do so, and it is believed that no case of this sort can be found in the courts of



the United States, at least, in which any test was acted upon except that of prior judicial seizure. Where the question, therefore, is one of jurisdiction over the res, and not merely over the person, its solution must logically and necessarily depend upon the priority of custody of the res which both courts are asked to control. If we have been right in supposing that jurisdiction over the res can only be acquired by some form of judicial seizure—some form of procedure by which it is actually brought within the grasp and custody of the court—then the inquiry admits of no difficulty.

I by no means intend to say that the rule as to the first acquirement of jurisdiction over the res depends in all cases upon an actual seizure, as in admiralty or under the internal revenue or customs laws, or by replevin, or under an execution or attachment, or through a receivership. The judicial custody of property to which I refer may sometimes be acquired in a somewhat less positive way. For example, it may, in some cases and as to certain parties, be accomplished by a *lis pendens* (*Miller v. Sherry*, 2 Wall. 235, 17 L. Ed. 827), or, as against parties to the suit, there may be an equitable levy by virtue of the suit itself, where equitable assets are sought to be subjected by means of a creditors' bill (*Commissioners v. Earle*, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301), though in all such cases there must be a suit upon a judgment, and a return of *nulla bona*, or there may be cases where the property is in the custody of the probate court by reason of its having been committed to the hands of an administrator, executor, or curator. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. But while in these cases the property is only potentially—that is, constructively—in custodia legis, it is nevertheless so under a certain form of judicial stress, and by virtue of a judicial proceeding, the nature of which must be appropriate to that result.

Upon a most attentive consideration of the whole case, I have reached these conclusions: First, that the proceedings in the suit in the state court, when given their just effect, had not in any way when this court's receiver was appointed, brought into the custody of that court any property of the Evening Post Company, nor could they be regarded as having, in fact, done so, even if their scope were measured by the prayer of the plaintiff's petition, rather than its averments; second, that it was therefore open to this court to appoint a receiver, and thereby judicially seize the property of the company at the instance of a judgment creditor; and, third, that, having thus first acquired jurisdiction over the property thus seized, the established principles of law and the plain rights of the judgment creditor demand that this court shall maintain its jurisdiction over it under these circumstances as certainly as it would have abandoned it if the first seizure had been by the state court.

It results that the motion of the intervening petitioner must be overruled and denied, and the intervening petition dismissed. Judgment may be prepared accordingly. Having reached this conclusion, I have not deemed it important to consider the exceptions to the intervening petition filed by the complainant, and they are pro forma overruled.

## GOODWIN v. NEW YORK, N. H. &amp; H. R. CO.

(Circuit Court, D. Massachusetts. July 27, 1903.)

No. 1,290.

## 1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—CITIZENSHIP OF CORPORATION INCORPORATED IN DIFFERENT STATES.

A corporation, owning and maintaining a system of railroad in Massachusetts and Connecticut, and so incorporated in both states that the Circuit Court in Massachusetts has jurisdiction of a suit there brought against it by a citizen of Connecticut, and, conversely, the Circuit Court in Connecticut has jurisdiction of a suit there brought against it by a citizen of Massachusetts, cannot be sued in the Circuit Court in Massachusetts by a citizen of Massachusetts, who alleges that the defendant is a citizen of Connecticut.

At Law. On plea to jurisdiction.

S. A. Fuller, for plaintiff.

Charles F. Choate, for defendant.

LOWELL, District Judge. This is an action of tort brought by a citizen of Massachusetts against "the New York, New Haven & Hartford Railroad Company, a corporation duly established by the laws of the state of Connecticut," to recover for injuries sustained in Massachusetts. The officer's return to the writ states that it was served "by delivering in hand to Fayette S. Curtis, fourth vice president thereof, at his office in said Boston, the original summons of this writ." The defendant has pleaded to the jurisdiction, and the issue raised by the plea has been tried upon agreed facts. The court has to determine if there is diversity of citizenship between the plaintiff and the defendant. The matter has been so much discussed in opinions rendered by the Supreme Court and by other federal courts, and the dicta, if not the decisions, are so contradictory, that a somewhat extended examination of the question must be made.

In the United States a single railroad system often extends into several states. The system is most conveniently operated by one organization, and the courts have had to determine what is the relation of this organization to the several states in which its lines are situated. In *Martin v. B. & O. R. R.*, 151 U. S. 673, 677, 14 Sup. Ct. 533, 38 L. Ed. 311, it was said:

"A railroad corporation, created by the laws of one state, may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as in *Railroad Co. v. Vance*, 96 U. S. 450 [24 L. Ed. 752]; *Memphis & Charleston Railroad Co. v. Alabama*, 107 U. S. 581 [2 Sup. Ct. 432, 27 L. Ed. 518]; *Clark v. Barnard*, 108 U. S. 436 [2 Sup. Ct. 878, 27 L. Ed. 780]; *Stone v. Farmers' Co.*, 116 U. S. 307; and *Graham v. Boston, Hartford & Erie Railroad*, 118 U. S. 161 [6 Sup. Ct. 1009, 30 L. Ed. 196]; or by virtue of a license, permission or authority granted by the laws of the latter state to act in that state under its charter from the former state. *Railroad Co. v. Harris*, 12 Wall. 65 [20 L. Ed. 20]; *Railroad Co. v. Koontz*, 104 U. S. 5 [26 L. Ed. 643]; *Pennsylvania Railroad v. St. Louis, etc., Railroad*, 118 U. S. 290 [6 Sup. Ct. 1094, 30 L. Ed. 83]; *Goodlett v. Louisville & Nashville*

¶ 1. Citizenship of corporation for purposes of federal jurisdiction, see note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.

See Courts, vol. 13, Cent. Dig. § 860.

Railroad, 122 U. S. 391 [7 Sup. Ct. 1254, 30 L. Ed. 1230]; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117 [8 Sup. Ct. 1037, 32 L. Ed. 94]. In the first alternative it cannot remove into the Circuit Court of the United States a suit brought against it in a court of the latter state by a citizen of that state because it is a citizen of the same state with him. *Memphis & Charleston Railroad v. Alabama*, above cited. In the second alternative it can remove such a suit, because it is a citizen of a different state from the plaintiff. *Railroad Co. v. Koontz*, above cited."

For purposes of convenience, the two classes of corporations above described will be designated in this opinion as the first and the second, respectively. It is not necessary here to consider by what marks the two classes are distinguished, because the Circuit Court for this district in *Smith v. New York, New Haven & Hartford Railroad* (C. C.) 96 Fed. 504, has decided that the railroad here in question is of the first class.

The classification just mentioned has been modified in one particular by later cases. A corporation of the second class, created by the laws of one state, may have become a corporation of another state into which its lines extend; but its incorporation in the latter state, though rendering it subject for many purposes to the laws of that state, is not deemed to affect its jurisdictional status. Thus in *St. Louis & San Fran. Railway Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, the plaintiff in error was a railroad corporation created in Missouri, and therefore a citizen thereof. It owned and operated lines of railroad in Arkansas, and by virtue of the general statutes of Arkansas had "become a railroad corporation of (Arkansas), subject to all the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation." Yet it was held not to be a citizen of Arkansas, so as to permit suit in the Circuit Court in that state brought against it by a citizen of Missouri. Incorporation for some purposes in Arkansas was not deemed to affect the defendant's sole jurisdictional citizenship in Missouri. Again, in *Louisville Railway Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 19 Sup. Ct. 817, 43 L. Ed. 1081, a corporation of Indiana sued as such, in the Circuit Court in Kentucky, a citizen of Kentucky. The defendant pleaded to the jurisdiction. The court said:

"But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction or as to the merits. As to jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States."

In other words, the Supreme Court has held that an organization may for some purposes be incorporated in a given state, and yet may

not be a corporation of that state for purposes of jurisdiction. A corporation of the second class, though in some respects treated as a corporation of several states, yet remains for jurisdictional purposes a citizen of the state which originally created it, and of that state alone. Plainly, the railroads in the two cases last mentioned were of the second class, and the language just quoted is in accord with that used in *R. R. v. Harris*, 12 Wall. 65, 82, 20 L. Ed. 354, 358:

"Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, quo ad hoc any property within its territorial jurisdiction."

It cannot be supposed that the language of the court in these cases was intended to deny the existence of corporations of the first class, although, in the latest case, the Supreme Court was disposed to treat interstate railroads as corporations of the second class, where the classification was open to doubt. *Southern R. R. v. Allison*, 23 Sup. Ct. 713, 47 L. Ed. —.

In *Memphis R. R. Co. v. Ala.*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518, the Supreme Court held that the railroad, a corporation of the first class—that is to say, a corporation for jurisdictional purposes both of Alabama and Tennessee—could not remove into the Circuit Court in Alabama a suit brought against it by a citizen of that state. In that case it was said:

"The defendant, being a corporation of the state of Alabama, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and, although also incorporated in the state of Tennessee, must, as to all its doings within the state of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States." 107 U. S. 585, 2 Sup. Ct. 436, 27 L. Ed. 518.

The decision was rested on *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571, and follows *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207, in both of which cases the corporation must be taken to have been of the first class. In the former case it was said:

"The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere." 13 Wall. 283, 20 L. Ed. 576.

If, then, a plaintiff, citizen of one state, can maintain in the federal courts in another state a suit against a corporation of the first class, created in both states (*Muller v. Dows*, *Railway Co. v. Whitton*), and if that corporation cannot remove into the federal court in either state a suit brought against it by a citizen of that state (*Memphis R. R. v. Ala.*), it would seem to follow that this court is without jurisdiction in the case now before it. This is certainly true if an interstate railroad of the first class is to be treated in both states and under all circumstances as one and the same corporation.

But the plaintiff urges that in the case of what has been called a corporation of the first class, such as this defendant, there are in the eye of the law two separate corporations, one having jurisdictional citizenship in Massachusetts, and one in Connecticut, and that he has

chosen to sue the latter. In some of the cases cited there is language which strongly states the separate existence of two corporations. See *R. R. v. Vance*, 96 U. S. 450, 24 L. Ed. 752; *Clark v. Barnard*, 108 U. S. 436, 452, 2 Sup. Ct. 878, 27 L. Ed. 780; *Graham v. B. H. & E. R. R.*, 118 U. S. 161, 169, 6 Sup. Ct. 1009, 30 L. Ed. 196.

In order to sustain its plea to the jurisdiction, the defendant may not be obliged to prove that a corporation of the first class is to be deemed jurisdictionally a single corporation having two aspects, in Massachusetts a citizen of Massachusetts, and in Connecticut a citizen of Connecticut. It will also prevail if it can prove that such an organization is to be deemed two separate corporations indissolubly connected, owners in common of the corporate property, each of which, in the state where created, is recognized as the owner of the property situated in both states, and in the other state is wholly ignored. Thus in *Ohio R. R. v. Wheeler*, 1 Black, 286, 297, 17 L. Ed. 130, the court said:

"It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers."

It is not true without qualification that a corporation created by one state has no existence outside that state. Corporations created outside Massachusetts sue and are sued in the state and federal courts of Massachusetts every day, and their existence is thus recognized. In the case of corporations like this defendant, however, it may be that the Massachusetts creation alone is recognized in Massachusetts, and the Connecticut creation alone in Connecticut. See the language already quoted from *Ohio R. R. v. Wheeler and Railroad Co. v. Whitton*. Whether the New York, New Haven & Hartford Railroad be considered one corporation with two aspects, or two separate corporations, a decision in favor of this plaintiff which would allow a citizen of Massachusetts to sue in this court the New York, New Haven & Hartford Railroad by styling it a corporation of Connecticut, and, by parity of reasoning, would allow the railroad, by styling itself a corporation of Connecticut, to sue a citizen of Massachusetts in this court, would ignore the railroad's real organization, and would make decisions in *Ohio R. R. v. Wheeler* and other considered cases practically ineffective, so far as a plaintiff is concerned.

In *Railroad Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752, the plaintiff, the Indianapolis & St. Louis Railroad Co., was a corporation of the first class (see *Gerling v. Railroad Co.*, 151 U. S. 677, 14 Sup. Ct. 533, 38 L. Ed. 311; *Pennsylvania R. Co. v. St. L. A. & T. R. Co.*, 118 U. S. 298, 6 Sup. Ct. 1094, 30 L. Ed. 83), incorporated in Illinois and Indiana. Alleging itself to be a corporation of Indiana, it brought suit in the Circuit Court in Illinois to restrain the collection of taxes

by a citizen of that state. If the corporation was to be deemed a citizen of Illinois, and in the federal courts of Illinois as a corporation solely of Illinois, the bill should have been dismissed for want of jurisdiction. The court entertained the bill, but dismissed it on the merits, holding that the corporation really taxed was the corporation of Illinois, and so the Indiana corporation had no cause of complaint. As the question of jurisdiction was not argued, and as the matter was not discussed or referred to in the opinion, the authority of the case in favor of the plaintiff is not great.

The plaintiff relies principally upon *Nashua & Lowell Railroad Corp. v. Boston & Lowell Railroad Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363. In that case the Circuit Court in Massachusetts took jurisdiction of a suit brought by the plaintiff, alleging itself to be a corporation of New Hampshire, against a citizen of Massachusetts. If the plaintiff in the *Nashua & Lowell Case* was a corporation like the defendant in the case at bar, then the former case is an authority binding upon this court in favor of the plaintiff here. This court must, therefore, inquire what was deemed by the Supreme Court to be the nature of the corporation plaintiff in the *Nashua & Lowell Case*. As the question concerns the true intent of a decision of the Supreme Court, this court must inquire what construction the Supreme Court put upon the acts of incorporation in the *Nashua & Lowell Case*, rather than construe those acts for itself. The question first put is hard to answer, yet upon its answer the decision here is likely to turn. If the plaintiff in the *Nashua & Lowell Case* was held by the Supreme Court to be a corporation different in kind from the defendant here, that case has little or no bearing upon this.

New Hampshire in 1835, and Massachusetts in 1836, each created a corporation to build a railroad exclusively in the state of its creation, connecting at the boundary. Each of these corporations was styled the *Nashua & Lowell Railroad*. The first was clearly a corporation of New Hampshire and of no other state; the second a corporation of Massachusetts and of no other state. In 1838 the Legislature of Massachusetts passed an act providing that:

"The stockholders of the *Nashua & Lowell Railroad Corporation*, incorporated by the Legislature of the state of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the *Nashua and Lowell Railroad Corporation*, incorporated by the Legislature of this commonwealth in the year one thousand eight hundred and thirty-six; and the said two corporations are hereby united into one corporation by the name of the *Nashua and Lowell Railroad Corporation*; and all the tolls, franchises, rights, powers, privileges and property granted, or to be granted, acquired or to be acquired, under the authority of the said states, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations." St. 1838, p. 378, c. 96.

The operation of this act was made conditional upon the passage of a similar act by New Hampshire, and upon acceptance by the stockholders. Somewhat later, in the same year, New Hampshire passed a similar act. This provided, among other things, "that whereas the Legislature of the commonwealth of Massachusetts have passed a subsisting act, substantially similar, uniting two said corporations, this act shall be in force when the same shall have been accepted by

the stockholders of each and both said corporations, at a meeting to be called for that purpose, at which meeting, said stockholders may vote to ratify and render valid in the united corporations, all former proceedings, which would have been valid in said corporations respectively, and the same shall be as binding on the united corporations, as if adopted separately by each." Also that, "after said corporations shall be united, according to the provisions of this act, they shall be one corporation by the name of the Nashua & Lowell Railroad Corporation." (Material portions of the New Hampshire statute are omitted at 136 U. S. 360, 10 Sup. Ct. 1004, 34 L. Ed. 363.)

Many years after the passage of the acts last referred to, the Nashua & Lowell Railroad Company, styling itself "The Nashua and Lowell Railroad Corporation, a corporation duly established by the laws of the states of Massachusetts and New Hampshire," entered into a contract with the Boston & Lowell Railroad Company, a Massachusetts corporation, and to enforce the provisions of that contract a bill in equity was brought by the Nashua & Lowell Railroad Company, styling itself a corporation of New Hampshire. The defendant objected to the jurisdiction, but the court sustained it, and granted a part of the relief prayed for in the bill.

What was the corporation plaintiff? Did the Supreme Court deem it to be the original New Hampshire corporation created in 1835, or a corporation created by the act of 1838? If the latter, then it was a corporation essentially like the defendant in the case at bar, and the Nashua & Lowell Case governs the decision of the case at bar. If the former, then it was a corporation quite different from this defendant and the Nashua & Lowell Case has little or no application here. In the opinion of the court Mr. Justice Field observed:

"It does not appear, so far as disclosed by the record, except in the allegations of the defendant, that there was any formal acceptance of this act (the New Hampshire act of 1838) by the stockholders of the two corporations; but it would seem that the corporations acted upon its supposed acceptance, for the defendant pleaded to the jurisdiction of the court on the ground that, by the legislation mentioned, the complainant was not a corporation of New Hampshire, and consequently a citizen of that state, but was a corporation of Massachusetts, and thus a citizen of that state." 136 U. S. 371, 10 Sup. Ct. 1006, 34 L. Ed. 363.

And again:

"Replications were duly filed to the answers, the effect of which was to deny the allegations respecting the acceptance of the acts having for their object the union of the two corporations, and those allegations were entirely unsupported by the evidence or by anything in the record, and neither in the final decree of the court nor in its opinion was any allusion made to the subject. The only evidence bearing upon the question is found in the legislation of the two states, New Hampshire and Massachusetts, and it is plain, as already stated, that no legislation of Massachusetts could possibly affect the existence of the complainant as a corporation of New Hampshire, or its character as a citizen of that state."

How far the court deemed the statutory acceptance to have been given does not appear except from the language above quoted. Yet upon the issue of consolidation or no consolidation, of acceptance or no acceptance, the question of jurisdiction might turn. If the consolidating act of New Hampshire was not accepted, and if the plaintiff

were deemed the original New Hampshire corporation of 1835, the jurisdiction of the court was clear, as that corporation, wherever its property was situated, was created by New Hampshire, and by New Hampshire alone. If, however, the consolidating acts were deemed to have been accepted, it would seem that the "one corporation," the "united corporation," therein mentioned, must be deemed to be a new corporation, different both from the New Hampshire corporation of 1835 and from the Massachusetts corporation of 1836. This would appear more plainly if the railroad corporation of 1838, created by the consolidating acts of Massachusetts and New Hampshire, had been given a name different from that of its component parts, as was the case with the defendant at bar, when it was formed from component corporations by the consolidating acts of Massachusetts and Connecticut. On this point the Supreme Court further said: "The plaintiff was created a corporation by the Legislature of New Hampshire in June, 1835. It is therefore to be treated as a citizen of that state." 136 U. S. 370, 10 Sup. Ct. 1006, 34 L. Ed. 363. This was the date of the incorporation of the original New Hampshire company, and the statement is a plain declaration that the plaintiff was the same original corporation which once had an existence in New Hampshire and nowhere else. Again, the Supreme Court said:

"There are many decisions both of the federal and state courts which establish the rule that, however closely two corporations of different states may unite their interests, and though even the stockholders of the one may become the stockholders of the other, and their business be conducted by the same directors, the separate identity of each, as a corporation of the state by which it was created, and as a citizen of that state, is not thereby lost." 136 U. S. 375, 10 Sup. Ct. 1008, 34 L. Ed. 363.

Here, again, the court seems to imply that the plaintiff in the suit before it was the original corporation of 1835. See, also, the quotation from *Farnum v. Blackstone Canal Co.*, 1 Sumn. 46, 62, Fed. Cas. No. 4,675, at 136 U. S. 376, 10 Sup. Ct. 1008, 34 L. Ed. 363. And a little earlier in the opinion it was said:

"The act of New Hampshire of 1838, whilst in terms authorizing the two corporations to unite, did not confer any new franchise or right upon either of them. All that it did was to permit the funding or conversion of the separate interests of each stockholder in each corporation into a common or joint undivided interest in both, and to declare that after the two corporations were united all property owned by either should be considered the joint property of the stockholders of both. There is nothing in these provisions looking to any abandonment of its corporate character as a creation of New Hampshire or its citizenship of that state." 136 U. S. 375, 10 Sup. Ct. 1008, 34 L. Ed. 363.

But if the New Hampshire act of 1838 created a new corporation, whatever its citizenship, then the act did confer a new franchise and a new right. It did not convert the interest of each stockholder in each corporation into a common interest in both, but the conversion was into an interest in a new corporation. To what the pronoun "its" in the last sentence of the quotation refers is not quite clear, but apparently to the New Hampshire corporation of 1835. The sentence just quoted, therefore, implies strongly that the plaintiff was that corporation, and so entitled to bring suit in a federal court in Massachusetts.



Still again the court said:

"A more satisfactory answer [to the defendant's plea to the jurisdiction] would, perhaps, have been that whatever effect may be attributed to the legislation of Massachusetts in creating a new corporation by the same name with that of the complainant, or in allowing a union of its business and property with that of the complainant, it did not change the existence of the complainant as a corporation of New Hampshire, nor its character as a citizen of that state, for the enforcement of its rights of action in the national courts against citizens of other states. Indeed, no other state could by its legislation change the character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity." 136 U. S. 372, 373, 10 Sup. Ct. 1007, 34 L. Ed. 367.

This language requires careful scrutiny. What was the "new corporation" created by Massachusetts, and when was it created? If the reference is to a corporation created by Massachusetts in 1838, most of the language just quoted is altogether inapplicable. The business and property of the Massachusetts corporation of 1838 were never united with those of any other corporation. The union of business and property, so far as there was any, was that of the old Massachusetts corporation of 1836 with that of the New Hampshire corporation of 1835. This language also gives reason to believe that the Supreme Court conceived the plaintiff in the case before them to be the New Hampshire corporation of 1835, and "the new corporation created by Massachusetts" to be the corporation of 1836. It is true that upon this supposition the statement of the court that the Massachusetts corporation was designed to accomplish the same purposes as some New Hampshire corporation was erroneous, as applied to the Massachusetts corporation of 1836. The Massachusetts corporation of 1836 was organized to build a railroad from Lowell to the state line and no further. This was not the purpose of any corporation created at any time by the state of New Hampshire, but, in the confusion created by the constant use of the same corporate name to designate different corporations, the statement just mentioned, which was not material to the decision, may well have been an oversight. Upon the whole, it seems that the Supreme Court, though perhaps not with complete logical consistency, treated the plaintiff as being a corporation created in 1835 by New Hampshire, and by New Hampshire alone. If this be true, then the Nashua & Lowell Case has little or no application to the case at bar. The two corporations of New Hampshire and Massachusetts, operating together, were held by the Supreme Court to constitute neither a corporation of the first nor of the second class, but an anomalous union of two corporations created for distinct purposes by different states, which had been united as to their business and property, but not as to their corporate existence. The plaintiff Nashua & Lowell Railroad Company was thus treated as a corporation analogous to the Hartford & Springfield Railroad or the New York & New Haven Railroad, and not to the defendant

here. It is true that this decision thus interpreted disregards the language of the statutes both of Massachusetts and of New Hampshire, in so far as those statutes provided that the two corporations should be united into "one corporation" or a "new corporation," but upon any construction of the decision the statutes were thus disregarded by the court to that extent.

Upon any construction which admits the existence of two corporations owning the same tangible property difficulties other than that concerning the jurisdiction must arise. If the federal courts of Massachusetts can take cognizance of the separate existence of both corporations, with which corporation did the Boston & Lowell Railroad contract? Plainly not with the New Hampshire corporation rather than with that of Massachusetts. What would have been the effect upon the complainant's bill in the federal court, if the Nashua & Lowell Railroad, suing as a Massachusetts corporation, had at the same time brought a bill in equity for the same purpose against the defendant in the state court of Massachusetts? These questions were urged upon the Supreme Court, and, though not discussed in the opinion, they must have been considered. But this difficulty is equally applicable to a construction of the decision which treats the plaintiff as a corporation created in 1838 rather than as one created in 1835. That the construction herein put upon the Nashua & Lowell Case has not hitherto been suggested may be admitted, but the case has been little noticed by the Supreme Court, and has not been critically considered by any other court. It has even been cited as an authority upon the status of corporations of the second class. *Hollingsworth v. Southern R. R.* (C. C.) 86 Fed. 353, 355. The cases in the state courts cited by Mr. Justice Field go no farther than to determine that each state which aids in creating one of these joint corporations can treat that corporation as its own creature. "They (the two Legislatures) cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state." *Quincy Railroad Bridge Co. v. Adams Co.*, 88 Ill. 615, 619, quoted in 136 U. S. 380, 10 Sup. Ct. 1004, 34 L. Ed. 363. "There may be separate consent given for the consolidation of corporations separately created, but when the two unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed and succeeds there to its privileges." *Chic. & Northwestern Railroad Co. v. The Auditor General*, 53 Mich. 91, 18 N. W. 586, quoted in 136 U. S. 381, 10 Sup. Ct. 1004, 34 L. Ed. 363.

Though the decisions of the Supreme Court in *Railroad v. Vance* and in the *Nashua & Lowell Case* be not deemed in point for the plaintiff, there are cases in the inferior federal courts which are directly in his favor. In *St. Louis Railroad Co. v. Indianapolis Railroad*, 9 Biss. 144, Fed. Cas. No. 12,237, the plaintiff was deemed by the Circuit Court to be a corporation of the first class, incorporated both in Illinois and Indiana, and yet, by describing itself as an Illinois corporation, it was held entitled to bring suit in the Circuit Court in Indiana against a citizen of that state. In his opinion Judge Drum-

mond recognized and discussed the argument against the jurisdiction stated above, viz., that, if the corporations of Indiana and Illinois were deemed separate corporations, then they were both parties to the contract sued upon, and so, upon the ordinary principles of equity, should have been joined. He therefore suggested that the Indiana corporation be made a party defendant, though he deemed the amendment unnecessary. But the Indiana corporation was interested in the controversy, not as defendant, but as complainant, and the parties to a suit in equity cannot be arranged without regard to their real interests, in order to give jurisdiction to a federal court. *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435; *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *Blacklock v. Small*, 127 U. S. 96, 104, 8 Sup. Ct. 1096, 32 L. Ed. 70; *The Removal Cases*, 100 U. S. 457, 25 L. Ed. 593. Moreover, even if this arrangement of parties were possible in a bill in equity, it would be impossible in a suit at law. Judge Drummond's solution of the difficulty stated above was not a happy one.

When the case was considered by the Supreme Court under the title of *Pennsylvania Railroad Co. v. St. Louis Railroad Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83, the corporation originally plaintiff was, for jurisdictional purposes, decided to be a corporation only of Illinois; that is to say, a corporation of the second class. The Supreme Court made full inquiry concerning the nature of the corporation—an inquiry which was quite unnecessary if the general principles of law declared by the Circuit Court were sound. The Circuit Court had held (1) that it had jurisdiction of a suit brought by a corporation of the first class, and (2) that the corporation was of the first class. If the first proposition was sound, the Supreme Court need not have considered the second, for that the court had jurisdiction of a suit brought by a corporation of the second class was undisputed. It seems, therefore, that the Supreme Court then considered the first proposition laid down by the Circuit Court to be doubtful, and that the federal jurisdiction over a suit brought under the circumstances by a corporation of the first class was at least doubtful. *Pennsylvania Railroad v. St. Louis Railroad* was decided before the *Nashua & Lowell Case*.

The same course was taken in *Louisville Railway Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, decided long after the *Nashua & Lowell Case*. There the Circuit Court of Appeals had held that the plaintiff, even if it was jurisdictionally a corporation both of Indiana and Kentucky, yet, by styling itself a corporation of Indiana, could maintain suit in the Circuit Court in Kentucky against a citizen of Kentucky. *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433, 22 C. C. A. 378. In his opinion Judge Taft cited and relied upon the *Nashua & Lowell Case*, though he relied also upon *St. Louis R. R. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. If his view of the law was correct, whether the plaintiff was a corporation of the first or second class was irrelevant. If it was of the first class, it could sue under the *Nashua & Lowell Case*; if of the second, under *St. Louis R. R. v. James*. Yet the Supreme Court fully considered the facts in order to determine

that the plaintiff was a corporation of the second class, and not of the first; that is to say, for jurisdictional purposes a corporation of Indiana alone, and not a corporation of Kentucky. "Nor could it [the plaintiff] have been sued as a corporation of Kentucky in any court of the United States." 174 U. S. 563, 19 Sup. Ct. 821, 43 L. Ed. 1081. This consideration was altogether unnecessary if a corporation of the first class could bring the suit in question, and the action of the Supreme Court implies a doubt of the correctness of the plaintiff's proposition. In the opinion no reference was made to the *Nashua & Lowell Case*. Neither the decision of the Circuit Court in the *St. Louis R. R. Case*, nor that of the Circuit Court of Appeals in the *Louisville R. R. Case*, however, was reversed by the Supreme Court. The first of these cases, therefore, and both of them, it may be, stand as authority for the plaintiff in the case at bar, although the Supreme Court went out of its way to decide them on other grounds, instead of simply affirming the decision of the lower courts upon the authority of the principle declared in the *Nashua & Lowell Case*. In still other cases, while the question here presented may not have been involved in the decision, yet inferior federal courts have intimated, more or less plainly, their agreement with the contention of this plaintiff. See *Uphoff v. Chicago, etc.*, R. (C. C.) 5 Fed. 545, 550; *Chicago, etc., R. v. Lake Shore R. R.* (C. C.) 5 Fed. 19, 21; *St. Louis R. R. v. Stephens*, 47 Fed. 530; *Chic. & N. W. R. v. C. & P. R.*, 6 Biss. 225, Fed. Cas. No. 2,665. See, also, the note to *Johnson v. P. W. & B. R. R.* (C. C.) 9 Fed. 6, 7, cited with apparent approval by Judge Lowell in *Horne v. B. & M. R. R.* (C. C.) 18 Fed. 50, 51. Yet it would be possible to take sentences from the opinion of that learned judge on page 52 which seem to make for the defendant's contention. *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.* (C. C.) 8 Fed. 458, is the case which was approved by the Supreme Court as far as the jurisdiction is concerned. In *Western & Atl. R. v. Roberson*, 61 Fed. 592, 9 C. C. A. 646, the defendant was held to be a corporation purely of Georgia. "The corporation sued is exclusively a Georgia corporation, never having been made a Tennessee corporation. Neither has the state of Georgia made the Tennessee corporation, as such a corporation, a corporation of the state of Georgia. Neither is it a case of consolidation of a corporation of one state with a corporation of another state under like authority from each state." 61 Fed. 598, 599, 9 C. C. A. 653. The case illustrates the difficulty of distinguishing between one kind of interstate corporation and another.

There are decisions of the inferior federal courts which support directly the defendant's contention. In *Baldwin v. Chicago & Northwestern Ry. Co.* (C. C.) 86 Fed. 167, suit was brought in the Circuit Court in Michigan by a citizen of Michigan against a corporation which was described as "the Chicago & Northwestern Railway Company, a corporation created and existing under and by virtue of the laws of the state of Illinois, and a citizen of Illinois." (This fact does not appear in the Federal Reporter.) The court there said:

"It may be added that it is the necessary and logical corollary of the doctrine on which the decisions in the above cases rest, namely, that the court

looks only to the law of the state in which the suit is brought for the purpose of determining the citizenship of the corporation in such cases, that a citizen of one of the states in which the corporation exists cannot maintain a suit against it in the federal courts of the state whereof he is himself a citizen." 86 Fed. 168.

This case is cited with approval in *Harvey v. Raleigh R. R.* (C. C.) 89 Fed. 115. *Burger v. Grand Rapids R.* (C. C.) 22 Fed. 561, is also in point, and the cases which take the other view are there discussed. In *Missouri Pac. R. v. Meeh*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250, decided by the Circuit Court of Appeals for the Eighth Circuit, the defendant was incorporated by the states of Missouri, Kansas, and Nebraska, and was sued as a citizen of Missouri in the Circuit Court of Kansas by a citizen of the latter state. The court held that it had no jurisdiction, and dealt in its opinion with the *Nashua & Lowell Case* as follows:

"The decisions in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 856, 365, 10 Sup. Ct. 1004, 34 L. Ed. 363, and in *Muller v. Dows*, 94 U. S. 444, 447, 24 L. Ed. 207, do not conflict with the prior decisions of the Supreme Court of the United States, for in the former of these cases the New Hampshire corporation, the *Nashua Railroad*, which had been created a corporation of the state of Massachusetts, sued the Massachusetts corporation in the Circuit Court of the United States for the District of Massachusetts to adjust certain differences that had arisen, growing out of a contract in which the two companies had dealt with each other as separate legal entities, and it was held that the suit could be maintained."

Apparently the Court of Appeals supposed that in the *Nashua & Lowell Case* the corporations consolidated were the *Nashua & Lowell Railroad*, a corporation of New Hampshire, and the *Boston & Lowell Railroad*, a corporation of Massachusetts, and that the suit was upon a contract in which the two component corporations had dealt with each other. As has been shown, the facts were quite otherwise, and the explanation of the decision of the Supreme Court given in *Mo. Pac. R. v. Meeh*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250, therefore fails. In an earlier case the Circuit Court in Nebraska had said of a corporation of the first class:

"It is a corporate trinity, having no citizenship of its own distinct from its constituent members, but a citizenship identical with each. By the consolidation the corporation of one state did not become a corporation of another, nor was either merged in the other. The corporation of each state had a distinct legislative paternity, and the separate identity of each as a corporation of the state by which it was created, and as a citizen of that state, was not lost by the consolidation. Nor could the consolidated company become a corporation of three states without being a corporation of each or of either. While the consolidated corporation is a unit, and acts as a whole in the transaction of its corporate business, it is not a corporation at large, nor is it a joint corporation of the three states. Like all corporations, it must have a legal dwelling place. Every corporation, not created by acts of Congress, dwells in a state. This consolidated corporation dwells in three states, and is a separate and single entity in each." *Fitzgerald v. Mo. Pac. Ry. Co.* (C. C.) 45 Fed. 812, 815.

See, also, *Winn v. Wabash R.* (C. C.) 118 Fed. 55.

Most of the cases decided in the state courts which deal with the status of corporations of the first class are concerned altogether with taxation or with the rights of the several states to control the operation of the railroad within their borders. This right is admitted,

even as to corporations of the second class acting in states where their incorporation gives no jurisdictional status, and a fortiori is effective as to corporations of the first class in states where their incorporation does give them such status. In *Tourville v. Wabash R.*, 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650, the railroad defendant was apparently a corporation of the first class. It had been garnished in Illinois, and tried to set up its payment under the judgment there rendered in defense of an action brought in Missouri by its employé and original creditor, a citizen of that state. The court said:

"So that in the defendant we have two legal entities—one a corporation and citizen of Illinois, the other a corporation and citizen of Missouri. With the former the plaintiff had no dealings, and it owed him nothing. The latter became indebted to him in the sum of \$81 for wages earned in Missouri, and under the law thereof exempt from attachment, execution, and garnishment; and, while it may be difficult to see how this debt due the plaintiff from the Wabash Railroad Company of Missouri could be impounded in the courts of Illinois by the service of garnishment process on the Wabash Railroad Company of Illinois, the ruling of the Court of Appeals was not based upon the ground that it was not so subject."

The language illustrates the confusion into which the court fell in attempting to work out logically the corporate fiction. Being earned in Missouri, the plaintiff's wages were held not to have been paid by the payment made by the Illinois corporation. The Illinois court, on the other hand, seems to have deemed that the Illinois corporation also was indebted to the plaintiff, and so the corporation or corporations, "a corporate trinity," or "separate corporations," paid out twice the number of material dollars actually owed. At that point the fiction failed to correspond to the facts.

Throughout the discussion we must bear in mind that we are dealing with fictions, and not with concrete facts. Corporate personality and existence are themselves fictions, and the citizenship or locality of a corporation is the fiction of a fiction. As developed by the federal courts, the citizenship of a corporation rests upon a conclusive presumption, which in hardly any case corresponds to the facts. In a corporation formed by consolidation there is but one line of railroad, of which one individual is president, and one other individual general manager. One set of individual directors sits around one table. Whether the organization is deemed (1) a single corporation, (2) one corporation with several aspects, (3) several separate corporations of which only one is recognized in each of the creating states, or (4) several separate corporations each recognized everywhere, is of no importance, except for the practical results which follow the adoption of one fiction or another. If the fourth fiction be selected, any corporation of the first class can sue or be sued in the federal court of any state by proper designation. If this result be desirable, that fiction is the best for jurisdictional purposes, but care must be taken to develop the fiction so as to avoid the unjust results of the Missouri case. It is not a question of justice, but of ultimate convenience, in what court a corporation may sue or be sued; it is injustice, and not mere inconvenience, that an organization of any kind shall be compelled to pay its debts twice over. In selecting a fiction, moreover,

it may sometimes be wise to take one which has some slight inconveniences in practical results, if its logical development is generally convenient, rather than another which has a slight advantage in some respect, but whose logical development would lead to such injustice that exceptions and subfictions must be numerous and strained. If the fourth fiction above mentioned be adopted, then it must be developed so as to permit any one of the several corporations, as plaintiff or defendant, to stand for and represent them all, and the satisfaction of a judgment recovered by or against one of them must bar the collection of the same claim by or against any other.

In the case at bar the court has to determine what sort of fiction is applicable to the defendant for the purposes of the jurisdiction of the federal courts. Upon the whole, that fiction which treats a corporation of the first class, so-called, as one corporation with several aspects, seems to me in best agreement with the concrete facts, and the logical development of that fiction appears to produce the most convenient practical result. By this fiction, an organization like the defendant, maintaining a single system of railroad in many states, and chartered by each of those states so as to make it jurisdictionally a citizen of each of the states, is deemed to be one corporation, treated in each of the incorporating states as a citizen of that state and of that state alone, however it may be described in some foreign state where it has no incorporation. This theory is supported by one or two recent decisions of one Circuit Court of Appeals, and by two decisions of two Circuit Courts. For the reasons already stated, the Nashua & Lowell Case is not deemed in point, and the reasoning of the Circuit Court of Appeals in the Louisville Case and of the Circuit Court in 9 Biss. 144, Fed. Cas. No. 12,237, is shown to have been doubted by the Supreme Court on appeal.

The plea to the jurisdiction is sustained.

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W. A. GAGE & CO. v. BELL.

(District Court, W. D. Tennessee, E. D. August 1, 1903.)

No. 218.

1. **BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PLEADINGS.**

The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed, and there should be no unnecessary departures by falling into a habit of using the more costly, prolix, and less suitable forms of special pleadings and procedure used in chancery cases.

2. **SAME—LIST OF CREDITORS FILED WITH ANSWER.**

The list of creditors required of the defendant debtor by Bankr. Act July 1, 1898, § 59d, 30 Stat. 561, c. 541 [U. S. Comp. St. 1901, p. 3445], when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than 12, should contain, besides the bare names and addresses of such creditors, at least a statement of the amount due each, the date of the debt, when it is due, whether due by note or account or by some other form of contract, the consideration therefor, whether owed jointly with another as partner or otherwise, and such full particulars as will enable the petitioning creditor to negotiate with

others to join with him in the petition, and save the necessity and cost of a reference to ascertain the facts.

3. SAME—REFERENCE.

If the particulars of the debts shown in the list of creditors filed under Bankr. Act, § 59d, where it is alleged by the debtor that his debts are more than 12 in number, are not disclosed in the answer, the court will, if necessary, refer the case to ascertain them, and thus settle any dispute between the parties concerning them.

4. SAME—AUTHORITY OF ATTORNEY—HOW QUESTIONED.

The authority of the attorney appearing for the petitioning creditors cannot be challenged by the answer of the defendant debtor setting up a want of such authority, or averring any fraud of the attorney in procuring other creditors to join in the petition. This can only be done by a rule upon the attorney to show by what authority he appears for the party supported by affidavit showing the facts relied on to question the authority.

5. SAME—PETITIONING CREDITORS—EFFECT OF PAYMENT OF DEBT.

Whether payment of the debt of one of the petitioning creditors after the petition is filed will defeat the proceeding for lack of a sufficient number of creditors joining in the petition, *quære*.

In Bankruptcy. On exceptions to answer in involuntary proceedings.

Craig & Casey and Warinner & Warinner, for creditors.  
C. E. Jerman and Hays & Biggs, for defendant.

HAMMOND, J. This case presents some rather unusual proceedings in bankruptcy practice, which it is well enough to settle for the better regulation of proceedings in similar cases. The original petition is by one creditor only, to whom the defendant debtor owes more than \$8,000, and it alleges, as acts of bankruptcy, the conveyance to his nephew of a tract of land for a consideration of \$8,000, the concealment of the conveyance from the records, subsequent mortgages to secure loans, particularly one by a local bank of which the nephew was cashier, all of which it is alleged were made without real consideration and to hinder and delay creditors, etc.; also, it charges as an act of bankruptcy the conveyance to one Harvey, for four notes aggregating \$4,047.42, payable to this same Bank of Crockett, of a gin lot and its outfit, at Bell's Station; the notes being secured by a deed of trust made by Harvey to this same nephew Bell, the cashier of the bank. It alleges that these conveyances also were concealed and withheld from the record, as the others were, and were all made in contemplation of insolvency and to hinder and delay creditors. By amendments these conveyances were charged to be fraudulent preferences of the bank, effected by artful and roundabout conveyances, so managed as to avoid, if possible, an attack under the bankruptcy statute within the four-months limitation.

A demurrer to the petition and amended petition was overruled, and the defendant debtor answered, averring (1) that his creditors were more than 12 in number, of which he annexes a list; (2) that being chiefly a farmer, and engaged in the tillage of the soil, he was not liable to the bankruptcy statute; and (3) denying the alleged acts of bankruptcy, and demanding a jury.

The so-called list of creditors attached to the answer is simply a



list of 21 names, all at Bell's Station, with no other information as to their claims. But in the list appears the names of W. B. Thompkins and W. H. Poindexter. These two subsequently filed their petition asking to join with W. A. Gage & Co., as petitioning creditors; the first alleging that the defendant debtor owed him \$1.90 on account, and the other that he owed him \$25 for medical service. Each swore to this petition, which is a brief and plain statement that they wished to join, and seemingly giving as a reason that the defendant debtor had listed their debts in an effort to defeat Gage & Co., to have him adjudged a bankrupt. It would seem incredible that any one signing and swearing to such a petition could misunderstand its import and purpose. On a notice to show cause, the defendant debtor also filed an answer to this petition, stating that he was informed by the petitioners that they were misled and deceived as to its purpose, they supposing that they were simply filing their claims in bankruptcy, that if they had known the object they would not have signed it, and that they wish to dismiss or withdraw the petition. The defendant also states in this answer that he was indebted to Thompkins only as a surety for one Williams, who has since the controversy arose paid the debt, and he no longer owes Thompkins anything. He exhibits an affidavit of Poindexter's, and a paper intended to be the affidavit of Thompkins, which was read to him, and to which he assented; but, being warned that he might get into trouble, he refused to sign and swear to it.

The affidavit of Poindexter states that when he signed and swore to the petition he did not know its contents or purpose, and that if he had he never would have signed it. He says that Mr. Casey, one of the lawyers for Gage & Co., asked him if Bell did not owe him something, and told him that signing the petition was the only way to get it; he did not read the paper, and only a part of it was read to him; that he was told it was a matter of form only; that Mr. Casey brought the notary public with him, and that he signed it without any knowledge that it was a proceeding "to put Mr. Bell into bankruptcy"; that he had no intention of doing this, and wishes to dismiss and withdraw the petition. He acquits Mr. Casey of purposely misleading him, but says he was misled. The unsigned affidavit of Thompkins is to same effect, and it states that Bell was only a surety for Williams; that Williams paid all the debt but \$1.90, for which small balance he has no desire to put Mr. Bell in bankruptcy, and never thought of such a thing, being of the impression that he was only proving his debt like all creditors had to do.

Later one Daniels filed his petition to join with Gage & Co. in their petition for an adjudication, stating that the defendant debtor owes him \$2.25 assigned to him by one Thomas, for two years subscription to the county paper. He is not on Bell's list, but Thomas' name appears on it as a creditor.

To the answer of Bell, setting up that Poindexter and Thompkins did not knowingly join Gage & Co., that they were deceived, and did not authorize their petition to join as petitioning creditors, Gage & Co. file exceptions, taking an objection that it is irrelevant and immaterial, and presents a collateral issue which cannot be so pleaded;

that the authority of an attorney to appear cannot be thus challenged, and that the paper should be stricken from the files; also, there is a "replication" to that part of the answer which relates to the Thompkins debt, denying its payment.

To the notice to show cause on Daniels' petition Bell answers that Daniels is not a bona fide creditor; and that if there has been any assignment by Thomas it is fraudulent and void.

There is an affidavit of Mannie Williams that he bought of Thompkins cotton seed hulls to amount of \$5, for which the defendant debtor Bell became his surety. He also owed Thompkins a small balance of account. About last May or first of June, after the proceedings in bankruptcy were commenced, he went to Thompkins' house to pay the debt. Thompkins was absent, but he paid his wife what was thought to be due, with the understanding, if there were any balance, he would pay Thompkins, who alone knew the true amount. He says frankly that he was eager to pay the debt to save Bell any trouble because of his suretyship and especially about this bankruptcy matter. He tried to pay Thompkins the balance claimed of \$1.90, and offered it, but Thompkins said he was in a controversy about it, and refused it. He is anxious to pay it, and feels able. After the filing of this affidavit, Gage & Co. moved to amend their petition, and set up that outside of the disputed balance of \$1.90 Bell owes Thompkins the sum of 82 cents on account for 750 "dirt bands," whatever these may be, at \$1.10 per thousand.

Pending the hearing the defendant Bell gave notice and filed a motion that the attorneys for the petitioning creditors show by what authority they prosecuted the petition for Poindexter and Thompkins, to which no answer has yet been filed.

The court has set out thus particularly the pleadings and other steps taken in this case to protest that they seem to divert the proceedings in bankruptcy from the strict line of proper procedure and raise issues that may be collateral and immaterial. As will presently appear, these pleadings also seem trivial in this case because of the very small amounts involved; but still the importance of keeping the practice within rightful bounds is none the less; and, after all, the firm of original petitioning creditors has a debt of magnitude, and the struggle with them is to maintain their purpose to have a court of bankruptcy overhaul the alleged fraudulent transactions by which the defendant debtor's property to a large amount has passed into the hands of his home bank, to pay what are alleged to be fraudulently preferred debts. This one creditor firm, having thus been left in the lurch, finds itself confronted with a defense that there are more than 12 creditors, and therefore one creditor may not procure an adjudication under section 59b of the statute (Act July 1, 1898, 30 Stat. 561, c. 541 [U. S. Comp. St. 1901, p. 3445]). It is, in fact, therefore, a formidable litigation about amounts of considerable size, and the triviality of the other debts, not one of which is over \$40, is merely an incident of that litigation.

It is to be observed that Form No. 6 (89 Fed. xxx, 32 C. C. A. liv) does not contemplate any other pleading than that of a brief and simple denial (1) that the defendant debtor has committed the act of

bankruptcy, or (2) that he is insolvent, and (3) an averment "that he should not be declared a bankrupt for any cause in said petition alleged." At first I was inclined to hold that no other pleading whatever was permissible than this, and that under it any defense whatever, whether by demurrer or otherwise, could be made that would defeat the petition for any cause. But yielding to the license given by General Order No. 38 (89 Fed. xiv, 32 C. C. A. xxxvii), that the several forms shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case and conforming to the practice in other districts, reluctantly and with constantly increasing regret, I allowed other and special pleadings to be framed, and now, as in this case, in almost every case there are demurrers, formidable answers after the manner of pleadings in chancery, with exceptions, replications, etc., until the practice has departed from the simple forms prescribed and degenerated into those of a suit in equity. I doubt if this is proper practice.

Here we are engaged in trying the question whether a certain creditor named by the debtor in his list as such is in fact a creditor, or whether his debt has been paid, and this on an issue of pleadings presenting that question, when the listed creditor joins in the petition for an adjudication; also whether another creditor, named in the list, has made a valid assignment of his debt to an outside person, who has likewise joined in the petition for bankruptcy; and again, whether still another creditor, likewise on the list, has joined in the petition in fact, or has been fraudulently overreached and misled into signing it—really the issue being whether or not his agreement to join should be rescinded for fraud and set aside by a court of equity. All this has the appearance to the court of a manipulation of creditors and a concerted scheme, on the one hand to defeat the main creditors of their use of the bankruptcy statute to vacate preferences, and on the other of a scheme to find the requisite number of creditors to invoke the statute.

The court is not now prepared to say that such proceedings are not admissible, but it very well may be said that a petitioning creditor, having a debt provable on the face of it, ought not to be compelled by the defendant debtor to enter into litigation about it, legal and equitable, and antecedently to establish it by overthrowing all the defenses, real or fabricated, that the debtor may choose to set up by pleadings specially framed to present such issues. It is in effect tantamount to holding that a creditor with a disputed debt cannot be a petitioning creditor in bankruptcy; or, at least, not until he has cleared away all dispute and controversy, and established his debt by a judgment at law; for it would be, in effect, a requirement to do this, even if he must get such a judgment or its equivalent in the bankruptcy proceedings. And the result is that before we can inquire whether a debtor is insolvent, and has committed an act of bankruptcy, we must engage in a preliminary work of litigation in law and equity, and, possibly, even in admiralty as well, with each petitioning creditor, in order that we may know beforehand whether the debtor has any defense he may possibly make to the creditor's claim of debt. This is converting the language of the statute, "three or more cred-

itors having provable claims," into a requirement that there shall be "three or more creditors having proved and established debts," before they may file the petition. Section 59b. If a debt is wholly wanting in existence, if it has been paid, for example, or if it has been fabricated for the purpose, of course the defendant should be allowed to show that fact in some form. But if it be a reasonably fair and honest claim of debt, which is provable in the sense that it is a claim that the court of bankruptcy after adjudication will hear and establish, if proved, the creditor should not be bound before the adjudication to so prove and establish it, but should be allowed to rely upon its provable quality, *prima facie*, to support an involuntary petition in bankruptcy. This certainly ought to be the rule; but here we are already engaged in a maze of trifling litigation, about trivial transactions, before we can get at larger transactions on their merits, for the investigation of which this particular and peculiar jurisdiction of bankruptcy was established. Our extraordinary, not to say unique, jurisdiction cannot be exercised until we have first exercised that of the ordinary justice of the peace, or of a law court and jury, or of the chancellor, or of the admiralty, to establish whether or not the creditor be a creditor in fact as against all possible defenses to his claim. I hardly think such was the intention of this act, but it is not essential here to enter upon any close investigation of the meaning of the words "provable claims," as used in section 59b, or in former bankruptcy statutes, nor how far the bankruptcy court will go in allowing litigation between the petitioning creditor and the debtor about the defenses there may be to the claim set up as a defense or obstruction to the proposed proceedings in bankruptcy; because, in this case, the pleadings first require a broader investigation into all of the alleged debts set up by the defendant debtor in his list of creditors so exhibited by him to show the fact that he has more than 12, and that therefore one creditor cannot sustain the petition. It may be that, after all, he has less than 12, and that his answer is not true in respect of that. We are engaged in ascertaining a mathematical fact by counting, excluding all spurious debts, and not in determining whether any particular debt be "provable."

Whether payment after petition filed be a good defense is doubtful, and that question is reserved for future consideration. Hilliard, Bk. (2d Ed.) 192, par. 30; Wms. Bk. 41.

The objection of the petitioning creditors that the defendant debtor's so-called "list of creditors," filed with his answer, is not a compliance with section 59d of the statute (30 Stat. 561, c. 541 [U. S. Comp. St. 1901, p. 3445]), is well taken. Certainly it is a "list of creditors," and verily complies with the mere words of the statute; but that is sticking in the bark of the statute. "*Qui hæret in litera hæret in cortice*. Broom's Leg. Max. 611. It is, however, more the fault of the statute than of the pleader. The statute sacrifices the advantage of explicit directions to a seeming infatuation for a structural compression of *multum in parvo*, nearly always leaving too much to implication and judicial guesswork. Under the English act, as soon as the petition is filed the debtor must exhibit a list of his creditors, giving particulars of address, amounts, dates, and nature of securi-

ties, if any, etc. Wms. Bk. 59. The original act of 1867 had no occasion for such a list of creditors before adjudication, because the petition could be filed by one or more creditors, the aggregate amount of the debt or debts being \$250. Act March 2, 1867, § 39, 14 Stat. 517, 536, c. 176. But by section 12 of the amendatory act of June 22, 1874 (18 Stat. 178, 180, c. 390), provision was made against trivial debts being used to sustain an involuntary petition, presumably to meet the experience had in that regard under the original act. But likewise and almost simultaneously the act of Congress known as the "Revised Statutes" was enacted, containing the title 61, in "Bankruptcy," sections 4972 to 5132, inclusive. Some confusion of interpretation arose by this circumstance not necessary to notice here particularly; but Rev. St. 5021, 5023, took no notice of this amendatory act of June 22, 1874, § 12 (18 Stat. 180, c. 390), and contained only the requirement of the original act that the adjudication might be made on the petition of one or more creditors whose debts aggregated as much as \$250, and this section 12 of the act of 1874 does not appear in any of the supplements of the Revised Statutes, because the whole act was repealed before the first supplement was issued. It appears nowhere except in the Statutes at Large, as above cited. So that, possibly, the framers of the act of 1898 gave it no attention, regarding the Revised Statutes as a complete substitute, as it was; and, possibly, again, as never having had any force; or it may have been believed, as it was elsewhere in some of the text-books, that the amendatory act was incorporated in the second edition of the Revised Statutes, which is a mistake. Bump's ninth edition of his work on Bankruptcy, without authority substitutes this section 12 of the act of 1874 as section 5021 of the Revised Statutes; and his notes give the decisions under the amendatory sections, which he treats as repealing the corresponding sections of the Revised Statutes. Bump, Bky. (9th Ed.) 396 et seq. But all this was only the convenient work of the text-writer or compiler himself, and had no legislative sanction.

This condition is noted here, so that it may be remarked that in the opinion of the court the failure of the act of July 1, 1898, § 59d, 30 Stat. 561, c. 541 [U. S. Comp. St. 1901, p. 3445], to use the same language in describing the kind of "list of his creditors" that is used in section 12 of the amendatory act of 1874, does not imply that any less full list is to be filed under the act of 1898 than was required under the amendatory act of 1874. The purpose of the list is the same, I should say precisely the same, under both acts, although the language expressing the purpose is less clear under the later than under the older act, owing, no doubt, to the structural compression before noticed. The language of the old act is:

"The court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain upon reasonable notice to the creditors whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. \* \* \* And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time \* \* \* within which other creditors may join in such petition."

It may be remarked here that this is the very jurisdiction we are now exercising under the act of 1898, more specifically and satisfactorily declared. Obviously, upon a comparison of the two sections, the purpose of the list is the same, and just as obviously a bare list of names and addresses, without more, does not accomplish that purpose of informing the creditors, not only of the names, but of the nature of the debts, and, most of all, of their dates and amounts. Such a bare list as that filed here smacks of a concealment of those facts for the purpose of embarrassment of the petitioners. If any creditor in the list be barred by the statute of limitation, the petitioning creditors need not negotiate or solicit such helpers to join in the bankruptcy; or, if the debts in the list be not provable debts in bankruptcy, they need not be counted, and negotiating with those creditors would be useless also; and so, in many contingencies to be imagined, this full information is necessary to guide the creditors in their further proceedings. Clearly, therefore, at least the dates and amounts should be given; and, moreover, it is useful to know whether the debt be due by note, account, etc., and when due, whether secured or not; and all such particulars, as fully disclosed as they would be in the schedules after adjudication, would be most in accordance with the analogies of the practice under former statutes. I am of opinion that substantially these requirements should be implied from the language of section 59d and correlative clauses of the same section.

Hereafter, in the practice of this court, the debtor in making out such a list must give, as nearly as may be, the same fullness of information as is required in the Schedule A of Form No. 1 (89 Fed. xvi, 32 C. C. A. xl), although it need not be in same form; and, at the very least, in addition to the names and addresses, he must give the dates, when due, and amounts of the debts; whether due by note, account, or other form of contract; and the consideration thereof; whether secured or not, and how; and whether the debt was contracted jointly with others or only by the debtor himself. Such a practice here might have saved the reference which now we are compelled to grant in this case; for there can be no doubt that it is the duty of the court to ascertain the facts connected with alleged indebtedness before it can be allowed to defeat the one large creditor in an effort to resort to bankruptcy proceedings to set aside alleged fraudulent preferences for equally large amounts paid or secured to the favored creditors. That duty was especially enjoined by the above-cited section 12 of the amendatory statute of 1874, and it is necessarily implied in the corresponding section 59 of the act of July 1, 1898, 30 Stat. 561, c. 541 [U. S. Comp. St. 1901, p. 3445], which leaves so much to such implications, without which the statute would not be at all workable by the courts.

Another pertinent consideration arises out of a comparison of the two foregoing sections. By that of the act of 1874 it was provided that, "in computing the number of creditors as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two-hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two-hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding

two-hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid."

This act of 1874 was the precursor of the total repeal of the act of 1867, a few years later, in 1878 (Act June 7, 1878, 20 Stat. 99, c. 160). It was symptomatic of the widespread dissatisfaction with the practical workings of the original act, and a last effort to make it acceptable in its involuntary features. Costly bankruptcies, instituted by creditors with trivial debts, not amounting in the aggregate to more than \$250, and very small in amounts due each creditor, were distasteful to public opinion, as being trifling with the process of the courts about matters not worthy of such attention. The foregoing provision of the amendatory act was a protest against such petty litigation, and yet, as will be observed, Congress was not quite willing to cut off small creditors altogether from the remedy by bankruptcy procedure. Later, disgust with the act for this and other reasons swept it off the statute book. The act of 1898 seems to tolerate voluntary and involuntary proceedings based on the smallest debts, but this history concerning the old act should warn those resorting to the new not to abuse it for petty litigation, even if thought to be permissible under it.

Here we have a creditor strenuously insisting on counting and using a debt for only 82 cents to sustain this petition, and, on the other hand, a debtor setting up trashy debts, not one of which is over \$40, most of which are less than \$5, it is said, and the whole not aggregating as much as \$250, the smallest amount allowed by the old disrelished act of 1867. As intimated at the hearing, if the question turned wholly upon the small sum of 82 cents, I should treat it as clearly within the protecting maxim, "*De minimis non curat lex.*" Broom's Leg. Max. 134. But counsel for the petitioning creditor, Gage & Co., forcibly contend that, if that maxim is to defeat a creditor with an indebtedness of over \$8,000 from challenging the legality of transfers of property given to prefer other creditors for quite as large a value, it ought also to be turned the other way, and used to expunge from the count the petty debts set up by the defendant debtor, leaving him a debtor with less than 12 creditors, and so maintaining a petition by a single creditor with an amount large enough to command respect as against the maxim. It is also intimated that some of these creditors should be excluded from the count because they are stockholders in the bank that was preferred, and therefore interested in defeating the bankruptcy petition by unlawful concert with the debtor.

On the whole, I have concluded to send the case to a referee to inquire about these debts, and report all the information to be obtained on oath as to their amount, dates, consideration, etc., and the relation of the creditors to the debtor, the bank alleged to be preferred, and to this litigation. Counsel may agree upon the terms of the reference, all other matters being reserved.

Necessarily it is the practice in all courts to treat the attorney appearing for a litigant as duly authorized thereto by that litigant. The authority to appear must exist, to be sure, but it is conclusively presumed, or assumed, rather, by the court, unless it is formally, and by a special proceeding known to the practice, called in question. 3 Enc.

L. (2d Ed.) 349; Id. 375. The defendant cannot, by answer or plea, set up want of authority in the plaintiff's attorney, but he must make a rule upon him to show his authority, supported by affidavit as to the facts. Id. 377, citing *Martin v. Walker*, Abb. Adm. 579, Fed. Cas. No. 9,170; *Howe v. Anderson* (Ky. 1890) 14 S. W. 216; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616. The reasons for this rule are well illustrated by this case. The courts could not conveniently do the business of litigation if either litigant could capriciously embody in his pleadings the collateral matter of the authority of the attorneys, respectively, to appear and file their pleadings. Every litigation would degenerate into a preliminary inquiry about the attorney's dealings with his client. Besides, as in this case, the attorney charged with the offense of fraudulently overreaching the party whom he assumes to represent would have no opportunity to make his defense against such grave charges, unless they are presented more directly against himself by such a rule as the practice requires.

But it is the province of the court when necessary, even of its own motion, to require the attorney to show his authority to appear for the litigant, and a rule is always granted when asked for by the adversary party, if the affidavit shows sufficient ground to question the authority. The rule asked for in this case, therefore, will be granted; but it should be answered promptly, and any issues of fact sent to the referee at the same time as the foregoing reference, so as to save the costs of too frequent references in the same case.

The rulings of this opinion which hereafter should govern the practice in this court are:

(1) The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed, and there should be no unnecessary departures by falling into a habit of using the more costly, prolix, and far less suitable forms of special pleadings and procedure used in chancery cases.

(2) The question is reserved whether or not a creditor having a provable debt, subsisting *prima facie*, can be required by special pleadings, tendered by the defendant debtor, to establish his claim against all defenses that may be set up, before he can be heard, as a petitioning creditor, to maintain an involuntary proceeding in bankruptcy.

(3) The "list of creditors" required of the defendant debtor by section 59d of the statute, when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than twelve, must contain, besides the bare names and addresses of such creditors, at least a statement of the amount due each creditor, the date of the debt, when due, whether due by note or account or by some other form of contract, the consideration therefor, whether owed jointly with another, as partner or otherwise, and such full particulars as will enable the petitioning creditor to negotiate with others to join with him in the petition and save the necessity and cost of a reference to ascertain the facts. There should be no concealment of these particulars by the debtor in making such a defense.

(4) If the particulars of the debts contained in the list of creditors filed under section 59d, where it is alleged by debtor that his debts are more than 12 in number, are not disclosed in the answer of the defend-



ant, the court will, if necessary, refer the case to ascertain them, and thus settle any dispute between the parties concerning them.

(5) The authority of the attorney appearing for the petitioning creditors cannot be challenged by the answer of the defendant debtor setting up a want of such authority, or averring any fraud of the attorney in procuring other creditors to join in the petition. This can only be done by a rule upon the attorney to show by what authority he appears for the party, supported by affidavit showing the facts relied on to question the authority.

(6) Whether payment of the debt of one of the petitioning creditors after the petition is filed will defeat the proceeding for lack of a sufficient number of creditors joining in the petition, *quære*.

(7) Whether trivial debts for petty amounts will be reckoned in either maintaining a petition or defeating it for want of the required number joining the petition, or whether the maxim, "*De minimis non curat lex*," will be applied to both sides, is a question reserved until the coming in of the report of the referee showing the true condition of the debts and the relation of the creditors to the litigation about the alleged preferences.

There will be an order of reference in accordance with the ruling above set forth. Ordered accordingly.

NOTE. After the filing of the foregoing opinion and the coming in of the report of the referee, the litigation was settled by the payment of one-half of the petitioning creditor's debt. Whereupon the petition was dismissed after publication for creditors to show cause against the application of the creditor to dismiss the petition.

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## EDWARDS v. MERCANTILE TRUST CO. et al.

(Circuit Court, S. D. New York. July 25, 1903.)

### 1. PARTIES—SUIT IN FEDERAL COURT—NECESSITY OF JOINING FOREIGN CORPORATION.

The fact that by an agreement between two corporations certain stocks were to be held by one as collateral security for bonds to be issued by a third corporation does not render the latter a necessary party to a suit to determine the ownership of the stocks as between the first and second corporations, so as to defeat the jurisdiction of a federal court where the third corporation is outside the jurisdiction and cannot be brought in, since the court has power to protect its interests under the pledge agreement, whichever party to such agreement may be decreed the owner of the security.

### 2. CORPORATIONS—SUIT BY STOCKHOLDER—CONDITIONS PRECEDENT.

It is not a condition precedent to the maintenance of an action by a stockholder against the corporation and another to set aside an alleged fraudulent agreement made between the defendants that complainant should offer to return property acquired by the corporation through such agreement, or show an effort to procure its return by the corporation, where he alleges a demand upon the corporation to institute the suit, and its refusal.

### 3. SAME—COMPLIANCE WITH EQUITY RULE 94—SUFFICIENCY OF ALLEGATION.

Allegations in a bill filed by a stockholder against the corporation and another to set aside an agreement between them, charged to be fraudulent, that complainant demanded of the corporation "that it institute the suit set forth in this your orator's bill of complaint" against its co-

defendant, but that the corporation has refused and neglected to bring such suit, is a sufficient compliance with equity rule 94.

4. SAME—LACHES—ALLEGATIONS IN EXCUSE OF DELAY.

In a bill by a stockholder against the corporation and another to set aside an alleged fraudulent agreement through which, as charged, the corporation was deprived of income and prevented from paying dividends, a general allegation that complainant was uninformed as to the matters set forth until a few weeks prior to the filing of the bill is insufficient to excuse a delay of eight years after the making of the agreement, and avoid the defense of laches, and especially where facts shown by the bill were of such a character as should have put him on inquiry.

5. SAME—PLEADINGS—ALLEGATIONS OF FRAUD.

In a bill by a stockholder against the corporation and another to set aside an alleged fraudulent agreement, made pursuant to a state statute, and through which, as charged, the corporation was deprived of income and prevented from paying dividends, allegations that the statute was unconstitutional as defendants knew, and that it was the company's duty to resist it, but that with this knowledge, and with full knowledge of the effect of proceeding under it, defendants took advantage of the unconstitutional statute, and perpetrated a fraud on the company and its stockholders, etc., followed by a particular statement of what was done, are sufficient allegations of fraud as against a demurrer.

In Equity. On demurrer to bill by defendant the Mercantile Trust Company. See 121 Fed. 203.

C. Godfrey Patterson (Henry Major, of counsel), for complainant.  
Alexander & Green, for defendant Mercantile Trust Co.

RAY, District Judge. This is a suit for equitable relief instituted by the complainant on behalf of himself and such other interested persons as may join as an income bondholder and stockholder respecting the defendant Bay State Gas Company of Delaware, and seeks to enjoin the Mercantile Trust Company from selling, hypothecating, or voting upon 15,000 shares of the capital stock of Bay State Gas Company claimed by the complainant to have been since its issuance the property of the defendant Bay State Gas Company of Delaware; also the appointment of a receiver of the property of the defendant Bay State Gas Company of Delaware, including the said shares of stock and all dividends thereon; and for the judgment of this court decreeing the ownership, as between the parties to this action, of the said shares of stock, and that the same have belonged since the issuance thereof to the defendant Bay State Gas Company of Delaware; and that the possession thereof, and of the dividends paid thereon by the defendant trust company, has been that of a trustee merely, the beneficial interest and ownership being vested in said Bay State Gas Company of Delaware, and that the said Mercantile Trust Company may be required to account therefor as such trustee to a receiver to be appointed herein.

The bill of complaint is voluminous, but its allegations may be summarized as follows, viz.:

The citizenship and residence of the complainant, the domicile of defendants and the corporate existence of defendants, the creation of defendant Bay State Gas Company of Delaware, the bonded debt, and the ownership by the complainant of 24 income bonds, of the face

¶ 4. See Equity, vol. 19, Cent. Dig. § 329.

value of \$24,000, and of 440 shares of stock, par value \$22,000, of the Bay State Gas Company of Delaware, and also the good faith of the complainant in bringing the suit, is first alleged. The bill of complaint alleges the creation on the 2d day of December, 1884, of the Bay State Gas Company of Massachusetts, and that said Company in March, 1885, made an agreement with one J. Edward Addicks to the effect that Addicks should equip and construct a gas manufacturing plant for said company in consideration of the immediate delivery by said company to said Addicks of its bond in the sum of \$4,500,000, and of the payment to said Addicks of the sum of \$450,000 in addition thereto; the said bond to become payable in 99 years, and the annual interest payable thereon to the holder thereof to be equal to 90 per cent. of the net earnings of the said Massachusetts Company, payable semiannually. The said Massachusetts Company was to deliver its said bond to said Addicks on March 11, 1885. Said Addicks assigned the said agreement and his rights thereunder to the Beacon Construction Company, March 19, 1885, and by separate instrument assigned to the same company the said bond. The Beacon Construction Company constructed and equipped the gas plant, and same was delivered to and accepted by the Massachusetts Company in fulfillment of the Addicks agreement. On the 1st of August, 1889, the Beacon Construction Company assigned the said \$4,500,000 bond executed by the Bay State Gas Company of Massachusetts to one Herman G. Mulock in consideration of \$5,000,000 paid therefor. About August 13, 1889, said Mulock sold and assigned the said bond to the defendant Bay State Gas Company of Delaware, then bearing the name Peninsular Investment Company, for the consideration of \$5,000,000, of which \$2,000,000 consisted of the entire issue of income bonds of said gas company, and \$3,000,000 in the full-paid capital stock of the defendant Bay State Gas Company of Delaware, which income bonds and stock were thereupon issued and delivered to said Mulock in payment for the said \$4,500,000 bond. The covenants of said income bonds are to the effect that the principal thereof is payable on the 1st day of May, 1939, and that interest, not exceeding 7 per cent. in any one year, shall be paid as the net earnings of the defendant Bay State Gas Company of Delaware will pay, such net earnings being such part of the income of the maker of the bond as would be applicable to payment of dividends, and to be reserved and applied to the payment of said interest before and in preference to payment on any other obligation of the obligor company, the payment of which interest is to be a just charge or lien upon said net earnings to the extent aforesaid. The bonds are to be and remain the first preferred obligation of the company, and all payments out of said net earnings of the company shall in all events be made prior to any payments on account of any other obligations. The defendant Bay State Gas Company of Delaware, while holding the \$4,500,000 bond of the Massachusetts Company, received interest thereon from the Massachusetts Company all the way from \$90,000 in 1889 to \$234,950 in the year 1893, and paid therefrom up to May 1, 1893, 7 per cent. interest on the \$2,000,000 of its said income bonds, and also paid a dividend of 2 per cent. in 1892, and 1 per cent. in 1893, upon its \$5,000,000 of capital stock.

The bill of complaint then avers that the Bay State Gas Company of Delaware, in addition to being the absolute owner of the \$4,500,000 bond mentioned, also acquired the ownership of the entire stock substantially of the Bay State Gas Company of New Jersey, and as such stockholder, in control of the New Jersey Company, became the beneficial owner, subject to the terms of the pledges as created by certain trust agreements of the several stocks and securities described therein, as pledged for the benefit of the holders of the Boston United Gas bonds. The ownership of the stock of the New Jersey Company was acquired in the following manner, viz.: The New Jersey Company was created in March, 1889, with a capital of \$1,000,000. March 25, 1889, said Addicks and one Dillaway made two agreements with the defendant, the Mercantile Trust Company, dated January 1, 1889, whereby they would purchase the stocks therein described, and transfer the same to the trust company in pledge for the holders of the Boston United Gas bonds therein described, aggregating in face value \$10,435,000, upon which the trust company was to issue its trust certificates in connection with said Boston United Gas bonds to be issued by said New Jersey Company. Addicks delivered the stocks to the trust company, which company prior to June 25, 1885, issued said trust certificates and Boston United Gas bonds to the amount of \$7,435,000 to Addicks and Dillaway, and also trust certificates and Boston United Gas bonds to the amount of \$3,000,000.

The 4,993 shares of stock of the Bay State Gas Company of Massachusetts, mentioned in the trust agreements, were not purchased by Addicks or Dillaway, who never owned them, but same were owned by the Beacon Construction Company, which company was not a party to the trust agreements. Addicks and Dillaway subsequently assigned their title in the stocks pledged by the trust agreements to the New Jersey Company subject to the execution of said trusts, and in consideration thereof the New Jersey Company issued to Addicks and Dillaway 9,950 shares out of a total of 10,000 shares of its own stock, with all rights as to increase of such stock, and said 9,950 shares of stock of the New Jersey Company was afterwards, and on the 9th day of August, 1889, transferred by Addicks and Dillaway to the defendant the Bay State Gas Company of Delaware, in consideration of its issuance to Addicks and Dillaway of \$1,995,000 of its capital, and the payment by the defendant gas company of \$5,000 cash.

The ownership by the defendant the Bay State Gas Company of Delaware of the \$4,500,000 bond is then alleged, as is the passage of an act by the Legislature of the state of Massachusetts known as the "Lyford Act," and the complaint also alleges that the said defendant gas company was then, as the owner of the controlling number of shares of the New Jersey Company, the beneficial owner of the equitable remainder of the pledged stocks held by the defendant the Mercantile Trust Company subject to the execution of the trusts created by said agreement.

The bill of complaint then alleges that the defendant the Mercantile Trust Company knew of the fact that the defendant the Bay State Gas Company of Delaware owned the \$4,500,000 bond, as well as the fact that the said bond was an outstanding obligation against the Bay State

Gas Company of Massachusetts. It also alleges that at and before the passage of the Lyford act the defendant the Mercantile Trust Company, and its directors and officers, knew that the said gas company had bought said \$4,500,000 bond as an investment, and had issued in payment therefor its income bond to the amount of \$2,000,000, and its stock \$3,000,000, and had derived large income, being net earnings, wherewith it had met the payments as required to be made for interest on said income bonds and some dividends on its stock, and also knew that said income bonds and stock were in the hands of purchasers thereof for value, and that said income bondholders were entitled to preferential payment from said net earnings by the terms of said bond, which charged the defendant gas company with a trust in relation to the production, protection, and application of said net earnings, and that the defendant trust company also knew that it was the duty of the defendant gas company to possess itself of any property for which said \$4,500,000 bond might be exchanged, so as to receive and apply the income therefrom to the payment required to be made on said income bond and to dividends on its own stock.

The bill of complaint then alleges the ownership of said \$4,500,000 bond by the defendant the Bay State Gas Company of Delaware, in June, 1893, when the Lyford act was passed by the Massachusetts Legislature, and sets forth such act in full, and also avers that the Bay State Gas Company of Massachusetts then had valuable working plants; that the Lyford act was unconstitutional; that in any event the defendant the Bay State Gas Company of Delaware was entitled to receive the \$1,500,000 of stock issued by the Massachusetts Company upon the surrender to it of the \$4,500,000 bond, which was thereupon canceled; that the defendant said gas company, and its then directors and officers, without notice to or knowledge of its income bondholders or stockholders, conspired with the defendant the Bay State Gas Company of Delaware, and as a result the \$4,500,000 was surrendered by the said gas company and canceled by the Massachusetts Company, who issued \$1,500,000 of its stock to the defendant the Mercantile Trust Company, instead of to the defendant the Bay State Gas Company of Delaware, which company, the bill of complaint alleges, was entitled to receive the same, and the defendant the Mercantile Trust Company thereupon issued its certificates founded on said \$1,500,000 shares of stock of the Massachusetts Company wrongfully received by the defendant the Mercantile Trust Company, and upon which certificate the New Jersey Company issued \$1,300,000 of Boston United Gas bonds, which were then delivered to the defendant the Bay State Gas Company of Delaware, in the place and stead of the \$1,500,000 of stock of the Massachusetts Company, which the complaint alleges was illegally received by the defendant the Mercantile Trust Company, without right or consideration, and now retained by it.

The complaint alleges that by these acts the income bondholders and stockholders of the defendant gas company were illegally deprived of the said bond and also of the said \$1,500,000 stock of the Massachusetts Company issued in payment for said bond, as well as of the dividend earned and since paid on the stock, the amount of

which is unknown to the complainant. The Bay State Gas Company of Delaware, since these transactions, has been unable to pay interest on said income bonds or dividends on its stock. The complaint then sets forth certain pretenses alleged to be unfounded and false made by the defendant the Mercantile Trust Company to justify its receipt and retention of the stock of the Massachusetts Company. The bill of complaint then alleges that the receipt by the Bay State Gas Company of Delaware of \$1,300,000 of Boston Gas bonds instead of the \$1,500,000 of stock of the Massachusetts Company constituted a fraud upon the defendant gas company and its bondholders and stockholders, by reason of the facts that the stock taken by the said trust company was dividend paying stock, while the Boston United Gas bonds were in effect an increased debt as against the Bay State Gas Company of Delaware, who was liable for all deficiencies growing out of the entire \$10,000,000 issue of said Boston United Gas bonds under the terms and trust agreements mentioned. The defendant the Mercantile Trust Company has continued to receive and now receives the dividends declared upon the said stock of said Massachusetts Company which should have been received by the defendant the Bay State Gas Company of Delaware, and it is alleged that said stock is of the actual value of \$1,500,000.

The bill of complaint then alleges that the complainant, as a stockholder and holder of income bonds as aforesaid, has demanded of the Bay State Gas Company of Delaware that it bring suit to recover the said \$1,500,000 of stock and dividends thereon, but that said gas company has refused to bring such action; whereupon this action is brought by the complainant in his own behalf and in behalf of all others similarly situated.

The bill of complaint then alleges that knowledge of these facts has been but recently acquired, and also alleges certain facts claimed to show the necessity for the intervention by this court to avoid irreparable damages.

The bill of complaint also states that the Bay State Gas Company of New Jersey is a foreign corporation and without the jurisdiction of this court, and that said company has no claim or title respecting the said shares of stock which alone constitute the subject-matter of this suit, and it is alleged and claimed that the presence as a party of the said New Jersey Company, etc., is unnecessary to the determination of this action. It is alleged that this fact appears from the bill of complaint.

The mode, means, and manner through which the defendant the Mercantile Trust Company came into possession of and came to be the alleged owner of the stock in question is alleged in the complaint substantially as follows:

The "Lyford Act," so-called, refers to the \$4,500,000 bond dated the 11th day of March, 1885, heretofore referred to, and is as follows:

**"An Act Relating to the Bay State Gas Company.**

**"Be it enacted as follows:**

**"Section 1.** The charter of the Bay State Gas Company is hereby revoked and annulled and said corporation shall be subject to the provisions of sections 41 to 45 inclusive of chapter 105 of the Public Statutes so far as the same are applicable and subject to the provisions hereinafter contained.

"Sec. 2. The Supreme Judicial Court shall on application made as provided in section 42 of chapter 105 of the Public Statutes, or on application of the mayor of the city of Boston, appoint a receiver of the said Bay State Gas Company who shall hold and distribute the estate and effects of the said company as provided in sections 42 to 45 inclusive of said chapter 105 of the Public Statutes.

"Sec. 3. Sections 1 and 2 of this act shall take effect on the first day of December, in the year 1893, unless the said Bay State Gas Company shall prior to said day procure or cause a certain obligation for \$4,500,000, dated the 11th day of March, in the year 1885, and issued by said company as part consideration for a contract for the construction of its works to be legally cancelled and discharged, and shall surrender and deliver the said obligation thus legally cancelled and discharged to the commissioner of corporations.

"Sec. 4. The said Bay State Gas Company may for the purpose of procuring such cancellation and delivery of said obligation issue to the holder or holders of the said obligation upon the said delivery, stock to the amount equal to the excess of the actual market value of the property of said company over \$500,000, not including therein any value for its franchises, the said value of said property shall be determined by three disinterested persons to be appointed as commissioners by the Supreme Judicial Court upon application of the said company after notice to the mayor of the city of Boston, who shall be a party to all proceedings before the said commissioners. Stock may be issued under the provisions of this act only after the findings of said commissioners have been approved by the court after due notice to all parties interested and only in the event that the aggregate amount of stock, bonds, notes and other liabilities of said company outstanding at the time of such issue shall not exceed the said value of the property found and approved as aforesaid.

"Sec. 5. It shall not be lawful for the said Bay State Gas Company to issue any stock or bonds or to assume any liabilities or to pay any consideration for or on account of the principal of the said obligation or for the purpose of procuring the cancellation and delivery thereof except as provided in this act.

"Sec. 6. Sections 4 and 5 of this act shall take effect upon its passage." Laws 1893, p. 1410, c. 474.

The Bay State Gas Company of Massachusetts, at the time said act was passed, owned valuable property and was engaged in a lucrative business in the city of Boston. Had the repeal of the charter been enforced, and had the assets and effects of the company passed into the hands of a receiver pursuant to said act, the Bay State Gas Company of Delaware would have been in a position to have enforced its remedies as a creditor upon said bond, and could have realized the whole of the face value thereof. The allegation is that the said act was unconstitutional, and to take effect at a future day only in any event. The bill of complaint says that the unconstitutionality of the act was well known to the directors and officers of both defendants, and it was their duty, in the interests of their stockholders and income bondholders, not to surrender the said bond as proposed in the act, but to oppose and resist such surrender or cancellation.

The bill of complaint then alleges in detail that the defendant the Bay State Gas Company of Delaware, through its then directors and officers, in the summer or fall of 1893, without notice to or consent of its stockholders or income bondholders, entered into an unlawful combination and conspiracy with the defendant the Mercantile Trust Company, its then directors and officers, in and by which they agreed to accept and carry into effect the Lyford act; that the Bay State Gas Company of Massachusetts, then controlled by the Mercantile Trust Company, should proceed to have the property appraised,

etc.; and that the said bond for \$4,500,000 should be assigned and transferred to the Mercantile Trust Company, which company should deliver same to the Bay State Gas Company of Massachusetts for cancellation, and receive the stock provided for in said act, and that such stock when received should be claimed and held by the defendant the Mercantile Trust Company, as subject to the trust agreements set forth or annexed to the bill of complaint, and should be treated and certified to as sufficient in character and amount to warrant the issuance by the said New Jersey Company of \$1,300,000 of its Boston United Gas bonds of the first series, and that thereupon the Mercantile Trust Company should certify said bonds and cause the same to be issued through the New Jersey Company to the defendant the Bay State Gas Company of Delaware, as and for a pretended consideration for its consenting to assign said bond to the said Mercantile Trust Company, and permitting it to receive and keep the \$1,500,000 of stock, the subject of this litigation. The said combination, conspiracy, or agreement was then carried out, the details by which it was done being set forth in full, and the said Bay State Gas Company of New Jersey thereupon delivered said \$1,300,000 of bonds to the Bay State Gas Company of Delaware, and that company consented to assign and did assign the bond to said trust company for cancellation, and the trust company took and kept, and still has and claims to own, under and pursuant to such agreement, the \$1,500,000 of stock, the subject of this litigation.

The trust agreements annexed to the bill of complaint were between J. Edward Addicks and William E. L. Dillaway of the first part, the Mercantile Trust Company of the second part, and the Bay State Gas Company of New Jersey of the third part, and were duly signed and executed by the parties.

This agreement, alleged to have been made in pursuance of a conspiracy, and which was executed, is not presumptively void, but voidable, for the fraud, and must be declared fraudulent and void before it can be said that the title to the \$1,500,000 of stock vested in the Bay State Gas Company of Delaware.

Again, here is an unequivocal allegation that the Bay State Gas Company of Delaware and the Mercantile Trust Company agreed between themselves that the certificate should be made to influence the New Jersey Company to issue \$1,300,000 of its Boston United Gas bonds, and it follows that the Bay State Gas Company of Delaware, in which the complainant owns stock, etc., induced the New Jersey Company to issue these bonds.

The bill of complaint alleges, as stated, that the 4,993 shares of the stock of the Bay State Gas Company of Massachusetts or Boston, mentioned in the trust agreement, were never issued to or owned by Addicks and Dillaway or either of them, but were owned by the Beacon Construction Company, and, as this company was not a party to the trust agreement, such shares could not be affected by such agreements. As Addicks and Dillaway only assigned their title in the stocks pledged by the trust agreements to the New Jersey Company subject to the execution of the trust, and as they never owned the stock of the Bay State Gas Company of Boston, it is difficult to



see how the New Jersey Company is interested in the litigation unless the mere fact that the New Jersey Company issued \$1,300,000 of Boston United Gas bonds on the faith of the certificate of the Mercantile Trust Company, which were subsequently delivered to the Bay State Gas Company of Delaware, makes it so.

The Bay State Gas Company of New Jersey issued \$1,300,000 of its bonds upon the faith of the certificate made by the Mercantile Trust Company that it had and held in pledge the stock in question, and this was done with the consent and knowledge of the Bay State Gas Company of Delaware, and that company can hardly be permitted to repudiate the transaction, even though it be a fact that the shares of stock referred to were not, as against the construction company, affected by the trust agreement. However, this court cannot see that the New Jersey Company would be deprived of its security underlying its said bond and any equity it may have in the stock, should it be decreed by this court that the stock in question belongs to the Bay State Gas Company of Delaware. It having consented to the pledge and being the owner, the lien of the New Jersey Company would attach thereto in the hands of the Bay State Gas Company of Delaware. This court is of the opinion that the New Jersey Company is not a necessary or indispensable party to this litigation. Should it appear on the trial that the New Jersey Company occupies the position described, this court would have ample power in the decree to protect its interests by declaring the stock in question subject to the same lien it now has, if any.

Again, it appears to this court, from the bill of complaint, that the shares of stock in controversy here did not come into existence until November, 1893, under and pursuant to the authority granted under and by virtue of the Lyford act to make such increase, and are not within the terms of the trust agreement executed in March, 1889. If this be true, the New Jersey Company has no possible interest.

Again, the bill of complaint alleges that the New Jersey Company is a foreign corporation, and not within the jurisdiction of this court.

Section 737 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 587] provides as follows:

"Sec. 737. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

See *Shields v. Barrow*, 17 How. 130-139, 15 L. Ed. 158.

The defendant Mercantile Trust Company urges that the failure to offer to restore the \$1,300,000 of bonds issued by the New Jersey Company, and now held by the Bay State Gas Company of Delaware under the alleged fraudulent agreement, in place of the \$1,500,000 of stock, or to show any effort on the part of the complainant to

secure such action by the Bay State Gas Company of Delaware before bringing this action, is fatal to the bill. The bond was surrendered and canceled, and the Mercantile Trust Company, through the Bay State Gas Company of New Jersey, delivered to the Bay State Gas Company of Delaware \$1,300,000 of the bonds of the New Jersey Company in exchange, so to speak, for the \$1,500,000 of stock. The Mercantile Trust Company has the stock and the Bay State Gas Company of Delaware has the bonds. If the transaction was fraudulent both companies were parties thereto, and perhaps neither could maintain an action to set it aside. But the complainant, a stockholder and income bondholder of the Bay State Gas Company of Delaware, is not in this position. He was not a party to the fraud, and may not he and other stockholders and bondholders undo the wrong done to them by the fraudulent transaction without first requesting the Bay State Gas Company of Delaware to return the bonds issued by the New Jersey Company? It is, of course, true that he who seeks equity must do equity, and it is a condition precedent to the rescinding of a fraudulent or ultra vires act that restitution be made of the fruits of the transaction relieved against.

It is also urged in support of the demurrer that the complainant by suing to recover the fruits of the alleged fraudulent transaction must be held to have ratified them; that he cannot ratify in part and disaffirm in part. But the complainant is hardly suing to recover the fruits of the alleged fraudulent transaction or agreement. The complainant alleges that the Bay State Gas Company of Delaware is entitled to the \$1,500,000 of stock fraudulently handed over to the Mercantile Trust Company which should have been handed over to the Delaware Company. The complainant seeks to have the fraudulent agreement by which that was done set aside, and the property to which it is entitled but for the fraud delivered to the Bay State Gas Company of Delaware. The complainant does not ratify the fraud. He complains of it, and simply seeks to have the wrong righted. The complainant adopts no part of the fraudulent transaction complained of. He says the fraud consisted in having the \$1,300,000 should have been transferred to the Mercantile Trust Company, and in having the \$1,500,000 of stock transferred to the Mercantile of the bonds transferred to the Bay State Gas Company when they Trust Company when it should have been transferred to the Bay State Gas Company of Delaware. It is very doubtful whether the complainant has any standing as an income bondholder to maintain this action. He has no judgment or execution returned unsatisfied. See *Van Weel v. Winston*, 115 U. S. 229, 6 Sup. Ct. 22, 29 L. Ed. 384.

The defendant Mercantile Trust Company insists that the complainant has no standing as a stockholder to maintain this action for the reason that the bill of complaint does not show sufficient efforts to secure action on the part of the corporation.

Equity rule 94, which is held to be imperative, provides:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must \* \* \* set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the

managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

The allegation of the bill of complaint on this subject is as follows:

"And your orator avers that your orator, as an income bondholder and stockholder of the defendant the said Delaware Company, is entitled to demand that said Delaware Company take action to recover the said \$1,500,000 of stock and the dividends that have been paid thereon, and to that end your orator has demanded of said Delaware Company that it institute the suit set forth in this your orator's bill of complaint against the said Mercantile Trust Company, but said Delaware Company has refused and neglected to bring such suit."

This court is of the opinion that the allegations of the complaint are a sufficient compliance with this rule. He says that he has demanded of the Delaware Company that it institute the suit set forth in the orator's bill of complaint against the said Mercantile Trust Company, but that said Delaware Company has refused and neglected to bring such suit. A demand that the suit be instituted for the recovery of this stock will include the taking of the necessary steps as conditions precedent to the bringing of the suit. The cause of the failure to obtain action by the company is that the Delaware Company has absolutely refused to bring the suit. It is not correct to say that the allegation in the complaint on this subject does not reach further than a request that the company bring a suit against the Mercantile Trust Company on the identical allegations contained in this bill. The Delaware Company was requested to institute the suit set forth in the bill of complaint, but it is not implied from this language that the Delaware Company was requested to file a bill of complaint containing any particular allegations. Had the suit been brought by the company, it would have been at liberty to insert such allegations and take such steps as preliminary thereto as it thought fit and proper.

The complainant could not offer to return the \$1,300,000 of bonds of the New Jersey Company issued to the Delaware Company, as he is not in possession or control thereof, and, the company having refused to bring the suit, it would have been a vain thing for the complainant to have requested it to offer to return the \$1,300,000 of bonds. The law does not require a party to do a vain thing.

The bill of complaint says "that your orator was uninformed as to the matters and things in this bill of complaint set forth until a few weeks before the commencement of this suit, and your orator avers," etc. This is the only allegation found in the bill giving an excuse for not bringing this action at an earlier date. For years dividends have not been paid, and the complainant has been put upon inquiry as to the causes of such nonpayment. The complainant does not allege that he has made any inquiry whatever, or that he has been denied any information which he might have obtained by inquiry had proper answers been given. The cause of action accrued when the alleged fraudulent agreement was made and consummated by the delivery of the bonds to the Delaware Company and of the stock to the Mercantile Trust Company. This occurred in 1893, at least eight years before the filing of the bill of complaint herein. True, the stock is still held by the Mercantile Trust Company in accordance with

the agreement, but, if the agreement was fraudulent and void or voidable, the cause of action in the company, and in the complainant, if the company refused to act, has existed all this time, and this court is of the opinion that within the authorities the bill of complaint is fatally defective in not showing more particularly the time of the discovery of the fraud, how the knowledge was obtained, why it was not obtained earlier, and the diligence exercised in looking into the matters of this company. Mere general averments of ignorance are not sufficient. *Hubbard v. The Manhattan Trust Co.*, 87 Fed. 51, 30 C. C. A. 520; *Harwood v. R. R. Co.*, 17 Wall. 79, 21 L. Ed. 558; *Diefendorf v. House*, 9 How. Prac. 243; *The Key City*, 14 Wall. 653, 20 L. Ed. 896; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Carr v. Hilton*, 1 Curt. C. C. 390, Fed. Cas. No. 2,437.

The complainant is a resident of the city of Boston, and the occasion of the alleged fraudulent transaction was the Lyford act, passed by the Legislature of the state of Massachusetts, and approved by the Governor of that state. The complainant must have known of this act, and it would seem probable that he knew something at least of the transactions of the company against which he held income bonds and in which he held stock. The bill of complaint, in the opinion of this court, should show either that nothing occurred to put the complainant on inquiry, or that he was put upon inquiry and failed to gain the required information in the exercise of due diligence.

This court is of the opinion that the six-years statute of limitations is not a bar to this action, and that it was brought in time.

It is further urged that the facts alleged in the bill of complaint show no fraud or conspiracy. It is urged that the sufficiency of the bill depends not upon the charges of fraud and conspiracy—that is, the use of words saying that fraud was committed and that there was a conspiracy—when the facts alleged in support of the charges fail to show fraud.

An act of the Legislature of a state is presumed to be valid until its unconstitutionality is declared by some court of competent jurisdiction. The bill of complaint, however, alleges that the Lyford act was unconstitutional, and that this fact was known to the defendants, and that it was the duty of the Delaware Company to resist it. The bill of complaint further alleges that with this knowledge, and with full knowledge of the effect of proceeding under it, the defendants took advantage of an unconstitutional act of the Legislature of the commonwealth of Massachusetts to perpetrate a fraud upon the Delaware Company and its stockholders and bondholders, and the particulars of what was done are then set out in full.

It is quite true that to charge that parties have complied with an act of the Legislature would not indicate fraud, but the contrary. This does not apply in this case, however, for to knowingly proceed under an act of the Legislature known to be invalid, for the purpose of cheating and defrauding the stockholders of the company, would constitute actionable fraud, if a fraud were actually perpetrated.

The demurrer to the bill of complaint is sustained, with costs and disbursements, upon the ground that the bill fails to set forth with

sufficient particularity the reasons why this action was not brought earlier, or, in other words, a noncompliance with equity rule 94. The complainant, however, may file an amended bill of complaint, on paying such costs and disbursements, on the first rule day after being served with a statement of such costs and disbursements, and a copy of the order entered sustaining the demurrer, and such amended bill of complaint may be amended in any other matter or matters the complainant desires.

An order in accordance herewith will be entered.

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UNITED STATES v. DETROIT TIMBER & LUMBER CO. et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. July 31, 1903.)

1. PUBLIC LANDS—SUITS FOR CANCELLATION OF PATENTS FOR FRAUD—MEASURE OF PROOF REQUIRED.

The rule that one who alleges fraud must prove it by satisfactory evidence, which is more than a bare preponderance, and sufficient to overcome the presumption of fact in favor of the honesty of the transaction, applies as well to suits in equity as to actions at law, and with especial force to suits by the United States to cancel patents to lands which have been issued in conformity to the prescribed rules and regulations of the Land Department.

2. SAME—VALIDITY OF ENTRIES—TIMBER AND STONE ACT.

The fact that a lumber company lent money without security to persons to enable them to enter and pay for land under the timber and stone act, in the expectation that when the entrymen obtained title it would be enabled to buy the timber from such lands by reason of the fact that it had the only mill in the vicinity, does not render the entries invalid for fraud, where there was no agreement for the sale prior to the entries, but each man was free to keep the timber or to sell it to others; nor are such entries invalid as made on "speculation" because the persons making them did so with the intention of selling the timber for their own benefit.

In Equity. Suit to cancel patents to lands.

James K. Barnes, U. S. Dist. Atty., and F. A. Youmans, Asst. U. S. Dist. Atty., for complainant.

Rose, Hemingway & Rose, Thomas C. McRae, and Read & McDonough, for defendants.

ROGERS, District Judge. This is a bill in equity, filed by the United States, by authority of the Attorney General, to cancel certain patents issued by the United States to the defendants other than the Detroit Timber & Lumber Company and the Martin-Alexander Lumber Company. Detroit Timber & Lumber Company occupies the position of an innocent purchaser from the Martin-Alexander Lumber Company and some of the other defendants, and in the view entertained by the court may be eliminated from any further notice in the opinion. In referring hereafter to "the codefendants" of the Martin-Alexander Lumber Company, it will be understood that no reference is made to Detroit Timber & Lumber Company unless it is specially named. The bill in this case was filed on the 7th day of April, 1902. All the lands in controversy were patented

to the codefendants of the Martin-Alexander Lumber Company prior to the 1st of June, 1901. The record shows that the several entrymen who are codefendants of the Martin-Alexander Lumber Company applied to the proper land office at Camden, Ark., to purchase the lands in controversy, and having complied in all respects with the requirements of the statute, paid the purchase price, and received their receipts therefor, and the patents were thereafter issued in the usual and ordinary course of business. The entries were all made under what is known as the "Stone and Timber Act" of June 3, 1878, c. 151, 20 Stat. 89, as amended by the act of August 4, 1892, c. 375, § 2, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545], the effect of which last act was to extend the provisions of the first act to all the public lands in the United States. Section 1 of the act of June 3, 1878, provides:

"That surveyed public lands \* \* \* valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law may be sold \* \* \* in quantities not exceeding one hundred and sixty acres to anyone \* \* \* at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands."

Section 2, so far as it is applicable to the case at bar, is as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act, shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; \* \* \* that deponent has made no other application under this act; that he does not apply to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

The third section of said act, so far as here applicable, is as follows:

"Sec. 3. That upon the filing of said statement \* \* \* the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish such applicant a copy of the same for publication, at the expense of the applicant, in a newspaper published nearest the location of the premises for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act \* \* \* and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the

transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

This bill was filed to vacate these patents upon one of two grounds: First. That there was a conspiracy between Elmer B. Martin and Arch. V. Alexander, president and secretary, respectively, of the Martin-Alexander Lumber Company, and Jim P. Copeland, an employé of said company, and also an entryman, with their codefendants, who were entrymen, to induce and procure the entrymen fraudulently to make application to the land office of the United States at Camden, Ark., to enter each a separate portion of the said land, and that before said entries were made by said entrymen they had each entered into an agreement with the Martin-Alexander Lumber Company that each and every entry so made should be made for the use and benefit of the said Martin-Alexander Lumber Company, and that on the issuance of the receiver's receipts that each entryman should at once execute to the said Martin-Alexander Lumber Company a conveyance to it of all the timber and trees standing and growing upon the lands so entered, with certain other rights and privileges in the nature of easements upon said land. Second. That if such agreement and conspiracy did not exist, that each and every of said entrymen made his or her said entry on speculation, and not in good faith for the purpose of appropriating the same to his or her own use and benefit, which was well known to the said Martin-Alexander Lumber Company, and said Martin-Alexander Lumber Company aided and assisted each and every one of said entrymen in the accomplishment of said purpose, to wit, the entering of said lands on speculation. To this last allegation, which was an amendment, a demurrer was entered, and a stipulation filed to the effect that, if the demurrer was overruled, the answer on file to the original complaint should be treated as applying to this allegation. The court overrules the demurrer, and will treat this allegation as denied by the original answer on file, in accordance with the stipulation. Each of the defendant entrymen answered, denying specifically the allegations of fact in the complainant's bill of complaint in so far as it alleged any fraudulent conduct upon their part, and each of the entrymen affirmed that the affidavits which they had made at the land office were true, and that the lands were purchased for their own use and benefit, and so appropriated. The Martin-Alexander Lumber Company and Detroit Timber & Lumber Company denied the allegations of fraud, and the latter also set up that it was an innocent purchaser. To these answers a replication was filed, and the case submitted upon pleadings and written proof. The record is most voluminous, and it is unnecessary to go into details. Two questions arise on this record: First. Is there such a combination or conspiracy shown to have existed between the Martin-Alexander Lumber Company and their codefendants (the entrymen) to obtain the lands in controversy for the use and benefit of the Martin-Alexander Lumber Company, as authorizes the annulment of the patents issued to the defendant entrymen? Second. Did the several entrymen make their said entries on speculation, and not in good faith, and not for the purpose of appropriating the lands to their

own use and benefit? It will be more convenient to consider both questions together.

The proof in this case develops this state of facts: The Martin-Alexander Lumber Company had established a large sawmill and lumber plant in close proximity to the lands in controversy, and had also become the owners of large bodies of timber land adjacent thereto. There was no other sawmill or lumber plant, at the time these lands were entered, so near thereto as to make it practicable or profitable to cut the timber standing on the lands in controversy. The lands in controversy were not on the market except under the homestead law, and the stone and timber act *supra*. Naturally the Martin-Alexander Lumber Company wanted all the timber it could get which was convenient to its mill plant. It had in its employ as timber man, or timber inspector, Jim P. Copeland, a resident of Pike City, where its mill plant was located, and he was an old surveyor, as well as real estate man, with large experience and much information in regard to lands in that vicinity; and was also well acquainted with the people residing in that vicinity, and especially with the lands, both public and private, in that county. Early in 1899, E. B. Martin, the president of the Martin-Alexander Lumber Company, who resided in Chicago, inquired of Copeland about timber lands in the county where the mill plant was located. Copeland informed him that there were many public lands in the county and adjacent to the mill plant valuable for their timber, and gave him the approximate amount. Martin then inquired how they could be procured. Copeland then told him they could be homesteaded; but the timber could not be cut until the patent was obtained or the homesteader had resided on the land for the period of five years, and in other respects conformed to the requirements of the homestead law. The proof also shows that these lands were not fit for cultivation, but were only valuable for their timber. Something was then said in reference to scrip which could be used in the entry of the lands. In the course of the conversation Copeland told Martin of the stone and timber act. Prior to this time he had written to the member of Congress, Hon. T. C. McRae, and obtained a copy of it, and afterwards, having occasion to go to Camden, he had laid the law before the land officers, and he and they read it over together, and he obtained their construction of it. He also informed Mr. Martin that he knew of a number of good, honest people in the community who would like to take up land under the stone and timber act if they had the money. Copeland had at that time talked to some men whom he knew personally and favorably, who had expressed a desire to take up land under that act if they could get the money, and he so advised Martin. Martin then told him that they would loan that class of men the money if they would take up the land. Copeland then inquired what security he would demand, and he said simply their note, with 8 per cent. interest. Copeland then hunted up the men that he had talked to, and others also, and others hunted him up, to inquire about the entry of these lands, and he explained to them the law, and told them they could get the money to enter the lands from the Martin-Alexander Lumber Company, without security, and that the



Martin-Alexander Lumber Company would trust to their honor to pay it. He took them and showed them the lands, made them a probable estimate of the timber in the respective tracts, and told them that the timber on the land at 50 cents a thousand feet (which was the market price at that time) would pay more than the land would cost, and told them they could sell the land or the timber after the patents were issued. All the codefendants of the Martin-Alexander Lumber Company, nearly all of whom were employes, or had been, of the company, entered the land under the conditions just above stated. The money was furnished by the Martin-Alexander Lumber Company. Copeland usually went with the parties to examine the land, accompanied them to the land office, and furnished them the money, and they entered the land, made the necessary proofs in conformity with law, and their expenses to the land office and back were paid by the Martin-Alexander Lumber Company, and charged to them upon the books of the company. Either just before the lands were entered and the receipts for the purchase money were obtained, or just afterwards, the money having been furnished to the entrymen by Martin-Alexander Lumber Company, they would execute their notes to the company for the amount, with interest, and in nearly all instances shortly afterwards they sold the timber standing on the land to the Martin-Alexander Lumber Company by a written contract, and the notes were canceled. By the terms of the contract the Martin-Alexander Lumber Company was to pay 50 cents a thousand stumpage for all the timber cut from the land, and the amount which had been loaned by it to enter the land was treated as purchase money advanced on the timber, and, if the value of the timber exceeded the value of the money advanced, with interest, the seller was to get the difference. In some cases the entrymen declined outright to sell at all to the Martin-Alexander Lumber Company, and finally sold to other parties after the patents were issued. In such cases the person purchasing from the entryman was an agent for the Detroit Timber & Lumber Company, and took the deeds in his own name, but gave credit to the entryman for the moneys advanced by the Martin-Alexander Lumber Company to the entryman, and the lands were subsequently conveyed to the Detroit Timber & Lumber Company, which had succeeded the Martin-Alexander Lumber Company by purchase of all its rights and interests in connection with the mill plant and lands. Before any of these lands were entered, the proof shows that Copeland took the law, and he and Martin, and perhaps Alexander, sat down and went over it together, and Copeland explained to them the construction placed upon the law by the land officers, informing them that the applicant would have to make affidavit to the requirements of the statute, and show that he did not make the purchase on speculation, but in good faith, with the intention of appropriating it to his own use and benefit; and that he did not, directly or indirectly, make any contract or agreement in any way or manner with any person or persons whatsoever by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any other person except himself. Both Martin and Alex-

ander knew that Copeland had examined and understood the law, and Copeland had taken advice as to its construction, and imparted that information to Martin and Alexander. He also imparted the same information to the entrymen, and each and all of the entrymen not only made affidavit at the land office, as required by the statute, but nearly all of them, being called by the plaintiff, have testified and corroborated that affidavit by positive testimony, which is part of the record in this case. Alexander and Copeland have also testified substantially to the same facts, and have positively and emphatically denied that there was any agreement or understanding, expressed or implied, prior to the issuance of the final receipts by the land office, whereby the Martin-Alexander Lumber Company should have any interest of any kind whatsoever in regard to the lands or timber on them in controversy; and there is no proof by any witness to the contrary. There are many circumstances in connection with the transaction which are suspicious in their nature, and tend to create the belief that the Martin-Alexander Lumber Company understood, were satisfied, felt sure that the lands would ultimately come into their possession. I have no doubt in my own mind, from all the facts, that it did so believe, and, if it had not so believed, that it would not have advanced the money to the entrymen in order that they might enter the land. As intelligent business men, Martin and Alexander knew that at that time there was no one else who could cut and use the timber but themselves; they knew that the lands were not homesteads, nor susceptible of being made homesteads; they knew that when the patents were issued the lands were not exempt from execution; they knew, if necessary, they could sue upon the notes and recover judgment and sell the land; they knew it was to the interest of the men who had entered them to sell the timber, and they knew that in making the entry the object of the parties was to sell the timber because the land was not fit for cultivation; they knew that the entrymen expected to get more from the timber than the land was worth, because Copeland had told the entrymen about what amount of timber was on the land, and what could be gotten for it at that time, and that more could be realized from the timber than it would take to enter the land; they knew their company could afford to pay more for the timber because their mill was already located in closer proximity to it than any other mill; they knew also that the persons to whom they had loaned the money were honest men, and would desire to pay their debts; they knew, in all reason, that they had no other resources out of which to pay back the borrowed money; they knew, therefore, that in all probability they would ultimately get the timber, and that they could purchase it without any fair competition with others.

Assuming all these things to be true, and that their motive for lending the money and assisting in making the entries was with the hope of ultimately getting the timber, which one of these acts is either violative of the letter or spirit of the timber and stone act? This precise question was before the Supreme Court of the United States in *United States v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384, in which case Mr. Justice Brewer, delivering the opinion

of the court, quoting from the opinion of Mr. Justice Miller in the Maxwell Land-Grant Case, 121 U. S. 325-381, 7 Sup. Ct. 1015, 1029, 30 L. Ed. 949, laid down the following rule:

"We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful. This case is even stronger in its aspects than some that have been before us, for, if the particular wrong charged upon the defendants be established, the money paid is, by the second section of the act, forfeited, and there is not even the possibility suggested in the case of *United States v. Trinidad Coal Co.*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640, of an equitable claim upon the government for its subsequent repayment. The hardship of such a result, so different from that which is always enforced in suits between individuals, makes it imperative that no decree should pass against the defendants unless the wrong be clearly and fully established."

The facts in this case are no stronger in favor of the government than they were in the Budd Case; indeed, in the opinion of the court, they were not so strong. In that case Mr. Justice Brewer said, in referring to the lands purchased by Montgomery:

"It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. *All that it denounces is a prior agreement—the acting for another in the purchase.* (Italics mine.) If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity, and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government; and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. And in this respect the case does not rest on presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acqui-

sition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase."

It is clearly established that Martin and Alexander both knew the provisions of the timber and stone act. They knew that they could obtain these lands in the manner in which they were obtained without violating the law, and also with the reasonable safety of escaping any loss by reason of the loans they made. Nothing could have been more foolish than for them to violate the statute in order to get the land, when they could get it without violating the statute, and without running any considerable risk by reason of the loans. Assume, if you will, that Martin and Alexander and Copeland were all corrupt and dishonest, and willing to violate the law, if it was necessary, to get the lands, still common prudence and common sense alike would suggest that if they could get them lawfully, and at the same price that they could get them unlawfully and dishonestly, that they would pursue the former course. These lands could not be entered by anybody at less than \$2.50 per acre. They could be entered for \$2.50 an acre by persons who could lawfully enter them, without any agreement with the Martin-Alexander Lumber Company, just as well as they could with an agreement; and, once being entered, they could be purchased by the Martin-Alexander Lumber Company as well as any one else, and under much more favorable conditions, for the reasons already stated; and, moreover, the Martin-Alexander Lumber Company were informed by Copeland that the men with whom they were dealing were honest men, and men who would pay their debts, and therefore they assumed practically no risks. The greater number—indeed, nearly all—the men were then in their employ. The Martin-Alexander Lumber Company was running a mill there, and also a commissary store, and had open accounts with the greater number of these entrymen. They knew them themselves, and were in a measure familiar with their homes and conditions. There is no rule of law better established than where, from a given state of facts, two opposite inferences may be drawn, that inference will be adopted which is lawful and honest, and not that which is unlawful and dishonest. As stated above in the Budd Case, the Supreme Court said:

"Montgomery might rightfully go or send into that vicinity, and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government; and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law."

That language is just as applicable to this case as it was to the Budd Case. Moreover, in the Budd Case it was shown by positive proof that Montgomery had promised at least one entryman in advance of the entry that he would pay him a bonus of \$125 and all costs and expenses if he would enter a tract of land and convey it to him. No such fact is developed in this case; but the court said in that case that that fact of itself was not sufficient to show that the

land in controversy in the Budd Case had been obtained in the same way, in the face of positive testimony to the contrary. In the Budd Case neither one of the defendants appeared as a witness, nor did the notary who took the acknowledgment of Budd's deed to Montgomery, nor did White or Rockwell, the two witnesses to the application for purchase of the land. In the case at bar every person interested, except perhaps two or three of the entrymen, who could not be found, have testified positively and emphatically that every allegation of fraud in the bill of complaint is untrue.

In the case of Walker et al. v. Collins et al. (decided at the December term, 1893, by the Court of Appeals of the Eighth Circuit) 59 Fed. 70, 8 C. C. A. 1, Judge Caldwell, in delivering the opinion of the court, in discussing the character of proof required where fraud is alleged, said:

"The court charged the jury that: 'Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but, on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case. In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof; i. e., proof to the satisfaction of the jury.' The defendants excepted generally to this charge, and in this court limit the exception to the last clause of the charge, which states that 'it devolves upon him who alleges fraud to show the same by satisfactory proof; i. e., proof to the satisfaction of the jury.' The objection to the charge is that the court should have told the jury that fraud may be established by a preponderance of the evidence, and not that it must be established by 'satisfactory proof; i. e., proof to the satisfaction of the jury.' The charge is taken almost literally from the opinion of the Supreme Court of the United States in the case of Jones v. Simpson, 116 U. S. 609, 615, 6 Sup. Ct. 538, 541, 29 L. Ed. 742. In that case the court said, 'It devolves on him who alleges fraud to show the same by satisfactory proof.' In Hatch v. Bayley, 12 Cush. 30, the trial court instructed the jury: 'That it was necessary that the defendant should adduce stronger proof to establish fraud, etc., than is necessary to prove a debt or a sale; that the presumption was that every man conducted honestly without fraud; and when fraud was alleged the proof must not only be sufficient to establish an innocent act, but to overcome the presumption of honesty.' Considering an exception to these remarks of the trial judge, the Supreme Judicial Court of Massachusetts, speaking by Chief Justice Shaw, said: 'As we understand them, the judge intended to say that he who alleges fraud against another is bound to prove it; that every man is presumed to act honestly until the contrary is proved; that he who charges another with an act involving moral turpitude or legal delinquency must prove it; that, as this is an allegation against a presumption of fact, it requires somewhat more evidence than if no presumption existed. It carried no direction as to the amount of evidence required, or as to the nature of the evidence, whether positive or circumstantial, but only that, on the whole, it must be somewhat stronger; and we cannot perceive that such a direction is incorrect. The ordinary direction to the jury is that he who charges fraud must prove it to the satisfaction of the jury. We think it not contrary to any rule or principle of law for the judge to inform the jury that, as the charge of fraud is a charge against a presumption of fact (perhaps often a slight one), yet the jury, in order to be satisfied, might require somewhat stronger evidence than would suffice to prove the acknowledgment of an obligation, or the delivery of a chattel.' This case is cited approvingly by the Supreme Court of the United States in Jones v. Simpson, supra; and to the same effect are the following authorities: Greer v. Caldwell, 14 Ga. 207, 58 Am. Dec. 553; Bierer's Appeal, 92 Pa. 265; Babbitt v. Dotten (C. C.) 14 Fed. 19; Lynn v. Railroad Co., 60

Md. 413, 45 Am. Rep. 741; Bigelow, *Frauds*, pp. 123, 145; 2 Rice, *Ev.* p. 953; *Flick v. Mulholland* (Wis.) 4 N. W. 527. In *Bouvier's Law Dictionary* (14th Ed.) the term 'satisfactory evidence' is defined to be 'that evidence which is sufficient to produce a belief that the thing is true; in other words, it is credible evidence.' The *Century Dictionary* defines 'satisfactory evidence' or 'sufficient evidence' to be 'such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced.' No better definition of these terms can be given, and it was in this sense, presumably, that the jury understood them."

This rule not only applies in jury cases, but it applies in courts of equity; and, moreover, it applies with increased force where the government seeks to cancel a patent which has been issued in conformity with all the prescribed rules and regulations of the department, and has undergone the supervision and inspection of the land office. Of course, it is not required that the fraud alleged shall be proven by the positive and direct testimony of witnesses. It may be proved, like any other fact, by circumstances; but the circumstances must be such as to be satisfactory to the mind of the court, and they should be circumstances that are inconsistent with the integrity and legality of the patent assailed. The facts established in this case, as a whole, are not inconsistent with the validity of the patent, or the integrity or legality of the actions of the defendants in entering the lands. Before patents which have been solemnly granted by the government shall be canceled and set aside, the facts adduced to establish the fraud should be inconsistent and irreconcilable with the integrity of the patent and the legality of the actions of the parties charged with the fraudulent entries, and should be so satisfactory as to make it clear to the court that the lands were procured by fraud. The testimony in this case falls far short of that contention. *Jones v. Simpson*, 116 U. S. 615, 6 Sup. Ct. 538, 29 L. Ed. 742; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

On the trial of the cause the government relied strongly upon the case of *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157. A careful reading of this case will disclose the fact that it is not in point. The question of a bona fide purchaser in this case is not necessarily involved, and cannot be involved unless the court should find that the entries were fraudulent. It matters not, therefore, whether the Martin-Alexander Lumber Company obtained a legal title to the property, or whether the Detroit Timber & Lumber Company acquired a legal title to the property, when the timber or lands were first purchased. They at least had the legal title when this bill was filed, because the patents had been issued, and whatever title the entrymen acquired had inured to their benefit. This is made so by the statute of the state. *Sand. & H. Dig.* § 699. That principle would be enforced in a court of equity even without the statute. The bill must be dismissed for want of equity.

ROSS-MEEHAM FOUNDRY CO. et al. v. SOUTHERN CAR &  
FOUNDRY CO.

(District Court, W. D. Tennessee. July 21, 1903.)

No. 2,327.

1. BANKRUPTCY—POWER OF COURTS—APPOINTMENT OF RECEIVER.

A District Court of the United States will not appoint a receiver for the property of an alleged bankrupt on a summary application therefor, by parties to a petition in bankruptcy filed in another district, without such notice to the persons in possession and those otherwise interested as will answer the requirement of due process of law of the Constitution of the United States; such a proceeding is not authorized by the bankruptcy act, and if it were the provision would be of doubtful constitutionality.

2. SAME—DISPOSSESSING OFFICERS OF STATE COURT.

A court of the United States will not dispossess the receiver or other officers of a state court by any summary order or process or otherwise than by formal proceedings taken by its own receiver or trustee for that purpose. Bankruptcy courts are governed by this rule, the same as others, in the exercise of their jurisdiction, and will not interfere with the possession of a state court until after the application, at least, to that court by the trustee or receiver of the bankruptcy court for a surrender of the possession to him, and the refusal of the state court, unwarrantably, to recognize the jurisdiction and authority in bankruptcy.

3. SAME—ANCILLARY JURISDICTION—APPOINTMENT OF RECEIVER.

The bankruptcy act does not vest courts of bankruptcy with ancillary jurisdiction to appoint receivers for the property of a debtor against whom a petition in involuntary bankruptcy has been filed in another district. Upon an adjudication the title to all the bankrupt's property, wherever situated, vests in his trustee, who must proceed to obtain possession like any other owner, and by regular proceedings in courts having jurisdiction, if the property is held adversely. The powers of a receiver pendente lite, appointed before adjudication in that respect, are not defined by the act, but it would seem that he can act only according to the rights and remedies given to ordinary receivers. In any case neither a receiver nor trustee can proceed in another district without making proper parties, obtaining and serving proper process, and filing proper pleadings.

In Bankruptcy. On petition for appointment of ancillary receiver.

HAMMOND, J. On Saturday last I received the following telegram:

"Chattanooga, Tenn., July 18, 1903.

"Hon. E. S. Hammond, Memphis, Tenn. Bankruptcy petition against Southern Car and Foundry Co. filed in this district 4-45 July seventeenth receiver appointed by Judge Clark Nine forty five this morning Ancillary petition for your court will be mailed from here tonight.

"Henry O. Ewing, Clerk."

Yesterday in due course of mail I received the following letter:

"Chattanooga, Tenn., July 18, 1903.

"Hon. E. S. Hammond, Judge U. S. Court, Memphis, Tenn. Dear Sir: We send you herewith papers in the matter of the appointment of an ancillary receiver for the Southern Car & Foundry Company, about which Mr. Ewing, Clerk of the United States Court for this District, wired you this morning. We trust you will make the order submitted, which conforms to the order made by Judge Clark in the main case here. Of course we are not disposed to ask you to appoint Mr. Hurlbut ancillary receiver if in your judgment some one in Memphis could better preserve the property for the interest of

all parties. We only think it might be more convenient to have the same receiver for all the property in Tennessee. Yours very truly,

"[Signed] Williams & Lancaster."

In reply to these communications the clerk was directed to send the following telegram:

"Memphis, July 19, 1903.

"Williams & Lancaster, Attys., 412 Temple Court, Chattanooga, Tennessee. Judge Hammond will not enter any orders except on notice to parties in interest and motion in open court. Papers held till you arrive.

"Dan F. Elliotte, D. C."

Also to-day the following letter was sent by mail:

"Memphis, Tenn., July 20, 1903.

"Messrs. Williams & Lancaster, 412 Temple Court, Chattanooga, Tennessee. Gentlemen: I received your letter with the petition and order therein enclosed yesterday and on Saturday received from Mr. Ewing, the clerk, the telegram to which your letter refers. You are already advised by the telegram I directed the clerk to send you that I must decline to enter the order except upon notice to the parties interested and upon motion in the open court. And I am now dictating an opinion explaining and justifying this action by the court which will be filed with the clerk during the day. For your information I may say that local lawyers have notified me before and since the telegram from Mr. Ewing that they desired to be informed if any proceedings were taken in this court; also that I have learned from the lawyers and from the newspapers here that the property of the company is already in the hands of the officials of the state courts. Of course, you will recognize at once that under such conditions as these, if for no other reason, it would be improper to comply with your request to enter the order which you send. Yours very truly,

"[Signed] E. S. Hammond."

The petition inclosed in this correspondence is entitled, "In the District Court of the United States for the Western Division for the Western District of Tennessee, in Bankruptcy"; is addressed to the judge of the court, and states that the petitioners, three in number, are creditors of the Southern Car & Foundry Company; that on the 17th of July, 1903, they filed their petition in bankruptcy against the said company in the Eastern District of Tennessee, and that pending a hearing of the said petition that court had appointed one Orion L. Hurlbut receiver of one of the plants of the said company located within that district; that the defendant company has also a factory and plant in Memphis, Tenn., within this district; that the property within this district has been attached by various creditors of the company with a view of obtaining a preference in the satisfaction of their debts and in contravention of the provisions of the act of Congress relating to bankruptcy; that it is necessary for the preservation of the estate of the alleged bankrupts that a receiver should be appointed to take possession of the property at Memphis, as well as that at Chattanooga, within the Eastern District of Tennessee. The prayer of the petition is that the said petitioners may be allowed to file their petition on executing a bond for costs, and that the said Hurlbut be appointed ancillary receiver of all the property and assets of the defendant company at Memphis, Tenn., consisting of real estate, the plant or factory of the company there located, and all its equipments and materials, together with its contracts, choses in action, and other personal property, or that, it being necessary, some other person may be appointed such ancillary receiver.



The petition exhibits the order of the District Court at Chattanooga appointing Hurlbut receiver upon giving a bond of \$3,000, and directing him to take immediate possession and control of the property, and hold the same intact until the further order of the court. He is further directed to effect insurance, to take an inventory of the property, and require all tenants thereon to attorn to him at once. Accompanying the petition is the form of an order by this court appointing the said Hurlbut as ancillary receiver of all the property of the defendant company at Memphis, couched in the same language as the original order in the court at Chattanooga, and directing the receiver to take immediate possession of the property here, as he was directed to take possession of the property at Chattanooga.

We cannot properly or conveniently do judicial business such as this, especially in the bankruptcy court, by epistolary correspondence; and the reasons for it are stated by me in *Re Sykes*, 106 Fed. 669. The petition, therefore, has been handed to the clerk with instructions to file it, and await such action as the parties may take in the premises.

But, apart from this reason of the court for declining to sign and enter the order sent to the judge by mail, there is a more important one. No order appointing a receiver or otherwise disturbing the possession of property should be granted by any court without notice to the parties in possession and those otherwise interested; notice that would constitute due process of law, as required by the Constitution of the United States. Even if the bankruptcy statute permitted such a summary proceeding as that which is indicated by this petition and its accompanying order, it is my opinion that it would not be in conformity to article 5 of the Constitution of the United States, which declares that no person shall be deprived of life, liberty, or property without due process of law. A mistaken notion seems to have grown up in reference to bankruptcy proceedings that they are in some way outside of this requirement of the Constitution, and constantly applications are made for some summary action by the courts in bankruptcy without any notice whatever to the parties who are in possession of the property, as has been done in this case.

Before the foregoing telegram was received by me I had been informed by local attorneys here representing creditors with very large debts against the defendant company that they desired to be notified if any proceedings were taken in this court against the defendant company; that proceedings in equity or bankruptcy had been taken against the company in the federal courts of New Jersey, in which state the company was chartered and has its domicile; that already the property in this city had been seized by the sheriff under process from the state courts; that a proceeding has been commenced by a general creditors' bill for the appointment of a receiver by the state chancery court; and that it was understood that the parties in possession claimed that they were acting under the possession and control of a receiver appointed at Birmingham, Ala., where also it seems this company has a plant and factory, as well as in other places not definitely known to me.

Manifestly, if we had the power to proceed summarily and without notice upon a petition such as this, having no parties defendant, and praying no kind of process or notice of any kind, nor contemplating such process or notice in any way, it would not be proper, under conditions like those above described, if the information mentioned be correct, to take the action proposed by the order; not, at least, until the state officials in possession of the property, or those they represent in the state proceedings, or the persons in actual possession of the property comprehended in the order, should have been brought into court by some kind of petition against them specifically, and upon which process had issued, if not by formal writs, yet by some kind of notice, which would answer, under the circumstances, the requirement of due process of law. In the beginning, in *Re Kelly* (D. C.) 91 Fed. 504, 1 Am. Bankr. R. 306, and later in *Re Ogles* (D. C.) 93 Fed. 426, 1 Am. Bankr. R. 671, this court held that such summary proceedings are inadmissible under the existing bankruptcy statute, and that possibly if any bankruptcy statute authorized them they would be contrary to the above-cited provision of the Constitution. I understand that so far as relates to the property in adverse possession of any one the Supreme Court of the United States has confirmed the foregoing rulings of this court in the case of *Bardes v. The Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 261, and the subsequent cases which have followed it; and that more especially in relation to proceedings for the dispossession of receivers or other officials holding the property of the bankrupt under the process of the state courts have the rulings in *Re Ogle*, *supra*, been confirmed by the Supreme Court in the recent case *In re Watts*, or *In re Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. —. Under the holdings of the Supreme Court in that case, it seems to me quite impossible that there can be any dispossession of the state courts by any summary process of the bankruptcy court, or otherwise than by formal proceedings taken by the bankruptcy court's receiver or by its trustee for that purpose. Just what those formal proceedings should be is a matter of considerable difficulty, but that is not necessary to be considered here.

Moreover, there are difficulties about the so-called ancillary jurisdiction of the bankruptcy courts assumed to exist by this petition and the order offered to be entered thereon. Recently, in *Re Williams*, 123 Fed. 321, it was held by this court that under the scheme of the bankruptcy statute there did not exist an ancillary jurisdiction for the purposes sought in that proceeding, for the reasons there stated, which need not be repeated here. The very purpose of the Constitution in giving Congress the power to establish a uniform system of bankruptcy, and the object of every bankruptcy statute, is to obviate the disastrous effect of the administration of insolvent estates in broken pieces, according to the insolvency laws of many different states. Ancillary administrations of insolvent assets, as found in equity courts, are neither desirable nor useful as analogies of practice in bankruptcy administrations. They have no application as precedents for bankruptcy proceedings qua bankruptcy proceedings, and only are applicable when a trustee in bankruptcy, just as any other

litigant, suing another, finds it needful to apply to the ordinary auxiliary or ancillary jurisdiction of the courts to assert his title or other rights devolved on him as an owner in trust. Other than this, ancillary proceedings in bankruptcy, if they may be so called, are unauthorized monstrosities in practice, in my judgment. The necessity for separate administrations and ancillary proceedings should not exist under any well-regulated system of bankruptcy. The design of the statute is to avoid all ancillary proceedings, and secure one uniform possession of the estate by a single court of bankruptcy having the jurisdiction to administer the assets everywhere under that statute. For the purpose of securing that object under the act of 1898, the trustee is invested with the title to the property everywhere, and according to the scheme of the act is required to go anywhere and everywhere, and assert his rights to the property in any court of competent jurisdiction, just and only as any other owner would do. He must depend for jurisdiction upon the conditions that would surround any other owner, and must proceed in any court according to its proper methods of procedure, and only as any other owner would proceed; and it is a mistake, in my judgment, to suppose that he has in bankruptcy courts or in the other federal courts any right to a jurisdiction, authority, or power, by reason of the proceedings in bankruptcy, other than any owner would have, except that he might resort to a federal court of competent jurisdiction to enforce the rights he has derived by his title to the property as a bankruptcy trustee, just as any plaintiff presenting a case arising under the Constitution and laws of the United States might do, if it shall be held under the very guarded rulings of the Supreme Court of the United States on that jurisdiction that his claim of title or right to the property does present a case arising under the Constitution and laws of the United States, thus giving a federal court jurisdiction where there is no diversity of citizenship between him and the defendant in the case he makes. This petition suggests these difficulties, and they afford another reason for not taking the summary proceeding that is asked by the immediate appointment of an ancillary receiver without notice to anybody. A summary method is not relieved of its vice as such by calling it ancillary. The service of process upon the defendant in a case of involuntary bankruptcy in one district, or of a rule to show cause against an application for a receiver there, will not support a similar application elsewhere in another district, even if the proceeding be ancillary; for there must be proper and appropriate process in ancillary proceedings as in others.

The most hurtful weakness of the present bankruptcy statute is that it has not provided for the care and custody of the property of an alleged bankrupt pending litigation upon an involuntary proceeding, or, at least, that it is not more specifically directed how the bankruptcy courts may proceed in protecting the property *pendente lite*. The act, by section 2 and section 23b (Act July 1, 1898, c. 541, 30 Stat. 545, 552 [U. S. Comp. St. 1901, pp. 3420, 3431]), as amended by section 8 of the amendatory act of February 5, 1903 (32 Stat. c. 487), confers ordinary equity jurisdiction, "as distinguished from proceedings in bankruptcy," to use the phrase of section 23a, upon the District Courts,

which they could not have exercised before, in aid of the bankruptcy jurisdiction which each has acquired in any given case of bankruptcy brought in that court, and which, possibly, that court would have had by implication arising out of the jurisdiction in bankruptcy, if there had been no specific grant; also, possibly, such a jurisdiction in cases arising out of a bankruptcy in some other district. It also confers such a general equity jurisdiction, by section 23, upon the Circuit Courts, which quite plainly they would have under the general law, apart from the bankruptcy statute. But that is all the jurisdiction the act confers, and we have no statutory directions as to its exercise. There is no special provision allowing the court having charge of the bankruptcy case to use its authority to protect the property located in other districts, such as might have been had. How a receiver appointed by the court of original jurisdiction shall proceed to obtain possession of the property in another jurisdiction is not declared either by the act or the rules of the Supreme Court made to govern the practice. What are the powers to be conferred upon such a receiver; whether his title and rights of action are the same as would belong to a regularly appointed trustee in bankruptcy; or whether he is limited, more or less, in his title and authority—is not declared by the act. Whether he is to bring suits to recover property in other jurisdictions in his own name, or whether the petitioning creditors are to bring them in their name, is not pointed out in the act or Supreme Court rules. What he is to do in the struggle for possession with adverse claimants, or with vigilant and competing creditors, desirous, through the state courts or otherwise, to get the first possession of the property held in their particular locality, is not pointed out in the act nor by any of the rules of the court. It may not be doubted that he could proceed, in law or equity, in a court of competent jurisdiction, as any other receiver would. But, as the legislation now is, in taking such steps he can act only according to the rights and remedies given to ordinary receivers. He must be authorized to do the particular thing proposed either by the specific directions contained in the orders of the court which originally appointed him, or by such orders made upon formal and proper pleadings in another court, giving such relief as would be decreed to him by what properly may be called auxiliary or ancillary proceedings. But these auxiliary or ancillary proceedings cannot be taken any more than any other proceedings can be taken without proper pleadings and process which shall meet the requirement of being due process of law. Proper parties must be made defendants upon averments of fact sufficient to show a federal jurisdiction, as in other cases, and the right to relief, and they must be brought into court by some appropriate process of law, whatever that may be, to make whatever defense they may have against such proposed ancillary jurisdiction; and a bankruptcy court in another district has no more authority than any other court to proceed without such proper pleadings and process to administer even ancillary or auxiliary relief. The mere fact that bankruptcy proceedings are pending elsewhere is not enough to entitle the plaintiffs to any relief, if there be nothing more.

The trouble here is that the petitioning creditors make an effort

summarily to seize property, without process, by calling their proceeding ancillary, assuming that the bankruptcy courts have power to aid other bankruptcy courts in that convenient way simply because they are both bankruptcy courts. There is no such jurisdiction in any court, in my judgment. It requires a formal bill in equity against the proper parties, in a court of competent equity jurisdiction, to obtain that auxiliary relief which the petitioning creditors need and seek by this proceeding. A district court of the United States may be one of such courts of equitable jurisdiction, if the bankruptcy statute so provides; but it does not possess the power qua a court of bankruptcy to entertain such a bill. Technically, there is no "court of bankruptcy," as to any given case, except that one court in which the bankruptcy proceedings are pending. These considerations furnish additional reason for not granting the order which has been sent here from the bankruptcy court in the Eastern District of Tennessee in the manner above described, and therefore the clerk has been directed to file and hold the papers until parties may proceed as they shall be advised.

Ordered accordingly.

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MASON CITY & F. D. R. CO. v. UNION PAC. R. CO.

(Circuit Court, D. Nebraska. August 19, 1903.)

No. 55.

**1. COURTS—RULES OF DECISION—MATTERS PREVIOUSLY DETERMINED BY SUPREME COURT.**

Where the question at issue in a suit was the right of complainant railroad company to the use of a bridge owned by defendant railroad company under a contract between the parties, which right was denied by defendant on the ground that the contract was ultra vires on its part, a decision of the Supreme Court on appeal, holding that the contract was valid (1) because it was one which the defendant had the power to make at common law, and (2) because it was expressly authorized by an act of Congress, such act, by reference, embracing a provision of a prior act, is authority on both propositions, and that the two acts referred to are to be construed together; but a further statement in the opinion that such acts made it the duty of the defendant to permit the complainant to run its trains over the bridge was dictum, only, not being necessary to the determination of any question at issue.

**2. RAILROADS—UNION PACIFIC BRIDGE ACROSS MISSOURI RIVER—CONDITIONS IMPOSED BY ACT AUTHORIZING.**

By Act Feb. 24, 1871, c. 67 (16 Stat. 430), the Union Pacific Railroad Company was authorized to issue its bonds, secured by mortgage on a bridge and approaches to be constructed over the Missouri river between Council Bluffs and Omaha, for the purpose of obtaining the means for the construction of such bridge and approaches. Said act contained a provision that "for the use and protection of said bridge and property the Union Pacific Railroad Company shall be empowered, governed, and limited" by the act of July 25, 1866, c. 246 (14 Stat. 244). The latter act authorized the construction of a number of bridges over the Mississippi and Missouri rivers; and by section 1, authorizing the building of a bridge across the Mississippi at Quincy, "for the more perfect connection of any railroads that are or shall be constructed to the said

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¶ 1. See Courts, vol. 13, Cent. Dig. § 335.

river at or opposite said point," it was provided "that when constructed all trains of all roads terminating at said river or opposite said point shall be allowed to cross said bridge for a reasonable compensation to be made to the owners of said bridge." *Held*, that such provision, which by reference became a part of the act of 1871, imposed on the Union Pacific Railroad Company the duty of permitting other companies whose roads terminated at Council Bluffs or Omaha to use the bridge constructed thereunder for the passage of their trains, for a reasonable compensation, and required that all such companies should be treated alike in that respect.

**3 SAME—EFFECT OF CONDITIONS ON MORTGAGEES—AMENDMENT OF CHARTER.**

Prior to said Act Feb. 24, 1871, c. 67 (16 Stat. 430), the railroad company, which was chartered by Congress, had executed mortgages on its property then owned and to be acquired, as authorized by its charter; and it also had authority under its charter to build the bridge, but lacked the means, which it was authorized by such act to procure by an issue of bonds secured by mortgage on the bridge and approaches, to be built with their proceeds, subject, however, to certain conditions, among which were the obligations imposed by section 1 of Act July 25, 1866, c. 246 (14 Stat. 244). *Held*, that under such legislation, which was accepted and acted on, the bridge property was acquired or brought into existence, burdened with such conditions, which operated, in effect, as an amendment of the company's charter, and which were effective as against the company and its mortgagees, either prior or subsequent.

**4. SAME—RIGHTS OF PURCHASER AT FORECLOSURE SALE.**

It having been determined in a suit in which all the mortgages on the property of the railroad company were foreclosed that the bridge mortgage constituted the first lien on the bridge property, acquired with its proceeds, on the ground that such was the intention of Congress and of all the parties in interest when such mortgage was authorized and executed, a purchaser at the foreclosure sale took the property subject to the conditions imposed by the act under which such mortgage was given.

In Equity. Suit to establish and enforce the right of complainant to use the Union Pacific Bridge and tracks across the Missouri river, and the approaches thereto, between Council Bluffs and South Omaha.

Frank P. Kellogg, Woolworth & McHugh, and Cordenio A. Sevrance, for complainant.

W. R. Kelly, John N. Baldwin, and Edson Rich, for respondent.

MUNGER, District Judge. By an act of Congress of date July 1, 1862 (12 Stat. 489, c. 120), the Union Pacific Railroad Company was incorporated with authority to construct and operate a line of railroad from a point to be fixed by the President of the United States on the western boundary of the state of Iowa to the western boundary of the state of Nevada, which act was amended by Congress July 2, 1864 (13 Stat. 356, c. 216). Under the provisions of these acts said railroad was constructed from the initial point designated by the President of the United States on the western boundary of the state of Iowa. Between the state of Iowa and the then territory of Nebraska to the west flowed the Missouri river, which was for several years crossed by said railroad by means of a ferry. Desiring to construct a bridge across the Missouri river, and not having sufficient means for that purpose, said railroad company applied to Congress for authority to issue its mortgage bonds upon the bridge and its approaches for that purpose, pursuant to which

request Congress passed an act of date February 24, 1871 (16 Stat. 430, c. 67). On January 26, 1880, said Union Pacific Railroad Company consolidated with certain other railroads, and formed one consolidated company, under the name of the Union Pacific Railway Company; such consolidated company succeeding to all the property and rights of said Union Pacific Railroad Company, and assuming all of its burdens and obligations. May 1, 1880, the said Union Pacific Railway Company and the Chicago, Rock Island & Pacific Railway Company entered into a contract by the terms of which the said Chicago, Rock Island & Pacific Railway Company was granted the right for a term of 999 years to use the said bridge and approaches across the Missouri river from Council Bluffs to South Omaha for the movement and operation of its engines, cars, and trains between said points. A similar contract was entered into on the 30th day of April, 1890, between said Union Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company. After the parties had operated and acted under said contracts for a period of time, said Union Pacific Railway Company repudiated the contracts upon the claimed ground that each was ultra vires, being a contract not within the power and authority of the Union Pacific Railway Company, under its charter, to enter into. Suits were thereupon instituted by the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company for the specific performance of said contracts, which actions resulted in a decree being entered by this court as prayed. 47 Fed. 15. An appeal was taken to the Circuit Court of Appeals, and the decree affirmed (51 Fed. 309, 2 C. C. A. 174), and on appeal to the Supreme Court was again affirmed (163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265).

Commencing in 1893, various proceedings were had, seeking a foreclosure of various mortgages which had been given pursuant to the provisions of the said several acts of Congress before specified. Such proceedings were had that said mortgages were foreclosed, and all of the property and franchises owned and controlled by said Union Pacific Railway Company were sold under the decree of foreclosure, including the bridge, its approaches, and the tracks in question, to \_\_\_\_\_ as trustees. Whereupon the present Union Pacific Railroad Company, respondent in this action, was organized under the laws of the state of Utah, and became and now is the owner of the property and franchises so sold at such foreclosure sale. After its organization and acquiring of the property, the present Union Pacific Railroad Company entered into contracts whereby the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and the Chicago & Northwestern Railway Company and other roads are given the use of said bridge, its approaches and tracks, over which the trains of said several railroads are run and operated between the cities of Council Bluffs, Iowa, and South Omaha, Neb. The complainant is a corporation owning and operating a railroad having its present western terminus at Council Bluffs, in the state of Iowa, and seeks to connect with and use the said bridge, approaches, and tracks

of respondent between the said city of Council Bluffs and South Omaha, Neb., upon the same terms and conditions as a like use is granted to the other roads. Respondent refusing to grant such use to complainant, this action was brought, asking for the mandatory order of this court requiring respondent to grant to complainant the use of such bridge and tracks between Council Bluffs and South Omaha on the same terms and conditions as are given such other railroad companies.

On behalf of complainant it is asserted that it is entitled to the relief asked, first, because the right is granted by the said act of Congress of February 24, 1871; second, because of the terms of a certain tripartite agreement entered into between the city of Omaha, the county of Douglas, and said Union Pacific Railroad Company, and shown by what is known as the "Saunders Deed" of date, ———, introduced in evidence. Respondent denies that the act of Congress of February 24, 1871, required the original Union Pacific Railroad Company to afford to complainant the same use of its bridges and tracks as it gave to other railroad companies, and, further, if it did, it alleges that the title it (respondent) acquired by the foreclosure sale was freed from any such servitude, and that it is free to contract with such companies for the use of the bridge and tracks as it may see fit, and, further, that complainant has no such rights under the tripartite agreement embraced within the Saunders deed. Counsel for complainant contend that its right under the act of 1871 to the use of said bridge and tracks as against the original Union Pacific Railroad Company and the consolidated company was adjudicated and settled in the Rock Island Case, *supra*. If that be so—if the act has been so interpreted by the Court of Appeals and the Supreme Court—then what is the proper construction of the act is not an open one for this court, but those decisions must be followed.

In the Rock Island Case the validity of the contract then under consideration was sustained in this court in an opinion by Mr. Justice Brewer, based upon the sole consideration that at common law, and without express statutory authority, one railroad company could enter into a valid lease with another railroad company for the joint use of its tracks, when such joint use did not impair the power of the lessor company to perform the functions and duties which it owed to the public or the sovereignty from which it derived its authority. The Circuit Court of Appeals, through Judge Sanborn, approved the doctrine thus announced by Justice Brewer, and, as a further ground for holding the contract valid, construed the bridge act of 1871 in the light of other similar legislation by Congress, and held that statutory authority was given the Union Pacific to enter into such a contract. While Judge Sanborn did not in express terms say that the first section of the act of July 25, 1866, c. 246 (14 Stat. 244), was applicable to the bridge act of 1871, and hence to be read into it as a part thereof, yet a careful reading of his opinion leaves no doubt in my mind that such was the understanding of that court in its interpretation of the 1871 act. If we exclude the first section of the act of July 25, 1866, from the act of 1871, as not applicable thereto,



then it is impossible to find express statutory authority for the Union Pacific Company to have made the contract with the Rock Island Company; and I am clearly of the opinion that the holding of the Circuit Court of Appeals was not only that the contract in question was valid, as the proper exercise of the common-law right to contract, but equally as authoritative that the right was given under a proper construction and interpretation of the bridge act of 1871, and that the first section of the 1866 act was applicable to the act of 1871.

While the Court of Appeals, in construing the act of 1871 with the first section of the act of 1866, as applicable thereto, decided that authority was therein given to enter into the contract then in question, they did not in express language say that the act made it mandatory upon the Union Pacific Company to grant the use of said bridge and tracks to other railroad companies. That court took one step in advance of that taken by Justice Brewer, and held that the statute authorized the making of the contract. When the case reached the Supreme Court, the Chief Justice, in pronouncing the decision of the majority, took a step in advance of that taken by the Circuit Court of Appeals, and said:

"For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included."

In support of the correctness of this pronouncement, the bridge acts of 1871 and 1866 were considered in connection with other similar bridge acts passed by Congress. The argument advanced that section 1 of the 1866 act was inapplicable to the act of 1871, that the reference in said act of 1871 to the 1866 act should be confined to sections 2 and 3, was expressly disapproved. It is, however, urged with much force and persistency that the quoted utterance of the Chief Justice is not authority, but dicta, merely. Considering the question as to what expressions of opinion are to be treated as authority, Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264-399, 5 L. Ed. 257, said:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but should not control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Applying this maxim to the decision of the Supreme Court, for the purpose of determining what expressions are authoritative, we are to consider what was the question before the court—what was it called upon to decide. The question before the court, and upon which it was asked to pronounce its judgment, was the validity of a contract which had been made by the Union Pacific Company; the validity of the contract having been challenged on the alleged ground

that it was beyond the power of the Union Pacific Company to make such a contract. The Court held that the contract was valid for the reasons (1) that the particular contract was one proper to be made under the common-law right to contract; (2) that the contract was authorized under the bridge act of 1871, that act, by reference, embracing the first section of the act of 1866. These two propositions are authority, within the maxim quoted. They were both proper questions to be considered and determined for a correct adjudication of the question before the court. It, perhaps, was unnecessary to place the validity of the contract upon both grounds. Its validity upon either ground would have been sufficient. That, however, does not render the decision less authoritative on both questions. The question as to whether the Union Pacific could be required against its will to enter into any character of a contract with another railroad company for the use of the bridge and tracks was not before the court in the Rock Island Case. It was not necessary to be considered for a correct determination of the question submitted, and hence the expression before quoted in the opinion of the Chief Justice, that the bridge act imposed upon the Union Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and trains over the bridge and tracks between Council Bluffs and South Omaha is not authority, but dicta, which, while it should be respected, is not to control the judgment in this case. It having been authoritatively decided by the Circuit Court of Appeals and the Supreme Court that the first section of the act of 1866 is applicable to the act of 1871, and hence to be read as a part of said 1871 act, it is left for the court in this case to determine the rights of complainant thereunder. The section reads as follows:

"That it shall be lawful for any person or persons, company or corporation, having authority from the states of Illinois and Missouri for such purpose, to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point; and that when constructed all trains of all roads terminating at said river or opposite said point shall be allowed to cross said bridge, for reasonable compensation to be made to the owners of said bridge, under the limitations and conditions hereinafter provided."

The language of the section is specific and unambiguous. It says that:

"When constructed all trains of all roads terminating at said river at or opposite said point shall be allowed to cross said bridge, for reasonable compensation to be made to the owners of said bridge."

It does not simply give to the company constructing the bridge authority to permit the trains of other roads terminating at the river to cross said bridge, but it expressly says:

"All trains of all roads terminating at said river at or opposite said point shall be allowed to cross said bridge, for reasonable compensation to be made to the owners of said bridge."

This is a mandatory provision, which was enforceable against the Union Pacific Railway Company, and equally enforceable against the respondent, unless its title and rights acquired through the foreclo-

sure proceedings before referred to were freed by such proceedings from the obligations thus imposed. It is true that the statute imposes the payment of a reasonable compensation for the use, but it is not shown or claimed that the compensation and terms imposed upon the roads which are given the use is not reasonable, and I think the act required that all roads shall be treated alike in this respect.

The amendatory act of 1864, before referred to, expressly authorized the construction of a bridge across the Missouri river (section 9, 13 Stat. 360), and by section 10 of the act the railroad company was empowered to issue its bonds and mortgage upon the road on the completion of each section, to an amount not exceeding the amount of the bonds of the United States; such bonds and mortgage to be a lien prior and superior to that of the United States. Under this provision the railroad company issued its bonds and mortgage upon the property then owned, as well as upon that to be acquired, which mortgage was given prior to the act of 1871, prior to the construction of the bridge, and prior to the mortgage given upon the bridge under the 1871 act. The mortgage thus given was one of the mortgages upon which the decree was based in the foreclosure proceeding, and it is urged on the part of respondent that such mortgage, and the interests of the holders of the bonds secured thereby, was not and could not be affected by the act of 1871, and hence the title acquired through the foreclosure sale thereunder is likewise unaffected by the act of 1871. It is to be borne in mind that, at the time this mortgage was given, the bridge had not been constructed; the company at that time simply possessing the naked right to acquire the bridge and approaches. Unable to secure the fruits of such naked right, because of lack of financial means, it applied to Congress for permission to acquire the means by a mortgage upon the bridge to be constructed. Congress granted this permission by imposing certain conditions, among which were the obligations of section 1 of the act of 1866. And this, I think, was in effect an amendment of the charter of the company which Congress had reserved unto itself the right to make.

While, as I say, the right to construct the bridge was not dependent upon the act of 1871, the right to give the mortgage by which the means were secured to construct the bridge was dependent upon that act. The provisions of the act and its conditions were accepted, as evidenced by the mortgage given upon the bridge. The result, then, was that this bridge property was acquired by the railroad company, burdened with certain conditions, among which was the provision of section 1 of the act of 1866, making it mandatory, as I have said, to permit other companies to run their trains over said bridge for just compensation.

It needs no argument to illustrate the proposition that a mortgage does not attach as a lien before the acquisition of the property, and that, where the property is acquired subject to conditions, the lien of the mortgage is also subject to such conditions. The mortgage covered not only the right of way which the company had at the time the mortgage was given, but such as it should subsequently acquire in the construction of the road. Suppose that sub-

sequent to the giving of the mortgage the company acquired the right of way over the land of A., subject to the easement of a private crossing by A. or assigns, it certainly would not be contended, I think, that the mortgage, when it attached to this right of way over the land of A., was not subject to such easement.

During the foreclosure proceedings the question as to the priority of the mortgage referred to, and the mortgage given upon the bridge to procure the means for its construction, came before Judge Sanborn for his consideration. Passing upon that question, he said:

"It is clear that, when this mortgage was made, neither the bondholders secured by the general first mortgage nor the government had any lien upon the bridge or upon the Bridge Division of the present railroad, because neither of these were then in existence. It was equally plain that neither the government nor these bondholders expected or intended that the security which they permitted the railroad company to offer in order to obtain the money to construct this bridge would be subordinate to their lien. The aggregate amount of the incumbrance upon the railroad, as it was then constructed, was more than \$54,000,000. Neither the government nor the holders of the first mortgage bonds could have intended or supposed that a third lien for \$2,500,000 on four miles of this railroad, subject to their liens for \$54,000,000, would induce purchasers to take these bridge mortgage bonds. On the other hand, it was plainly upon the theory that the mortgage of April 1, 1871, would constitute a first lien upon the bridge and its approaches, that Congress authorized, and the first mortgage bondholders acquiesced in, its execution, and that the holders of the bridge bonds purchased them and furnished the funds which built the bridge. It would be unjust, inequitable, and a violation of the faith upon which the bridge bonds were sold, to permit the first mortgage bondholders or the government now to displace the lien of the bridge bonds, to destroy their security, and to appropriate to themselves the valuable improvement produced by the funds realized from the sale of these bridge bonds. The mortgage of April 1, 1871, must therefore be held to be a first lien upon the Bridge Division of the Union Pacific Railroad Company."

It was argued at the hearing that this decision of Judge Sanborn was based upon the finding by him that the first mortgage bondholders had acquiesced in the execution of the bridge mortgage as a first lien. If the bridge mortgage was subject to conditions, and the first mortgage bondholders acquiesced in the giving of said bridge mortgage subject to such conditions, and by reason thereof the first mortgage became subject to said bridge mortgage, then, the lien of such mortgage being subsequent to and inferior as a lien to the bridge mortgage, it was subject to the same conditions as were imposed upon such bridge mortgage. It is not claimed by Judge Sanborn, in the opinion referred to, that such bridge mortgage became the first and paramount lien, upon any principle of estoppel upon the part of the first mortgage bondholders. It is upon the proposition that, as the property had not been acquired by the railroad company, Congress intended that such bridge mortgage should be the first and paramount mortgage, and that the holders of the first mortgage bonds, he says, could not have intended or supposed that the bridge mortgage was to be subject to prior mortgages, but that the theory upon which the government and all parties acted was that the bridge mortgage, from which the funds to construct the bridge were realized, was the first and paramount lien. That being so, and the bridge having been acquired by the railroad company subject to the conditions

imposed by the act, and the lien of the mortgage not attaching until the acquisition of the property, it is clear that such mortgages were subject to the conditions imposed by the act, and that the purchasers under the foreclosure decree took no greater or superior rights than were held by the mortgagees.

But it is argued that the decree of foreclosure did not impose the burden of the bridge mortgage upon the purchaser, but only the indebtedness secured thereby. I fail to observe any material distinction in that respect. Certainly, all that the holders of the bridge bonds could expect, or all that they were entitled to, was payment of their mortgage indebtedness. The question is not what rights the holders of that mortgage obtained, but whether the conditions upon which that mortgage was authorized (and which, I think, constituted an amendment of the charter to that extent) were superior to the rights of the other mortgagees, and I think such conditions were superior to the estate of any of the mortgagees. If so, then persons entitled to the benefits conferred by such conditions, who were not parties to the foreclosure proceedings, were not affected thereby, notwithstanding any recitals which the decree contained.

For these reasons, I hold that complainant possesses the same rights as against respondent to enforce the provisions of the act of 1871 as it possessed against the original and the consolidated company. This conclusion renders it unnecessary to consider the rights of the parties under the tripartite agreement embraced in the Saunders deed.

A decree will be entered for complainant. Counsel for complainant will prepare draft of decree, submit same to counsel for respondent, and the same may be presented to the court on Thursday, the 13th, at 10 o'clock a. m., when objections will be heard as to the form of the decree.

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In re CAMPBELL.

(District Court, W. D. Virginia. August 28, 1903.)

**1. BANKRUPTCY—EXEMPTIONS—PROCEDURE AND BURDEN OF PROOF.**

In setting apart the property claimed by a bankrupt as exempt, after its appraisal, the trustee acts ministerially; and no issue as to the bankrupt's right to the exemption arises until the trustee's report is filed, when issue may be taken by exceptions thereto which cast the burden of proving all facts essential to the right upon the bankrupt, including, where the exemption is claimed under the Virginia statute, the fact that such property was paid for.

**2. SAME—CREDITORS HAVING RIGHT TO OBJECT TO ALLOWANCE—VIRGINIA STATUTE.**

The Virginia homestead statute, allowing exemptions of real or personal property (Code 1887, § 3630), provides that it shall not extend to any execution or other process issued on any demand for the purchase price of said estate, or any part thereof. *Held*, that under the bankruptcy law, by which the proceeds of nonexempt property are divided pro rata among all creditors, objection to the allowance of a bankrupt's exemption under such statute on the ground that the property claimed has not been paid for may be made by any creditor, without showing that his claim is for the purchase price of any of such property.

**3. SAME—EXCEPTIONS TO TRUSTEE'S REPORT—VERIFICATION.**

While an exception to the report of a trustee setting apart the bankrupt's exemptions is in some sense a pleading, in that it makes an issue, it is doubtful if it was intended to be embraced within Bankr. Act July 1, 1898, c. 541, § 18c, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], which requires all pleadings setting up matters of fact to be verified; and in any event the lack of verification is not jurisdictional, and, where not objected to on the hearing before the referee, objection cannot be made on a review of his decision by the court.

**4. SAME—CREDITORS ENTITLED TO OBJECT TO ALLOWANCE OF EXEMPTION.**

In applying in bankruptcy proceedings the Virginia exemption statute, which provides for the exemption of certain property of a debtor "from levy, seizure, garnishment or sale under any execution, order or process," a creditor is not precluded from objecting to the allowance of exemption to a bankrupt because he is not armed with any process; the bankruptcy proceedings themselves being in effect a seizure of all the debtor's property, for the purposes of the state statute.

**5. SAME—PROCEDURE.**

Where, on the hearing before the referee of exceptions to the report of a trustee setting apart the bankrupt's exemptions under the Virginia statute in merchandise, neither the bankrupt nor any creditors holding notes in which the right to the exemption was waived made any proof that the property claimed and set apart was paid for, and the referee decided against the right to the exemption, the cause will not be remanded for the taking of proof on such issue after the merchandise has been sold by agreement of the parties in interest, and delivered to the purchasers.

In Bankruptcy. On review of decision of referee disallowing exemption claimed by bankrupt.

Chas. A. Hammer, for bankrupt.

Roller & Martz, H. W. Bertram, and D. O. Dechert, for nonwaiver creditors.

Conrad & Conrad, for homestead waiver creditors.

MCDOWELL, District Judge. This case arises on a petition for review of the ruling of the referee filed by the bankrupt.

On November 15, 1902, C. G. Campbell, a retail dealer in clothing and men's furnishing goods, doing business at Harrisonburg, Va., filed his voluntary petition in bankruptcy. On the same day he was adjudicated a bankrupt. The chief item of assets is the bankrupt's stock in trade, scheduled as of a value, "at cost and carriage," of \$2,500. In Schedule B5 is a claim of homestead exemption in the following language:

"Petitioner claims his homestead exemption, allowed by the Constitution of Virginia and the laws made in pursuance thereof, amounting to \$2,000, the same to be paid out of the household property above scheduled, and the proceeds of the sale of the stock of goods, and the collections on the accounts and notes above scheduled, as against the debts of the petitioner, except those as to which he has waived his homestead exemption."

On November 20, 1902, the bankrupt had admitted to record in the clerk's office of the county court of his county an attempted deed of homestead, which purports to have been executed on November 14, 1902, in which he claims the said stock of goods, also his household furniture, and all accounts due him. In this instrument there is no attempt at itemizing the articles claimed, or at affixing to each a valuation. On December 17, 1902, the bankrupt had admitted to

record in said county court another deed of homestead, which appears to have been executed on December 13, 1902—the day on which the appraisers under the bankruptcy proceeding made their appraisal of his stock. In this deed the articles claimed are itemized, and a valuation affixed, and in it certain store fixtures are included in the claim. The property listed in the deed of homestead and that set out in the appraisal is as follows:

| Claimed as Exempt.          |            | Appraisement.               |            |
|-----------------------------|------------|-----------------------------|------------|
| 128 prs. gloves .....       | \$ 26.55   | 128 prs. gloves .....       | \$ 20.     |
| 548 undershirts .....       | 175.89     | 548 undershirts .....       | 140.       |
| 248 workshirts .....        | 88.71      | 246 working shirts .....    | 75.        |
| 70 prs. shoes .....         | 81.        | 59 prs. shoes .....         | 53.77      |
| 71 prs. overalls .....      | 23.96      | 51 prs. overalls .....      | 20.        |
| 373 colored collars .....   | 30.47      | 91 winter underwear —       |            |
| 50 prs. cuffs .....         | 6.96       | shirts .....                | 30.        |
| 221 prs. hose .....         | 43.82      | 373 collars .....           | 23.        |
| 54 prs. suspenders .....    | 17.81      | 50 prs. cuffs .....         | 5.75       |
| 7 vests .....               | 3.75       | 221 prs. hose .....         | 20.        |
| 23 prs. boys' pants .....   | 32.59      | 49 belts .....              | 8.         |
| 63 summer coats .....       | 43.07      | 54 suspenders .....         | 13.        |
| 116 men's & youths' suits.. | 389.58     | 182 bows and ties.....      | 13.50      |
| 149 prs. boys' pants .....  | 46.49      | 7 vests .....               | 3.75       |
| 36 overcoats .....          | 121.50     | 23 prs. boys' pants .....   | 22.        |
| 234 boys' suits .....       | 442.13     | 63 summer coats .....       | 31.50      |
| 154 men's & youths' pants   | 269.31     | 119 men's & youths' suits.. | 353.50     |
| 13 stiff hats .....         | 7.61       | 149 boys' pants .....       | 40.        |
| 227 felt hats .....         | 101.77     | 35 overcoats .....          | 121.       |
| Sundry store fixtures,      |            | 228 boys' suits .....       | 387.50     |
| including 24 "show          |            | 154 men's & youths' pants   | 205.       |
| window stands" ...          | 112.30     | 676 neckties .....          | 69.        |
|                             |            | 10 umbrellas .....          | 5.88       |
| Total as stated..           | \$1,985.50 | 106 straw hats .....        | 12.        |
|                             |            | 13 stiff hats .....         | 7.61       |
| Corrected total..           | \$2,065.27 | 129 caps .....              | 15.        |
|                             |            | 230 felt hats .....         | 95.        |
|                             |            | 5 satchels .....            | 1.50       |
|                             |            | Fixtures .....              | 70.        |
|                             |            | Notes .....                 | 16.50      |
|                             |            | Accounts .....              | 130.88     |
|                             |            | Total .....                 | \$2,009.64 |

The trustee allowed the claim of homestead as made by the bankrupt; his report consisting mainly of a carbon copy of the deed of homestead of December 13, 1902. Within the 20 days allowed by general order 17 the creditors hereinbelow mentioned—all holding claims as to which the homestead is not waived—filed exceptions to the report of the trustee. On the hearing the referee ruled that the claim of homestead should be disallowed in toto.

The excepting creditors, and the articles sold by them to the bankrupt, are as follows: Hirsh, Monk & Co., for coats, vests, and pants sold in May and June, 1902; Oppenheimer & Sons, for suspenders sold in March, 1902; Brent, Bull & Co., for merchandise (character not stated), on which demand judgment was obtained October 18, 1902; Valentine & Robinetowitz, for merchandise (character not stated) sold in March and April, 1902; Sullivan & Co., for shirts, drawers, hose, handkerchiefs, collars, etc., sold in April and

June, 1902. One of the nonexcepting creditors is the Wood Display Stand Company, which sent in, apparently by mail, proof of debt for two dozen display stands. It appears from the record that the stock consisted mainly of fall and winter goods. The exceptions filed in behalf of the above-named creditors, except Sullivan & Co., state in the first paragraph that goods sold by the exceptants to the bankrupt, and not paid for, are among the goods set apart to the bankrupt.

The state law (Code 1887, § 3630) allows every resident householder to hold exempt his real or personal estate to the value of \$2,000, provided that such exemption shall not extend to any execution, order, or other process issued on any demand for, inter alia, the purchase price of said estate, or any part thereof. Section 3639 of the Code reads:

"How Set Apart in Personal Estate. Such personal estate shall be selected by the householder and set apart in a writing signed by him. He shall, in the writing, designate and describe with reasonable certainty, the estate so selected and set apart and each parcel or article, affixing to each his cash valuation thereof; and the said writing shall be admitted to record, to be recorded as deeds are recorded, in the county or corporation wherein such householder resides."

Section 3647 of the Code allows a waiver of the homestead to be made in any bond, bill, note, or other instrument. Some of the creditors, who do not except, hold homestead waiver notes, or have proved claims for labor and rent which are not subject to the homestead exemption.

On the examination of the bankrupt, he was asked by counsel for some of the creditors if he had not mingled and confused unpaid-for goods with goods that had been paid for. Under the advice of his counsel, he refused to answer the question. No further step was taken by creditors' counsel to require an answer to this question, nor was the referee asked to rule on the point.

Since the hearing before the referee, the trustee, who at the request of the bankrupt sold all the assets, has reported the net proceeds of the sale as being \$1,511.42, out of which must come sundry items of cost. The claims of the creditors holding homestead waiver notes, and of those whose claims are not subject to the homestead exemption, amount, exclusive of interest, to something over \$1,520. While in the Schedule B5, and in the paper requesting the sale of all the assets, filed December 19, 1902, the bankrupt did not claim the proceeds of sale of the property claimed as exempt, except as to the residue, if any, after payment of his waiver creditors, he subsequently, in argument before the referee and here, claimed for himself the entire proceeds of the property claimed as exempt.

For the purposes of this case, I will assume, without expressing an opinion thereon, that the claim of homestead was made in the proper manner and in due time.

The doctrine of *Rose v. Sharpless*, 33 Grat. 153, does not here apply, as there is no evidence that the bankrupt removed the marks of identification from the goods, or confused unpaid-for goods with those that had been paid for. I also doubt if this case properly falls



under the ruling in the Case of Tobias (D. C.) 103 Fed. 70. There is here no agreement that some of the articles claimed as exempt had not been paid for, and no evidence of a commingling of goods. The mere refusal of the bankrupt to answer a question on this point, especially as no effort was made to require an answer, cannot be treated as evidence of a commingling of goods. However, I am of opinion that the ruling of the referee should be sustained. Under the Virginia homestead law, the exemption cannot be had in any property against a demand for the purchase price thereof. Const. 1869, art. 11; Code 1887, § 3630. There is no evidence in the record that the articles set apart as exempt had been paid for. The exceptions are designed to put in issue this question, and some of them allege that unpaid-for goods sold by the exceptants to the bankrupt are among the goods set apart to the bankrupt. Perhaps *McGahan v. Anderson*, 51 C. C. A. 92, 113 Fed. 119, and *In re Sykes* (D. C.) 106 Fed. 669, are sufficient authority for the conclusion that the burden of proof is on the bankrupt. And it seems to me, in reason, that the burden of proving that the articles claimed as exempt have been paid for should rest on the bankrupt. When he, in a bankruptcy proceeding, in which he seeks a discharge from all his creditors, designates certain articles, and claims them as exempt, he, in effect, alleges that the articles designated have been paid for. He is presumed to know the law, and to know that he cannot exempt any property as against a demand for the purchase price. He must therefore be treated as having impliedly asserted that every article claimed has been paid for. In a voluntary bankruptcy case, the first opportunity that a creditor has to make on the record a denial of the truth of this implied allegation is to except to the report of the trustee, if the trustee sets apart the property. There is no requirement in the bankrupt act that the creditors shall contest the claim of exemption in pais before the trustee. The act seems to contemplate (Act July 1, 1898, c. 541, § 47, cl. 11, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]) and general order 17 clearly allows any creditor to make objection by filing exceptions to the trustee's report. When, and not until, such exception has been filed, is an issue made as to the right of the bankrupt to have the exemption. The bankrupt has, in effect, alleged that the property has been paid for. The excepting creditors deny the allegation. The bankrupt has the affirmative of the issue. He is the actor. He is in the position of a plaintiff who asks affirmative relief, in that by his claim of exemption he has asked the court to set apart to him the property claimed to be exempt. Moreover, he best knows the facts. The means of proof are much more readily at his command than at that of any creditor. While the courts should liberally construe exemption laws, yet they will not willingly establish a doctrine by which illegal and unjust exemptions could be readily secured. If the burden of proof were put on the creditors, the result would very frequently be that illegal claims of exemption would avail. The expense, inconvenience, and difficulty of proof by a creditor that certain articles claimed as exempt by a retail dealer were not paid for would be such that in many if not in the majority of cases the creditor would be wise not

to contest the claim of exemption. To hold that the burden of proof is on the creditors is equivalent to holding that the mere claim of homestead creates a presumption that the property claimed as exempt has been paid for. We might as well say, when A. sues B. in *assumpsit*; and the latter pleads *non assumpsit*, that the burden is on B. to disprove the claim of the plaintiff.

It may be contended that the action of the trustee in setting apart an article as exempt creates a presumption that such article had been paid for. But the trustee acts as a mere ministerial agent. Ordinarily the creditors do not appear before the trustee. They are allowed to, and I think usually do, wait until the report of the trustee is filed, and then they make their objections by excepting to the report. The bankrupt act requires the trustee to put his own valuation on the property claimed as exempt. And unless the bankrupt should claim a greater value than the state law allows him, the act does not seem to authorize the trustee to exercise any discretion. Having valued the property, his duty is to set it apart and make report. His action is in no sense even a quasi judicial finding that the exemption is properly allowable. There is no issue on this question until exceptions are filed to his report. And on that issue, as above stated, the bankrupt clearly has the affirmative.

It is objected that the exceptions here do not show that the exceptants are the vendors of the articles set apart by the trustee. Some of the exceptants do assert that they are the vendors of a part of the goods set apart. But aside from this, the opinion of the majority of the court in *Cannon v. Dexter Broom Co.* (C. C. A.) 120 Fed. 657, is in effect a ruling that an exception on this ground may be made by any creditor. General order 17, in terms, allows any creditor to file exceptions. And it seems to me that any creditor should have the right to make the objection, because every creditor shares *pro rata* in the fund that may by such objection be saved to the estate. Let us suppose that the bankrupt—having given no waiver obligations—owes A., B., and C. for the entire purchase price of a stock of goods which cost \$2,000, and that he owes D. \$200 for the board and lodging of himself and wife; also that the bankrupt, having no assets except the stock of goods, claims, and the trustee sets apart to him, the stock of goods as a homestead. Under these circumstances, if A., B., and C. except to the report of the trustee, the result is that D. shares *pro rata* in the proceeds of the sale of the goods. It is clear that D., under the policy and intent of the bankrupt act, has an interest in defeating the bankrupt's claim of homestead; and it cannot be said that A., B., and C. and the bankrupt are alone concerned as to the allowance of the homestead. It is true that under the state law, considered alone, the homestead can be claimed in unpaid-for property as against the claim of every one except that of the vendor. But the bankrupt act, so to speak, consolidates the demands of all the creditors. What is gained for one is gained *pro rata* for all. The other creditors are in some sense the assignees in part of the claims of the vendor creditors. So far as the bankrupt is concerned, the result is the same whether the objection be made by a vendor creditor or by some other

creditor. And since the other creditors have an interest in the matter, the failure or the refusal of the vendor creditor to file objections to an allowance of homestead should not be allowed to prejudice the rights of the other creditors. It follows that the exceptions in the case at bar would not be vitally defective even if they showed that the exceptants were not the vendors of any of the articles set apart by the trustee. The burden of proof having rested on the bankrupt, and as he offered no evidence tending to show that the articles claimed had been paid for, the referee rightly held that he was not entitled to the exemption.

An objection is made to the ruling of the referee, in that the exceptions to the trustee's report were not verified. This objection does not appear to have been made before the referee. While an exception to a trustee's report is in some sense a pleading, in that it makes an issue, and while such an exception may be treated as a pleading "setting up matters of fact," yet I doubt if Congress, in enacting clause "c" of section 18 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), had the intent to require that exceptions to a trustee's report should be verified. The procedure on reports of trustees setting apart exemptions is not specified in the bankrupt act. In making general order 17, the Supreme Court provided that any creditor might within 20 days after the filing of the trustee's report "take exceptions to the determinations of the trustee." Considering the source of the general orders, and the familiarity of the Supreme Court with the practice as to taking exceptions to reports of masters in chancery, it seems very probable that the intent was that exceptions to a trustee's report should be in the familiar form of exceptions to a master's report. But even if we assume that clause "c" of section 18 applies here, I cannot conceive that the want of verification is jurisdictional, or that it is ground for setting aside the ruling of the referee. If the point had been made before the referee, he could have required the exceptants to verify their exceptions before passing on them. But the point was not made at the hearing before the referee, and cannot be now made in this, in effect, appellate proceeding, for the first time. *In re Raynor*, Fed. Cas. No. 11,597; *In re McNaughton*, Fed. Cas. No. 8,912; *In re Simmons*, Fed. Cas. No. 12,864; *In re Simonson* (D. C.) 92 Fed. 911; *Leidigh Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 641; *Green River Bank v. Craig* (D. C.) 110 Fed. 138.

I have not overlooked the contention that the excepting creditors have no standing, because they are not armed with executions against the bankrupt. This contention is founded on the language of the state homestead law, "shall hold exempt from levy, seizure, garnishment or sale under any execution, order or process." Under proceedings in bankruptcy the property is in effect seized or levied upon as much in behalf of nonjudgment creditors as of any party in interest. In a voluntary case the debtor surrenders his property, and, when he claims some or all of it as exempt, he is asking that such property be not "sold" under judicial "process" or "order."

It may be thought that this cause should be sent back to the referee, with directions to hear evidence, and determine which, if any,

of the articles claimed as exempt had been paid for. The report of sales of the trustee is very informal, and seems to indicate that no account was kept, showing the price realized for the separate articles claimed as exempt. If such is the case, it is manifest that it would now be impossible to fix at all accurately the part of the proceeds of sale to be set apart, if any of the articles claimed as exempt had in fact been paid for. But even if such account has been kept, it does not seem to me that either the bankrupt or the waiver creditors are in a position to now demand the opportunity to produce evidence which it was their duty to produce at the former hearing before the referee. They have had their "day in court." While the articles claimed as exempt were still in the possession of the trustee, a mistaken or false claim could have been rebutted; but now, since all the assets have been sold and delivered to the purchasers, the non-waiver creditors would not have a fair opportunity to rebut the evidence of the bankrupt. Moreover, the bankrupt alone has appealed from the ruling of the referee. If, under the doctrine of *Moran v. King*, 49 C. C. A. 578, 111 Fed. 730, the homestead were allowable in this case, and if any part of the proceeds of the sale of the exempt articles would eventually go to the bankrupt after satisfying the claims of his waiver creditors (*Lockwood v. Exchange Bank*, 23 Sup. Ct. 751, 47 L. Ed. —), it is manifest that such sum would be very small. The claims of the waiver creditors slightly exceed the proceeds of the sale of all the assets. Even assuming that practically all the articles claimed as exempt had been paid for, and considering that the claims of the waiver creditors will be slightly reduced by their pro rata of the proceeds of sale of the assets other than those claimed as exempt, still any possible remnant left to be paid to the bankrupt as exempt is necessarily trifling in amount. For the assets, aside from the articles claimed as exempt, amount to very little, and the property was sold at considerably less than the appraised value. In other words, the interest of the bankrupt in the proceeds is *de minimis*. It is certainly too small to justify an order allowing him to now make proof as to which, if any, of the articles claimed, had been paid for, even if it were otherwise proper to make such order. The ruling of the referee will be approved and confirmed.

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**PROCTOR COAL CO. v. UNITED STATES FIDELITY & GUARANTY CO.**

(Circuit Court, N. D. Georgia. July 11, 1903.)

**1. INSURANCE—FIDELITY BONDS—SIGNATURE BY EMPLOYÉ—ESTOPPEL.**

Where a fidelity insurance company received premiums for two renewals of a bond, with knowledge that the bond was not signed by the employé whose fidelity was insured, as required by the bond, it was estopped to set up the absence of such signature to prevent a recovery on the bond.

**2. SAME—BONDS—RENEWALS—CONSTRUCTION.**

A fidelity bond bound the guarantor to make good and reimburse to the employer any pecuniary loss sustained, occurring during the continuance

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¶ 1. Fidelity insurance, see note to *American Credit Indemnity Co. v. Wood*, 19 C. C. A. 273.

of the bond, or any renewal thereof, and discovered during such continuance or within six months thereafter. Another provision declared that on the issuance of a subsequent bond, or renewal, responsibility on any other bond should cease; it being the intention that only the last bond should be in force at any one time. The bond was subsequently renewed, the first renewal providing that, in consideration of the sum of \$25, the guarantor guaranteed the fidelity of the employé from December 1, 1899, to December 1, 1900, subject to the conditions of the previous bond; and the second renewal recited that, in consideration of a similar sum, the guarantor "continued in force" bond numbered, etc., in the sum of \$5,000. *Held*, that such renewals did not operate as a continuing contract, but that each renewal was a separate and distinct obligation, and that an action could only be maintained for losses sustained and discovered at any time after December 1, 1900, and during the continuance of the last renewal.

8. SAME.

A fidelity bond provided that the guarantors should not be responsible to the employer under any bond previously issued on behalf of the employé, and that on the issuance of any subsequent bond all responsibility under the bond in question should cease; it being understood that it was the intention of the provision that but one (the last) bond should be in force at any one time unless otherwise stipulated. *Held*, that such provision should be construed merely to prevent a double responsibility of the guarantor, and did not affect the employer's rights under another provision, authorizing a recovery for any defalcation discovered within six months after the termination of the bond.

Dorsey, Brewster & Howell and Templeton & Carlock, for plaintiff.  
Smith, Hammond & Smith, for defendant.

NEWMAN, District Judge. This is a suit by the plaintiff against the defendant on a fidelity insurance bond. The original declaration was demurred to, when amendments were filed by the plaintiff, to which amendments demurrers have also been filed. On December 1, 1898, the defendant company entered into a contract with the plaintiff company, by which it insured the plaintiff against loss by reason of any act of fraud or dishonesty on the part of one C. H. Stanton. The Proctor Coal Company had its office at Knoxville, Tenn., and Stanton had charge of its business at Atlanta, Ga. The bond was in the sum of \$5,000. The bond was renewed from December 1, 1899, until December 1, 1900, and again from December 1, 1900, to December 1, 1901. On August 8, 1901, the plaintiff discovered a shortage in the accounts of C. H. Stanton, the total of which, by subsequent examination, proved to be \$6,585.82. On August 29, 1901, the plaintiff furnished to the defendant company in the city of Baltimore an affidavit setting forth a detailed list of the shortage, which up to that time had been found to amount to \$5,099.20. Suit was filed in the office of the clerk of the city court of Atlanta on February 11, 1902, and the cause was removed to this court on March 1, 1902.

Several interesting questions are presented by the demurrers, the first being as to the effect of the failure (which is conceded) of Stanton, the employé, to sign the bond. A provision of the bond is as follows:

"That it is essential to the validity of this bond that the employé's signature be hereunto subscribed and witnessed."

And immediately following is this:

"That no one of the above conditions or the provisions contained in this bond shall be deemed to have been waived by or on behalf of said company

unless the waiver be clearly expressed in writing, over the signature of its president and secretary, and its seal thereto affixed."

After this follows a provision which it is claimed by the defendant shows that the signature of the employé is of real importance, and not a mere formality, as follows:

"That the said employé doth hereby, for himself, his heirs, executors, and administrators, covenant and agrees to and with the said company that he will save, defend, and keep harmless the said company from and against all loss and damage of whatever nature and kind, and from all legal and other costs and expense, direct or incidental, which the said company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this bond, and without notice to him thereof), or for or by reason or in consequence of the said company having entered into the present bond."

And then follows this language:

"In witness whereof the said C. H. Stanton (the said employé) hath hereunto set his hand and seal, and the said company has caused this bond to be sealed with its corporate seal, attested by its president and its secretary, this 30th day of December, one thousand eight hundred and ninety-eight."

As this bond has never been signed by Stanton, and considering these very stringent provisions, it seems exceedingly doubtful if there could be a recovery, if this suit was on the original bond alone; but, for reasons which will be hereinafter stated, I treat this as a suit on the original bond and the renewals.

The plaintiff had filed an amendment to the declaration in this case in which it makes this allegation:

"Petitioner avers that, with the knowledge that said bond did not have thereto the signature of said Stanton, said defendant received from petitioner not only the first premium thereon, but has received from petitioner two other premiums, one for the year beginning December 1, 1899, and ending December 1, 1900, the other ending December 1, 1901, leading petitioner to believe it was secure against loss by reason of the fraud and dishonesty of said Stanton, and accepting petitioner's money for said insurance; therefore it would be a fraud if said defendant now insisted it was not bound because said Stanton had not signed said bond."

And this further allegation:

"Petitioner further avers if the signature of said Stanton is necessary to said bond in order to protect the defendant, and to enable it to hold said Stanton bound to it for any money it may be required to pay petitioner by reason of any fraudulent and dishonest act of said Stanton occasioning loss to petitioner, petitioner avers said Stanton has at all times recognized said bond, and by many acts and letters with and to petitioner recognized the existence of said bond, and had notified petitioner of its approaching termination, and the necessity of the payment of accruing premiums, and at other times sought to have it reduced in amount, etc., whereby he is estopped from denying any obligation which the giving of said bond would impose on him or his estate."

And the further allegation:

"That said bond was given, not only upon the application of petitioner, but on the solicitation of said Stanton, and the obligations defendant assumed for any fraudulent and dishonest act of said Stanton was by his consent and at his instance."

It might be that, the bond having been sent from the defendant's office in Baltimore to the Proctor Coal Company at Knoxville, the

defendant company could accept that premium, supposing that Stanton's signature would be obtained, as has been urged by counsel here; but if, as alleged in the amendment to the declaration, the defendant received premiums for the two renewals, "with the knowledge that said bond did not have thereto the signature of said Stanton," then the defendant cannot set up the absence of Stanton's signature to prevent a recovery upon the bond, if the plaintiff be otherwise entitled to recover.

The next question presented is as to the effect of the renewal of an obligation of suretyship such as this, insuring an employer against the dishonesty of an employé. It is contended by the plaintiff in this case that the effect of this original bond and the two renewals, taken together, was to create a continuous obligation. Counsel for plaintiff insist that certain language in the bond shows, and the character of the transaction indicates, that it was intended that the Proctor Coal Company should be insured against any dishonesty on the part of Stanton occurring at any time from December 1, 1898, up to December 1, 1901, discovered during such period of continuous insurance, or within six months from the expiration of such period. The opposite contention is that each renewal was a new contract of insurance; that each renewal was a separate and distinct obligation of suretyship, the renewals having embodied in them all the terms and provisions of the original bond as is expressly stated in the renewal receipts. It is then urged that, if each renewal be a new contract, this suit must fail for this reason, that it is a suit upon the original bond, and therefore an amendment setting out and declaring upon renewals would be adding new and distinct causes of action, which could not be allowed; and that, as a suit upon the original bond, it would fail because no loss was discovered within six months from the expiration of the original bond—that is, within six months from December 1, 1899.

I think the contention of counsel for defendant that these renewals are separate and distinct contracts is sound. It is urged that certain language in the bond shows that it was intended to be a continuous contract covering the period of the bond or of any subsequent renewals. The language referred to is this: "Make good and reimburse to the employer all and any pecuniary loss sustained by the employer," etc., "occurring during the continuance of this bond or any renewal thereof, and discovered during said continuance, or within six months thereafter." I am unable to agree with the argument of plaintiff as to the proper construction to be put upon this language. I think it should be construed so as to read in this way: "Occurring during the continuance of this bond or any renewal thereof, and discovered during the continuance of this bond, or during the continuance of any renewal;" that is, that the discovery must be within six months of the expiration of the original bond, or within six months of the expiration of any renewal thereof. I do not think the language is sufficient to justify the conclusion that this was a continuous contract of suretyship running through the whole period covered by the original bond and the two renewals. The correct view seems to be that each renewal is a separate and distinct contract, and such I think is the effect of the authorities on the subject. Mayor and Council of Brunswick v.

Harvey, 114 Ga. 733, 40 S. E. 754; *De Jernette v. Fidelity & Casualty Co.* (Ky.) 33 S. W. 828.

Attention is called by counsel for the plaintiff to the difference in the language of the two renewal contracts. In the first renewal the language is:

"In consideration of the sum of twenty-five dollars, the United States Fidelity & Guaranty Company hereby guarantees the fidelity of C. H. Stanton, in the sum of five thousand dollars, in favor of the Proctor Coal Company, from the 1st day of December, 1899, to the first day of December, 1900, subject to all the covenants and conditions set forth and expressed in the bond of this company No. 27,178, heretofore issued on the 1st day of December, 1898."

In the second renewal the language is:

"In consideration of the sum of twenty-five dollars, the United States Fidelity & Guaranty Company hereby continues in force bond No. 27,178 in the sum of five thousand dollars," etc.

It is claimed that the language, "hereby continues in force," gives strength to the argument that the contract was a continuous one from the beginning of the original bond to the end of the last renewal.

While there is some force in this contention, I do not think the use of this language is sufficient to change the conclusion reached that these renewals are new and distinct contracts. There is very little difference between continuing a contract and renewing it. But, besides this, it is perfectly clear that the first renewal created a new and distinct contract, and, this being true, the second renewal could not well be called a continuance of the original contract, in the sense claimed by counsel for the plaintiff.

It is urged by counsel for defendant that this case is controlled by the case of *Mayor and Council of Brunswick v. Harvey*, supra. That was a suit like this, upon a bond of fidelity insurance, and against the same company, the United States Fidelity & Guaranty Company. In that case it was held by the Supreme Court of Georgia that the suit was on the original bond, and, that being true, it could not be amended by declaring on the renewals, because under the facts there it would be adding new and distinct causes of action, and that, as the dishonesty of the official insured was not discovered within six months from the expiration of the original bond, there could be no recovery against the company.

It is earnestly contended that that case is like this in every respect. I am unable to agree with this contention. There is a marked difference between the two cases. In that case, as gathered from the opinion by the Chief Justice, the only reference in the declaration to the renewals was that the company had "renewed the said bond from year to year, and continued the same in force without intermission, \* \* \* to and through the year ending February 1, 1901." In the present case the declaration with reference to the first renewal is as follows:

"Petitioner avers that, in accordance with the terms of said bond, on December 18, 1899, the said defendant company, for and in consideration of a like premium paid to said defendant company by petitioner, renewed said original bond aforesaid, for the term of one year—that is, from December 1, 1899, to December 1, 1900—and that all of the conditions and obligations contained in the original bond were renewed and kept in force until December 1,



1900, a copy of which renewal is hereto attached, marked 'Exhibit G,' and made a part of this petition."

And again, with reference to the second renewal:

"Petitioner further avers that on the 19th day of February, 1901, said original bond was again renewed by said defendant company, continuing said bond, with all of its covenants and conditions, in force until the 1st day of December, 1901, a copy of said continuation certificate being hereto attached marked 'Exhibit H,' and made a part of this petition."

Copies of the original certificates, signed by the officers of the company, are attached to the declaration as stated in the above paragraphs.

The renewals in this case were therefore set out more carefully and elaborately than in the case referred to. The principal distinction, however, between the two cases is that in the case of Mayor and Council of Brunswick v. Harvey, 114 Ga. 733, 40 S. E. 754, the amendment sought to sue upon the renewals as adding a new and distinct liability. The amount of the bond in that case was \$15,000, and the original suit was for that amount. The amendment alleged that the default was \$54,000, and the suit, as sought to be amended, would have been for \$45,000—\$15,000 on the original bond, and \$15,000 on each of the two renewals.

Discussing the case further, in the opinion the Chief Justice says:

"The intention of the pleader when he drew the original petition was manifestly to sue upon the original bond alone. A careful reading of the petition will demonstrate this. While the petition alleged that the defalcation amounted to more than \$21,000, the prayer for judgment against the defendants was for but \$15,000 (the amount of the original bond), and the petition refers to the liability of the company as \$15,000. It did aver that the company had 'renewed the said bond from year to year, and continued the same in force without intermission \* \* \* to and through the year ending February 1, 1901'; but the context shows that the pleader regarded the renewals as merely continuations or extensions of the bond first given, and not as new and separate contracts or obligations. New counsel put in control of the case seem to have differed with counsel who filed the petition. They offered the amendment whereby it was sought to include the renewals as separate and independent contracts, and to recover \$15,000 upon each of the renewals as well as the sum of \$13,000 on the original bond; the loss being stated at more than \$54,000. This amendment was offered as amplifying the allegation that the bond had been continued from time to time and renewed from year to year. We think we have shown that the intention of the pleader was to sue on the first bond only, treating the renewals as simply extensions of that bond. We think, therefore, that the amendment was properly disallowed. If the original suit had been for \$45,000, and by mistake or accident the renewals had not been specifically declared on, but only mentioned in this general way, perhaps the original petition could have been amended by setting out the renewals and declaring on them. Inasmuch, however, as the only sum sued for was \$15,000, and the petition shows that the suit was based upon the original bond only, the allowance of the amendment offered would have been to add new and distinct causes of action, which is contrary to the laws of pleading and practice in this state and to Civ. Code [1895] § 5099."

In the case at bar the suit was originally for \$5,000, and the amendment only seeks to set out specifically the loss which occurred during the continuance of the last renewal; that is, from December 1, 1900, and up to the discovery of the loss, on the 8th of August, 1901. The amount sued for is not increased at all by the amendment. The only effort of the amendment, so far as pertinent to this particular matter,

is to segregate the items constituting the defalcation, and to set out the part embraced in and covered by the last renewal.

It is not at all clear from the language of the Chief Justice in the case referred to that if the only effort in that case had been to do what is done here, to amend by attaching the items covered by the last renewal, that the right to amend would have been denied. So that, giving that decision due weight, it is not thought to be controlling in the case now under consideration.

Another question is presented in this case by the following clause in the contract under consideration:

"That the company, upon the execution of this bond, shall not thereafter be responsible to the employer under any bond previously issued to the employer on behalf of said employé; and, upon the issuance of any bond subsequent hereto upon said employé in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company."

It is claimed that, if the court should hold that the renewals are new contracts, the effect of so holding would be to destroy the provision of the contract which gives the insured the right to discover a defalcation within six months after the termination of the bond. I do not think so. In my opinion, the whole purpose and intention of this clause is that there shall not be double responsibility on the part of the company. It is not at all inconsistent with the right to discover within six months after the expiration of the original bond or any renewal the dishonest acts of the employé, and to claim indemnity for the same. The original bond and each renewal stands for the malfeasance of the employé during the continuance of each and discovery within six months after the termination of each. The purpose of the above clause evidently is to avoid double liability on the part of the company; that it shall not be liable beyond the amount of the bond as originally given and renewed. Taking this contract altogether, this, in my opinion, is the proper construction to place upon this clause.

My conclusion is that, as the pleadings now stand, this case may proceed for the purpose of recovering from the defendant such loss as may be properly shown to have been sustained by the plaintiff by reason of the dishonest acts of Stanton during the period covered by the last renewal; that is, from December 1, 1900, up to the discovery of the alleged shortage, on August 8, 1901. An order to this effect may be taken on the demurrer.

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BOOZ v. PHILADELPHIA & L. TRANSP. CO. et al.

(Circuit Court, D. Delaware. June 11, 1903.)

No. 234.

1. SHIPPING—CHARTER—CONSTRUCTION—VALIDITY.

The complainant and the Philadelphia and Lewes Transportation Company entered into a charter party under seal by which the complainant hired a steam boat to that company for the term of six months for the hire and other considerations and on the conditions therein specified; the company covenanting, among other things, that the complainant

should "have a lien upon all of the property of said charterers, including the wharf at Lewes, Delaware," owned by the company. *Held*, on demurrer to a bill seeking to enforce a lien on the wharf, that the above quoted provision was not void for uncertainty, but, taken in connection with other provisions of the charter party, gave to the complainant an equitable lien on the wharf to secure or indemnify him against any and all defaults by the company in the performance of its duty to him under the terms thereof.

(Syllabus by the Court.)

In Equity.

Horace L. Cheyney, for complainant.

Herbert Ward, for defendant.

BRADFORD, District Judge. The bill in this case is brought by Edward D. Booz, a citizen of Maryland, to enforce an alleged lien against certain wharf property at Lewes, Delaware. The defendants have filed a general demurrer, and through their counsel at the hearing only one ground of demurrer was assigned, which was oral and as follows:

"The only ground for demurrer to be urged in this argument is that the supposed agreement for said lien is so ambiguous and uncertain as to be void and incapable of enforcement by this court."

It appears from the bill that the complainant and the Philadelphia and Lewes Transportation Company, hereinafter called the transportation company, a corporation of Delaware, and one of the defendants, entered April 23, 1901, into a certain charter party or agreement, "Exhibit A", under hand and seal, as follows:

"Charter party made this 23rd day of April, A. D. 1901, between Edward D. Booz of Baltimore City, State of Maryland, owner of the steamboat 'General J. A. Dumont' of 309 tons gross register and 195 tons net register, or thereabouts, now at the port of Baltimore, of the first part, and the Philadelphia and Lewes Transportation Company, a corporation established under the laws of the State of Delaware, charterers, of the second part;

Witnesseth, that the said owner, for the consideration hereinafter mentioned, agrees to let and the said charterers agree to hire said steamboat, together with such tackle, apparel, furniture and appurtenances belonging to the said steamboat, as per inventory attached hereto, for the term of six calendar months from the fifteenth day of May, 1901; the said steamboat to be delivered to the charterers at the port of Baltimore, fully spoked forward of wheels, and being otherwise tight, staunch, strong and in every way fitted for service; to be employed in lawful trade as the charterers or their agents shall direct, on the following conditions:

1. That the charterers shall pay for the use and hire of the said vessel, at the rate of fifteen hundred dollars (\$1,500) per calendar month, payable monthly from the fifteenth day of May, 1901, hire to continue from the time specified for terminating the charter until her delivery with clear decks to owner (unless lost) at the port of Baltimore, Maryland, and upon the further consideration that three thousand dollars (\$3,000) in non-assessable stock, at par value, of the said Philadelphia and Lewes Transportation Company be delivered to the said owner, at or before the delivery of the said boat; payment for the use and hire of the said vessel to be made in cash monthly in advance, in par funds. And in default of such payment or payments, as herein specified, or any other breach of this Charter Party, the owner shall have the faculty of withdrawing the said steamboat from the service of the charterers, without prejudice to any claim he (the owner) might otherwise have on the charterers, in pursuance of this charter.

2. And the said charterers hereby agree to assume all risk of damage or

loss from any cause whatsoever, including breakdowns, and to make all repairs necessary to keep the said steamboat in good running order during the term of this charter, and to deliver the said steamboat and the articles named in the inventory hereto attached, at the port of Baltimore, within five days after termination of this charter, free from all bills, liens or incumbrances of any nature whatsoever, except such bills, liens or incumbrances of any nature which may exist against said steamboat at the time of her delivery to the said charterers, the said vessel to be delivered in substantially the same condition as when delivered to the said charterers, reasonable wear and tear alone excepted.

3. The said charterers further agree to insure and to keep insured the said steamboat, her engines, boilers, tackle, apparel, furniture and appurtenances, as named in this Charter Party, and inventory attached, to the amount of thirty thousand dollars (\$30,000) from the fifteenth day of May, 1901, wherever the said steamboat may be located, against damage or loss arising from fire, collision, foundering, stranding, breakage of machinery, etc., and separate insurance to be effected for an amount to be hereafter agreed upon, against the bursting of boilers; the intention being that the policy shall cover full marine insurance risk, except collision, which is to be the three fourths ( $\frac{3}{4}$ ) collision clause; said policies to be effected in the name of Edward D. Booz and to be delivered to the said Edward D. Booz at or before the delivery of the said steamboat to the said charterers, and the policies to extend from the fifteenth day of May, 1901, until the expiration thereof. It being the intention, however, that the said insurance of thirty thousand dollars (\$30,000) is not understood to be the full valuation of the said steamboat in the event of loss, but that in the event of such loss, the valuation of the said steamboat is understood to be thirty five thousand dollars (\$35,000) which risk of five thousand dollars (\$5,000) over and above the insurance is assumed by the said charterers; the said thirty five thousand dollars (\$35,000) being understood as an arbitrary valuation for the purposes of this Charter Party and is not to be understood as the actual valuation of the vessel by the owner in event of any negotiations for purchase by the said charterers.

4. And it is a further condition of this Charter Party that the first month's hire, which is payable on May 15th, 1901, shall be paid as follows: One thousand dollars (\$1,000) at the signing of this Charter Party and five hundred dollars (\$500) before the said steamboat leaves the port of Baltimore.

5. It is further agreed by the charterers that they will forward monthly to the said owner, a statement from all parties having had bills or other obligations against the said steamboat during the preceding month, stating over the signatures of the said parties, that said bills or other obligations have been paid.

6. And it is further agreed that no statement of the charter price of the vessel is to be made for any cause, unless the vessel be lost, in which event the said charterers shall be severally and jointly liable with the underwriters to pay to the said owner the sum or sums named in this Charter Party the charter price to cease at the time of the happening of the said loss and the insurance to then become immediately due and payable, and for any deferred payment of the said insurance, the owner is to be allowed six per centum interest.

7. That should dispute arise between the owner and the charterers, the matter in dispute shall be referred to three persons in Baltimore, one to be appointed by each of the parties hereto, and the third by the two so chosen, their decision or any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of court, said arbitration to be submitted in ten days after written notice of complaint.

8. That the said owner shall have a lien upon all of the property of the said charterers, including the wharf at Lewes, Delaware, and the said charterers hereby covenant that they hold an undisputed and clear legal title to the said wharf, without any incumbrance whatsoever, and that they will not dispose of or incumber the said wharf during the continuance of this charter, but this clause is not intended to prevent the said charterers from improving the said property because of such incidental obligations which may be thereby incurred.

In Witness Whereof the said Philadelphia and Lewes Transportation Company, charterers, by H. E. Vanden its General Manager for that purpose duly authorized, has hereunto set the name and seal of the said corporation, and the said Edward D. Booz, owner, has hereunto set his hand and seal on the day and year first above written.

The Philadelphia & Lewes Transportation Company.  
Signed, sealed and delivered in presence of  
A. Lee. [Corporate Seal.]  
Vespasian Ellis."  
by  
H. E. Vanden.  
Edwd. D. Booz. [Seal.]

It further appears that Booz was the owner of the steamboat mentioned at the time of the execution of the above charter party or agreement; that the steamboat was duly delivered to the transportation company "in accordance with the terms of the said agreement and was retained by it thereunder" until November 15, 1901; that the said company "failed and neglected to pay all of the charter hire" to the complainant, "which became due to him under said agreement, and failed and neglected to deliver the said steamboat in substantially the same condition as when delivered to it, and at the time of the said redelivery the said steamboat was also subject to a lien for wages of crew amounting to \$181.83", which the complainant has been compelled to pay; that at the time of the re-delivery of the steamboat to the complainant by the transportation company there was due from the latter to the complainant "under said agreement the following amounts:

|   |                   |
|---|-------------------|
| 4 mos. hire from July 15, 1901, to Nov. 15, 1901, at the rate of \$1,500 per month .....                    | \$6,000 00        |
| Damage to said steamship in failing to return it in substantially the same condition as when delivered..... | 2,000 00          |
| Wages of crew .....   | 181 83            |
|   | <hr/> \$8,181 83" |

That the whole of said sum of \$8,181.83 is still due and owing to the complainant by the transportation company "under said agreement, no part of the same having been paid"; that in accordance with the provisions of said agreement the complainant had a lien upon the wharf of the transportation company at Lewes, Delaware; that, on the day and at the time when said agreement was entered into, the defendant West was president of the transportation company and had "actual notice of said contract and of the provisions therein that the plaintiff should have a lien upon the wharf of the said Philadelphia and Lewes Transportation Company at Lewes, Delaware, for the amounts which might become due under said agreement to the plaintiff." That the following judgments were obtained against the transportation company, namely, judgment by confession in the Superior Court for Sussex County, Delaware, in favor of the defendant West, July 19, 1901, for \$2,817.65; judgment by confession in the said court in favor of J. Howard Reber, trustee, October 14, 1901, for \$2,750; judgment by confession in said court in favor of J. Howard Reber, trustee, October 10, 1901, for \$2,750; and judgment recovered by John L. Conoway before a justice of the peace in Sussex County, Delaware, November 14, 1901, for \$194.03 and \$1.05 costs; that thereafter, by virtue of execution process on one or more of the above mentioned

judgments, said wharf was sold to the defendant Tunnell for \$3,300, of which amount \$205.17 was paid to Conoway on account of his judgment and costs, \$2,987.66 was paid to George H. West, and \$107.17 was paid to J. Howard Reber, trustee, these several sums aggregating the full amount of the purchase money; that the defendant Tunnell was "the purchaser of the said wharf at said sale for and on behalf of the said George H. West, who is, as plaintiff is advised, the owner of said wharf at the present time"; and that the sum of \$8,181.83 due by the transportation company to the complainant under said agreement is a lien upon the said wharf.

The vital questions in the case are, first, whether the complainant has an equitable lien upon the wharf, and if so, for what. The counsel for the demurrants contend that no such lien exists for the reason, as alleged, that the charter party or agreement is fatally uncertain in omitting to specify the moneys or duties for the non-payment or non-performance of which the complainant should have a lien. They have cited a large number of cases, including *Palmer v. Albee*, 50 Iowa, 429; *Atkins v. Van Buren School Township*, 77 Ind. 447; *Gelston & Meyenberg v. Sigmund*, 27 Md. 334; *Myers v. Forbes*, 24 Md. 598; *Church v. Noble*, 24 Ill. 292; *Gilpatrick v. Foster*, 12 Ill. 355; *Wainwright v. Straw*, 15 Vt. 215, 40 Am. Dec. 675; *Leonard v. Carter*, 16 Wis. 607; *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530; *Delashmutt v. Thomas*, 45 Md. 140; *Figs v. Culer*, 3 Starkie, 129; *Clinan v. Cook*, 1 Shoales & Lefroy, 22; *Davies v. Davies*, 36 Chan. Div. 559; *Fairplay School Township v. O'Neal*, 127 Ind. 95, 26 N. E. 686; *Sherman v. Kitsmiller*, 17 Serg. & R. 45; and *Ballou v. March*, 133 Pa. 64, 19 Atl. 304. Most, if not all, of these cases relate to patent ambiguities in contracts which it was sought specifically or otherwise to enforce; and a careful examination of them fails to disclose that they have any material bearing upon the case in hand. The propositions on which the complainant relies are that under the provisions of the charter or agreement he was given a lien upon the wharf, and other property of the transportation company unnecessary to be considered in this connection, to secure or indemnify him against any and all defaults by the transportation company in the performance of its duty to him thereunder, and that the kind and nature of such defaults are pointed out with sufficient certainty and particularity. In *Walker v. Brown*, 165 U. S. 654, 664, 17 Sup. Ct. 453, 457, 41 L. Ed. 865, some of the instances in which equitable liens arise are clearly pointed out by the court. Mr. Justice White in delivering the opinion of the court said:

"Before considering the contract itself, and the issue of fact which arises, it is necessary to fix the legal principles by which the question of equitable lien is to be determined. It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers or have notice. It is well settled, said the court in *Pinch v. Anthony*, 8 Allen, 536, "that a party may by express agreement create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that

equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation.' The subject was very fully reviewed with reference to the English and American authorities in *Ketchum v. St. Louis*, 101 U. S. 306 [25 L. Ed. 999], where the language just cited was approved, and that ruling was considered and reaffirmed, during this term, in *Fourth Street Bank v. Yardley*, 165 U. S. 634 [17 Sup. Ct. 439, 41 L. Ed. 855]. *Pomeroy* in his work on *Equity Jurisprudence* (vol. 3, par. 1235), condenses and states the general result of the authorities on the subject as follows: "The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or incumbrancers with notice. \* \* \* The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is purely an application of the maxim, equity regards as done that which ought to be done.'"

There can be no doubt that the parties to the charter party or agreement intended that the complainant should have a lien on the wharf at Lewes for some purpose; for paragraph 8 expressly provides that "the said owner shall have a lien upon \* \* \* the wharf at Lewes, Delaware." Nor can there be any doubt that the subject of the lien, so far as sought to be enforced in this suit, was designated with all requisite certainty as the wharf of the transportation company at Lewes. Further, the prohibition against any disposition or incumbrance of the wharf "during the continuance of this charter" necessarily signifies, in the absence of any allegation to the contrary, that the lien to which the wharf was subject should not be disturbed or embarrassed by any disposition or incumbrance made by the charterers during the continuance of the agreement. And it is equally clear that the lien provided for had reference to the obligations and stipulations of the contract; for in the same paragraph it is provided that "the said charterers hereby covenant that they hold an undisputed and clear legal title to the said wharf, without any incumbrance whatsoever, and that they will not dispose of or incur the said wharf during the continuance of this charter", &c. It is suggested by the counsel for the demurrants that the lien provided for might have reference to transactions other than those provided for by the agreement. But no reference to such other transactions, if any such were contemplated, is contained in the bill, nor is there any allegation by counsel of the existence of such. The charter or agreement, as a contract, is to be read as a whole in so far as it may be necessary to arrive at the true meaning of any particular clause. In the portion of the agreement preceding paragraph 8 provision is made for the payment of moneys and performance of certain duties by the transportation company with reference to which the lien in question can have proper application. The charter party, after setting forth the names of the parties, states that "the said owner, for the consideration hereinafter mentioned, agrees to let and the said charterers agree to hire the said steamboat \* \* \* to be employed in lawful trade as the charterers

or their agents shall direct, on the following conditions." The consideration and conditions referred to are contained in eight paragraphs; and it is in the last of these paragraphs, immediately preceding the attestation clause, that the lien upon the wharf is provided for. Under these circumstances, and without referring more in detail to the contents of the agreement, it is wholly inadmissible to assume that the lien mentioned therein is either a nullity or has any other purpose than to secure the complainant against loss or damage by reason of the failure of the transportation company to comply with its duties and obligations therein fully and plainly set forth. The demurrer cannot be sustained on the ground of ambiguity or uncertainty in the statement of the lien or the purpose for which it was created.

Nor can the demurrer be sustained on the ground of non-joinder of proper parties. The bill does not pray for a personal decree against the defendants, or any of them. It seeks the enforcement of an alleged equitable lien against the wharf, and sets forth that the defendant Tunnell was the purchaser of the wharf at execution sale for and on behalf of the defendant West, who is the owner of the wharf at the present time, and, further, that the defendant West was, at the time that the agreement was entered into, president of the transportation company, and had actual notice of the contract and of the provisions therein relating to a lien; and that the sum of \$8,181.83, due by the transportation company, under the agreement, is a lien upon the wharf.

The demurrer must be overruled, with costs to the plaintiff in this cause hitherto accrued. And it is ordered that the defendants plead or answer on or before the sixth day of July, 1903.

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#### MYERS v. LUZERNE COUNTY.

(Circuit Court, M. D. Pennsylvania. July 29, 1903.)

##### No. 3.

#### 1. FEDERAL COURTS—JURISDICTION—DETERMINING RIGHT TO FUND IN COURT.

A federal court has jurisdiction to determine the right to the proceeds of a judgment rendered therein which has been paid into court, as between different claimants who appear and assert their claims, regardless of their citizenship.

#### 2. ATTORNEY AND CLIENT—CONTRACTS BETWEEN—VALIDITY.

While a contract by which an attorney purchases the interest of his client in a claim in litigation is to be closely scrutinized, it is not necessarily invalid; and where it appears that the parties dealt on equal terms, that the purchase was at the solicitation of the client, and that no advantage was taken of the relationship, it will be sustained.

Sur Petition of George W. Radford to Take Money out of Court.

Levi T. Griffin, for petitioner.

James D. May, opposed.

¶ 1. Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

¶ 2. See Attorney and Client, vol. 5, Cent. Dig. § 240.



ARCHBALD, District Judge. On February 25, 1903, the plaintiff recovered a verdict in this case for \$14,750, and the present controversy is over the ownership of one-half of it, which, on account of the conflicting claims thereto, the defendant has had leave to pay into court. Ownership is asserted on the one hand by the petitioner, George W. Radford, and on the other by George W. Myers, the plaintiff's son. Both parties, though resident in Detroit, Mich., have submitted themselves to the jurisdiction of this court by petition, answer, and extended proofs going in to the entire merits, and there can be no question, under the circumstances, as to the authority of the court to determine to whom the fund belongs. *Minn. Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886; *Morgan Co. v. Texas Cent. Ry.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; *Rouse v. Letcher*, 156 U. S. 47, 15 Sup. Ct. 266, 39 L. Ed. 341; *Havens v. Pierck* (C. C. A.) 120 Fed. 244.

The money in court was recovered on a contract entered into February 22, 1895, between Elijah E. Myers, an architect of Detroit, Mich., and the county commissioners of Luzerne county, Pa., for plans for the construction of a new courthouse at Wilkes Barre. Col. Myers was to receive 5 per cent. on the cost of the building, of which \$5,000 was to be paid down, \$5,000 when modified sketches had been prepared and delivered, and \$10,000 on the delivery of complete working drawings. The rest was not to be due unless the courthouse was built, and, as it never was, it is of no significance. Col. Myers complied with his part of the contract, and was paid the first two installments of \$5,000 each; but upon delivery of the working drawings he was met with a refusal on the part of the county to pay the \$10,000 thereby due. After several ineffectual attempts to secure the money, the case was put in the hands of John T. Lenahan, a prominent attorney of Wilkes Barre, Pa., who in July, 1895, brought suit in the courts of Luzerne county. Though Mr. Lenahan expressed himself as confident of winning the case, nothing further was done until some time in 1897 or 1898, when, on account of the danger of local prejudice, application was made for a change of venue, and after a further delay of two or three years was finally allowed by the court, November 9, 1900, to the neighboring county of Columbia.

In the meantime the plaintiff, on January 2, 1896, assigned a half interest in the contract to his son, George W. Myers. It is said by Col. Myers that this was brought about by importunity, and was without consideration, except the promise of his son to assist in the prosecution of the case, which was not carried out. On the other hand, it is said by the son that he held notes of his father to the amount of \$32,500, which had been given him for securing the contract, and which he destroyed at the time of the assignment. This is denied by the father, and so far as it is necessary to the case I am prepared to find that it is not true. At the same time he was authorized to draw the first two payments for his father, out of which he retained \$6,000 without apparent demur; and it was he also who put the case in Mr. Lenahan's hands, which seems to imply some control over it. But it is not material. The assignment from his father gave him a half interest for the time, and that is all we need to know. It is by virtue of it that he makes his present claim.

The first connection that George W. Radford had with the case was as attorney for the plaintiff, Elijah E. Myers. In September, 1899, when no progress seemed to be made, Col. Myers, who had long been his client, consulted him with regard to it. Mr. Radford at once took the matter up with Mr. Lenahan, writing him numerous letters, but without result, except to learn that, as already stated, on account of local prejudice, application had been made for a change of venue. This was the condition when, on December 9, 1899, Col. Myers, to whom Mr. Radford had made several previous loans of money, applied to him for additional accommodation, and proposed to turn over his interest in the contract as collateral security. He asked for a hundred dollars, which, with that already advanced, would amount, as was figured, to over \$4,600. Col. Myers explained to Mr. Radford that one-half the contract had already been assigned to George, and it was recognized that if he held onto the assignment there would be little, if anything, coming to Col. Myers after he had settled with Radford. But it was stated by Col. Myers that the assignment was without consideration, and if he succeeded, as he hoped, in getting George to surrender it, then Radford was to account to him for that interest also, after deducting for expenses and services. The trust relation so established still continues.

So the matter stood until the next April. At that time George, who had been several times ineffectually approached by both his father and Radford, came forward with the proposition to turn over his interest to Radford on condition that the latter would go on and prosecute the suit, and account to him for one-half of what he recovered, after deducting a fee of \$1,000, which Radford was to have as attorney, and half of the necessary disbursements. This was agreed to, and a writing executed April 2, 1900, by which, on the conditions named, he assigned and surrendered his interest to Radford, to which Col. Myers, who was present, gave his assent. Subject to the duty of accounting, this vested in Radford entire control of the matter.

On April 11, 1900, nine days later, George W. Myers came to Mr. Radford's law office in Detroit, and wanted to know what he would give in cash for his interest, offering to make an absolute assignment, and step out altogether, as he expressed it. Radford told him he was satisfied with the existing arrangement, but George said he had to have money, and wanted Radford to give him \$1,000 for it. This he refused to do, and declined to make any offer, telling him that his father, as he knew, claimed he had no actual interest, and that if he paid him anything Col. Myers could subsequently question it. George insisted that his interest was worth something, which being conceded, he offered it for \$750, and when that was refused kept coming down until finally Radford agreed to take it at \$150. This was paid by check, and an assignment executed, Radford exacting a guaranty that George was the owner of the interest, and had not otherwise disposed of it, and George at the same time giving up the agreement of April 2d, which embodied the existing arrangement between them. This assignment was absolute in form, and was intended by George as a complete disposition to Radford for \$150 of the half interest derived from his father. The case turns upon the character and validity of it.

It is testified by George W. Myers that the transaction of April 2d was a loan and not a sale; that it was to be repaid when the money was collected on the contract, or, as he says at another place, when he could; and that the assignment was simply to stand as collateral security. It is further, and not very consistently, charged that it was obtained from him in its present absolute form by misrepresentation; Radford stating at the time, as it is said, that the assignment from his father of a half interest was good for nothing because of a previous assignment to him (Radford). This is so contradicted at every point by the other testimony in the case that I am convinced it is not true. At the outstart the assignment itself, which, as we have seen, is absolute in terms, would have to be reformed, and there is everything to confirm rather than disturb it or authorize a change. Not only have we the statement of Mr. Radford as to what occurred at the time, which I believe, but his testimony is sustained in part, at least, by that of Edward Widdifield, who was then a stenographer in Radford's office, and was called in to witness the paper. After he had returned again to his own room, he says that George W. Myers came out angry and swearing, and, having been asked what was the trouble, said he had got rid of the damned Wilkes Barre matter, and guessed he had got as much out of it as the old man would after Radford was through with him. George also told his sister, Florence, some time later, in the presence of his mother, that he had sold out his interest and had nothing more in it, and did not think his father would ever get anything out of it. His mother also testifies that he frequently told her he had sold out to Radford, and he said the same thing to his father soon after the occurrence. This he also repeated in February last, when the new suit brought in this court was coming up for trial. Having been told by his father that Radford wanted to see him about the contract, he replied that he had sold out the damned thing, and did not want anything more to do with it—a position he consistently maintained when Radford telephoned him the day before Col. Myers and he started for Scranton. It cannot be expected that his single and unsupported oath will prevail against the force of this combined and contradictory proof, nor that the belated interest which he manifested when he learned of the large verdict that had been recovered—stirring around to get nine \$20 gold pieces and tendering them to Mr. Radford—will do away with the effect of his previous declarations and indifference.

It is urged, however, that by the arrangement of April 2, 1900, Radford became the attorney of George W. Myers, undertaking for a contingent fee of \$1,000 to prosecute to a conclusion the pending suit, or such other as might be instituted, and that because of this relation the assignment of April 11th, even if taken as a sale, cannot be enforced. It must be confessed that the agreement referred to, to the extent specified, established the relation of attorney and client; and although it may be that the moving purpose in the mind of Radford was to secure control of the case without chance of interference, by which the other was obscured, if not lost sight of, we cannot disregard the fact that he was to account to George in the end for all that he got over and above the compensation and deductions agreed upon, wheth-

er it was large or little. Neither is it an answer to the argument to say that the claimant by the agreement is not in any event entitled to the fund, but only to an accounting by Radford out of it. Assuming it to be so, the present proceedings are sufficiently elastic to enable the court to refer the case to a master to take an account, if the claimant has otherwise established a right to it. The case, in my judgment, does not turn upon that question. Admitting all that has been said with regard to the relation between the parties, the sale to Radford is not necessarily invalid. An attorney is not prohibited from making any bargain whatever with his client, but only from taking undue advantage of him, with the burden upon him of showing that he has not. The rule is thus laid down in 3 Am. & Eng. Enc. Law (2d Ed.) 332:

"In all dealings with his client the highest degree of fairness and good faith is required of the attorney. The courts view all such transactions with suspicion, and examine them with the utmost scrutiny, and, if they present even a suggestion of unfair dealing, the burden of proof lies on the attorney to show the honesty and good faith of the transaction, and that it was entered into by his client freely and understandingly."

This is a clear and comprehensive statement of the law by recognized authority, and we do not need to go further for it. It means no more, however, after all, than, as has just been said, that the attorney is not allowed to take advantage of the relation or the confidence which it begets to the detriment of his client. His duty is to look after his client's interests, and not to bargain for them, and the temptation induced by a benefit to himself in that way is to be avoided. But it cannot be said that there is anything that calls for intervention upon that ground here. George W. Myers does not lack in business shrewdness, and he knew fully as much about the subject-matter of the bargain as did the attorney with whom he was dealing. He came to him of his own accord, determined to sell, and he finally brought down his price to the point where the other was willing to take the risk involved and buy. What was so bought and paid for was the doubtful outcome of a lawsuit which had dragged its slow length along for nearly five years. By the existing arrangement Radford was already assured of the first \$1,000 recovered and his disbursements, and George's interest was represented only by what was over and above that, and it was for that that they dealt. We must look at the case as it then stood, and not as it has now turned out. A lawsuit is always an uncertainty, and none more so perhaps at the time than this one. Nearly three years still went by before there was any result or even an approach to it. A new suit, with the aid of new counsel, having been brought in this court last January, and a speedy trial reached, the plaintiff got a verdict; but it was simply because the defendant was found to rely upon an equity, which, as is well established, cannot be asserted in an action at law in a federal court. A contemporaneous parol understanding was attempted to be set up, that the cost of the building for which Col. Myers was to furnish plans should not exceed a certain sum. This defense would have been entirely available in the state court, where the first action was brought, and with the jury sitting as chancellors, and proof being made that \$10,000 had already been paid the architect for what he had done, it is not difficult to

presage the result. Aside from this, it was open to the county also to have had the contract reformed by bill to the same effect, if able to command the required proof. It is true that it was not known at the time of the sale to Radford that this was the defense. It is only referred to to show upon what a narrow point the case finally turned. As was well said at the argument, the plaintiff won on the letter of his bond. But it was known that the case in the hands of able counsel, who continued in it to the end, had dragged along for years in the state court, and that to avoid the certain prejudice of the local jury in one county it had been transferred at last to another, where much the same prejudice against the case was likely to prevail; and no one understood better than George W. Myers, who claims that he secured the original contract from the county commissioners, what infirmities might lurk in it thereby. The most he asked for was \$1,000, but finally took \$150, and not only at the time, but after he had had abundant opportunity to think it over, expressed himself as content with his bargain. It is useless to suggest, under such circumstances, that advantage was taken of him, or that Mr. Radford profited by the confidence induced by the relation to get from him what he had. As the case has turned out, it would have been better, of course, if he had held onto his interest, but to undo the transaction upon that ground, which is really the only one there is, would be an unwarranted stretch of power.

Let an order be drawn awarding the fund to the petitioner, George W. Radford, and dismissing the claim of George W. Myers, with costs.

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**Ex parte HAGGERTY et al.**

(Circuit Court, N. D. West Virginia. August 6, 1902.)

**1. COURTS—CONTEMPT—HABEAS CORPUS.**

Where petitioners were imprisoned for violation of a strike injunction, the only question reviewable on habeas corpus to secure their discharge was whether the court had jurisdiction to grant the injunction.

**2. LABOR—INTIMIDATION OF EMPLOYÉS—STRIKES—INJUNCTION—PARTIES.**

A bill for injunction to restrain intimidation of certain employés alleged that complainant, a resident of New York, held a large mortgage on the property of a fuel company located in West Virginia, which required the latter to pay interest on the bonds secured semiannually, which it would be enabled to do only in case it derived income from the operation of its plants, and that if the plants were closed, or interfered with, injured, or destroyed, neither such interest nor the principal could be paid; that the defendants, who were residents of various states other than New York or West Virginia, were and had been unlawfully engaged in a conspiracy to prevent the mortgagor's employés from remaining in its employment; and that defendants had been congregating around the mortgagor's mines and place of business for the purpose of intimidating its employés, inducing them to strike, etc.; and prayed an injunction restraining defendants from such interference. *Held* that, since the bill prayed no relief against the mortgagor, the latter was not a necessary party thereto.

**3. SAME—FEDERAL JURISDICTION.**

Where, in a suit in the federal courts for an injunction against strikers, the court's jurisdiction depends on the residence of the parties, a party

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¶ 1. See Habeas Corpus, vol. 25, Cent. Dig. § 95.

interested in the subject-matter need not be made a party to the suit where his joinder would oust the court of jurisdiction, provided a final decree against the parties before the court, consistent with equity and good conscience, can be made.

Petition for Writ of Habeas Corpus.

John J. Coniff and A. G. Fiekeison, for petitioners.

A. B. Fleming, J. J. Davis, J. W. Davis, and Reese Blizzard, for respondents.

GOFF, Circuit Judge. On the petition of Thomas Haggerty, George Baron, and Andrew Raskawee, of the state of Pennsylvania, William Morgan, of the state of Ohio, William Blakely, of the state of Indiana, and Peter Wilson, of the state of Illinois, alleging that they were illegally restrained of their liberty by C. D. Elliott and J. W. Dudley, I directed that the writ of habeas corpus issue, returnable before me on the 5th day of August, 1902. On that day due return was made by said parties, and the petitioners were produced before me. By the return it appears that C. D. Elliott is the United States marshal for the Northern District of West Virginia, and that J. W. Dudley is the sheriff of Wood county, W. Va., and as such the jailer of that county, and that they as such officials have the custody of and detain the said petitioners by virtue of a judgment of conviction against each of them, rendered by the Hon. John J. Jackson, on the 24th day of July, 1902, he then, as District Judge for the Northern District of West Virginia, holding the Circuit Court for that district, for a contempt of the orders of that court by them and each of them theretofore committed. Such orders had been entered by that court in the equity suit of the Guaranty Trust Company of New York filed against Thomas Haggerty and others, for the purpose of restraining such defendants from entering upon and trespassing upon the lands and property of the Clarksburg Fuel Company, a corporation organized under the laws of the state of West Virginia, and doing business in that state; also to restrain them from going on the said company's tipples, tracks, and other property for the purpose of unlawfully preventing that company's employes remaining in its employment; also restraining them from assembling, congregating, or camping at or near any of the mines or places of business of that company, or the roads traveled by its employes in going to and from their work, for the purpose of preventing, by intimidation, such employes from continuing in said employment; also restraining them from unlawfully interfering with the management of that company's business, and from assembling together, and marching at or near the mines of said company, with a view of preventing such employes from working.

It appears from the record that on the filing of said bill the court issued the injunction as prayed for, and that it was duly served on the defendants, the petitioners mentioned. Afterwards the petitioners were arrested, charged with violating the terms of the injunction, and were, after due investigation of said charges by the court, found guilty of the willful infraction of the provisions of the injunction order, and sentenced for such contempt, the said Haggerty for 90 days' con-

finement, and the others for 60 days each, in the jail of Wood county, W. Va. Petitioners now insist that they should be discharged, for the reason that the court so imprisoning them was without jurisdiction of the cause mentioned, and that, therefore, its injunction orders and subsequent judgments were and now are null and void. If that contention be sustained, then the petitioners are improperly and unlawfully deprived of their liberty, and should be discharged.

I am not hearing the case of Guaranty Trust Co. v. Haggerty et al. on appeal, nor am I passing upon the weight of the evidence upon which judgments of conviction were rendered, nor any of the questions connected with the trials or the rules for contempt. Such matters can only be considered by an appellate court, and the writ of habeas corpus cannot be used as a writ of error or appeal. I am therefore to consider the question of jurisdiction alone.

It appears from the bill that the Clarksburg Fuel Company, on the 26th of September, 1901, executed a mortgage on all of its property to the Guaranty Trust Company of New York, to secure the payment of \$2,500,000, of which sum \$1,450,000 is still due and payable. It also appears that by the terms of the mortgage the whole of such indebtedness will become due and payable if default be made in the payment of the semiannual interest due on the 1st days of April and October of each year; that such trust company is the trustee named in the mortgage, and that it has loaned the Clarksburg Fuel Company \$950,000, to secure the payment of which such company has deposited with the trust company 2,000 of the bonds of the fuel company of the aggregate value of \$2,000,000. It is alleged in the bill that the Clarksburg Fuel Company will not be able to pay, from its earnings or otherwise, the interest accruing on its bonds, except by means of the income it may derive from the operations of its several coal mining plants, and that if such plants be closed or interfered with, or injured or destroyed, such interest cannot be paid, nor can the principal of said bonds be discharged. It is also alleged that the petitioners, defendants in said suit, have come among the employés of said company for the purpose of endeavoring to create dissatisfaction among them and to induce them to engage in the "strike" prevailing among the coal miners of the country, especially in the states of Pennsylvania and West Virginia; that in furtherance of that object they have had a large number of persons to march in procession near the mines of the Clarksburg Fuel Company; that they have held or addressed meetings, making inflammatory speeches intended to excite dislike and hatred of all persons owning and operating coal mines, especially of the officers and managers of the Clarksburg Fuel Company; that they have caused strikers and others to march in large numbers along the county roads, by the residences of the miners working in the mines of that company, and by and along the paths they travel in going to and from work, and have threatened them, intimidated them, and fired shots from guns and pistols, until said employés have become frightened and are afraid to work; that employés of such coal company have been intimidated, assaulted, and threatened because they would not cease working for it, and this in an effort to carry out the designs and conspiracies set on foot by such defendants; that they

have established camps very near said mines for the purpose of coercing said employes and forcing them to join in such strike; that, if the defendants and their associates be permitted to continue their threats, marching, camps, and intimidation, all or a large portion of said employes may be induced to cease labor, and that thereby irreparable injury will result to said company and the complainant; that because of all such actions by defendants the Clarksburg Fuel Company cannot successfully prosecute its business; that the Guaranty Trust Company is without remedy at law, and can only find protection in equity. To this bill no appearance had been entered, nor any answer or demurrer filed, nor plea tendered, at the time the judgments of conviction against the petitioners were pronounced. The allegations of the bill were not denied, and so far as the proceedings in equity were concerned they stood uncontroverted when such judgments were entered.

The claim of want of jurisdiction in the court rendering the judgments complained of is based on the fact that the Clarksburg Fuel Company was not made a party to said suit. Is such insistence supported by the law and the practice in cases of this character?

Counsel for petitioners admit that a mortgagee may maintain such suit as said complainant has instituted, but they insist that the mortgagor must of necessity be made a party thereto. Ordinarily that is true. Is it always so? Are there circumstances under which it is not necessary?

On the bill mentioned, the salient points of which I have referred to, can a decree be entered that will dispose of the questions raised, without the presence of the Clarksburg Fuel Company? I think that it can. Has the complainant any controversy with that company, and is any relief asked for from it, or is any decree prayed for against the defendants the granting of which by the court requires any disclosure from that company, in order that full and complete justice may be done? In other words, is there equity in the bill as it was drawn and filed? I find that there is. The Guaranty Trust Company, a citizen of the state of New York, is entitled to be heard in the Circuit Court of the United States for the Northern District of West Virginia concerning property located in that district, as to which it has interests amounting to over \$1,000,000, which it alleges certain citizens of West Virginia and of states other than New York are conspiring together for the purpose of injuring and destroying. Has not the Guaranty Trust Company such an interest in this property, as trustee and as creditor, as will require a court of equity to entertain its complaint, under the circumstances set forth in this bill, even though its mortgagor is not a party? What claim does the Guaranty Company set up that in any way antagonizes the interests of the Clarksburg Fuel Company? If the fuel company were in collusion with the defendants, or if it denied the validity of the mortgage, or if there were a question as to the title to its property, or its right to mine and sell coal and employ men for that purpose, or if the suit were a foreclosure proceeding, then it would not only be a proper, but an indispensable, party. The cases cited by counsel for petitioners (*Consolidated Water Co. v. Babcock* [C. C.] 76 Fed. 243; *Consolidated*



Water Co. v. City of San Diego et al. [C. C.] 84 Fed. 369; Id., 93 Fed. 849, 35 C. C. A. 631) have had my careful scrutiny, and with **the reasoning and conclusions** therein respectively reached I am, under the circumstances of those cases, in full accord. They differ radically in some particulars from the case we are now considering, although in some respects they are quite similar to it.

In the first case mentioned, the point relied on is that it was held that, where a person is so related to the subject-matter of the suit that his rights must unavoidably be passed upon by the court in reaching a decree, he is a necessary party. That point I have already in effect considered and disposed of, as I understand its application to cases such as this. The second case mentioned decides that, in a suit by a mortgagee of a water company, the object of which is to enjoin the enforcement of an ordinance of a city fixing water rates, the mortgagor is a necessary party. Surely that must be so, and surely the questions raised by the bill in the case of Guaranty Trust Company of New York v. Thomas Haggerty et al. are not identical with those existing in the case just cited, in which the city, through its municipal authorities, had established an ordinance fixing the rate at which water should be furnished, such ordinance being alleged to be null and void upon the ground that the rates therein established were so unreasonably low as to amount to the taking of the mortgaged property without just compensation. In that case the water company was directly and not incidentally affected by any decree which could be rendered therein. The last case cited is in fact the same as the second, only that it was heard on appeal, and is distinguished from the one we now consider, as I have already stated.

The case of Board of Trustees of Oberlin College v. Blair et al. (C. C.) 70 Fed. 414, is also relied on by the petitioners, especially the reference therein to the forty-seventh rule of equity practice in the courts of the United States. Said rule was held not applicable to that controversy, for the reason that the parties the court was asked to dismiss from that suit were held under the facts there existing to be indispensable, and in their absence the court would on that account have been prevented from entering a decree disposing of the rights of all the claimants to the property in dispute. If there can be a case in which it is proper to proceed to decree in the absence of a party, who could with propriety have been made a defendant but for the fact that thereby the jurisdiction of the court would have been ousted, it is this case, and the discretion which I must presume the court exercised was I think wisely resorted to, as under all the circumstances the fuel company was a dispensable party, the bill seeking no relief against it, and its presence before the court not being essential to the equitable disposition of the questions raised, so far as the other defendants were concerned.

The limitation of the jurisdiction of the courts of the United States by the citizenship and nonresidence of the parties has caused a modification of the general rule of the English chancery practice relating to who shall be made parties to equity suits. A discussion of the modifications now existing is not deemed essential in this cause, further than to say that in cases like this if the joinder of a party, inter-

ested though he be in the subject-matter of the controversy, would oust the jurisdiction of the court, he need not be made a party, provided a final decree between the parties before the court can be made, and not be inconsistent with equity and good conscience.

With the questions of fact passed upon by Judge Jackson I have in this proceeding nothing to do. It is only with questions of practice that I now deal, with matters relating to our Code of Procedure, by which the rule of our conduct is regulated, which in fact constitutes the law, of which it has been beautifully said that "there is nothing so high as to be beyond the reach of its power, and nothing so low as to be beneath its care."

Having jurisdiction of the cause, and finding that its orders had been intentionally disregarded, the court exercised that right inherent to all judicial tribunals to punish those so in contempt. Not to do so would result in inextricable confusion, in riot, disorder, bloodshed, and anarchy. Such punishment is expressly authorized by Act Cong. March 2, 1831, c. 99, 4 Stat. 487, which limits the power of the United States Circuit and District Courts to punish for contempt to cases of misbehavior in the presence of or near to the court, to the misbehavior of any of the officers of said courts in their official transactions, and disobedience or resistance to any lawful writ, process, order, rule, decree, or command of the court. Since courts have been organized this power has been found necessary to the due administration of justice. Its existence has been declared by the Supreme Court of the United States, and its absolute necessity has been announced by that court of last resort. *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. To the judgment of that great tribunal provided for by the Constitution of our fathers all must submit, and to it we all confidently turn for advice and direction, bowing to its authority, even though its decree causes us to pass under the rod of its discipline and justice.

I find it to be my duty to remand the petitioners to the custody of the marshal and of the jailer, and an order to that effect will be entered.

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In re LAMBERTON.

(District Court, W. D. Arkansas, Ft. Smith Division. July 28, 1903.)

1. WITNESSES—PRIVILEGE—INFORMATION OBTAINED BY INTERNAL REVENUE OFFICER.

A collector or deputy collector of internal revenue cannot be compelled by a court to disclose as a witness before the court or a grand jury the names of persons in whose places of business special tax stamps are posted, or the places in which the same are posted; his information on the subject being obtained in an official capacity, and primarily from the records of his office, copies of which he is forbidden to furnish by the lawful regulations of the Treasury Department, as against public policy.

Habeas Corpus. Hearing on writ and return.

James K. Barnes, U. S. Dist. Atty., for petitioner.

F. A. Youmans, Asst. U. S. Dist. Atty.

ROGERS, District Judge. F. M. Lamberton, deputy internal revenue collector, on the 24th of July, 1903, filed a petition in this court for a writ of habeas corpus, alleging that he is unjustly and illegally deprived of his liberty and retained in custody of D. A. Eoff, sheriff of the county of Boone, in the state of Arkansas, under and by virtue of an order of the circuit court of said county. The writ was issued and served, and on the 27th inst. said sheriff filed his response, in which he sets forth that he holds the petitioner under an order of the Boone circuit court at its regular term, 1903, and makes a copy of the proceedings in that court a part of his return, and adds that "the respondent is ready in all things to obey the order of this court." The copy of the proceedings of the Boone circuit court is as follows:

State of Arkansas, Plaintiff, v. F. M. Lamberton, Defendant.  
Contempt of Court.

On this day comes into open court the grand jury of this, Boone county, Arkansas, and by said grand jury it is made known to the court that F. M. Lamberton, a deputy collector of internal revenue for district of Arkansas, had been regularly summoned to testify before said grand jury, and that the following questions were asked the said F. M. Lamberton, to which he replied in words as follows: "Q. 1. Have you seen any one within the past twelve months sell any whisky in Boone county, Arkansas? If so, state the name of the party or parties so selling. A. I have not seen any one so selling in Boone county, Arkansas, that did not have state and county license. Q. 2. State, as a citizen, if you have seen in Harrison, Arkansas, within the past twelve months, any United States retail liquor license, or any permit from the government of the United States, posted in a conspicuous place, to sell liquor. A. I have seen retail liquor dealers' special tax stamps posted in conspicuous places in the town of Harrison within the last twelve months. Q. 3. You state you have. State the house and its owner, if you know it, and the owner of the license or permit. A. I have never seen the special tax stamps in Harrison except while acting in an official capacity, and I therefore refuse to state to whom they belonged or in whose house they were posted. Q. 4. If you know of your own knowledge, outside of referring to official records, and in an unofficial way, of any sales of liquor, or any person or persons being engaged in the traffic, so state, and also name of the parties. A. I do not have any such knowledge, except what I have obtained in an official capacity. Q. 5. Did you ever visit the house of Mrs. Cromwell, in Lead Hill, Arkansas, and did you see there such a United States license, or permit to sell liquor, posted in a conspicuous place, within the past year? A. I have been at her house within the past year, but always in an official capacity. I therefore refuse to state if I have seen such license posted there. Q. 6. Have you seen in any drug store in Boone county, Arkansas, any such license or permit posted in a conspicuous place? A. I have seen a retail liquor dealer's special tax stamp in a drug store in Boone county, Arkansas, but I saw it while visiting the same in an official capacity, and I therefore cannot state in whose house or whose stamp it was."

To this response of the sheriff, petitioner has filed his demurrer.

It will be seen that the only question involved is as to whether or not the Boone circuit court had the jurisdiction, power, and authority to imprison the petitioner for the refusal to answer questions 3, 4, 5, and 6, supra. So far as the precise questions involved are concerned, I have not been cited to, nor been able to find, any direct authority. So far as the principle involved is concerned, there is a conflict of authorities. If the principle involved presented an original question, I should feel constrained to remand the prisoner to the custody of the

sheriff. Reluctantly, I have reached the conclusion that he must be discharged. The information which the state seeks in this case is to enable it to punish its own citizens for the violation of its own laws. The information is within the knowledge of the petitioner, who is the deputy internal revenue collector, and was acquired by him while in the discharge of his official duties. It was within the scope of his official duties that he should know the very facts, the disclosure of which by him is sought. He does not decline to answer because of any reason personal to himself, but because he is directed by his superior officers not to do so. He cannot, of course, justify his refusal under instructions which his superiors had no power or authority to make. This raises the question as to whether his superiors have such power, and, if so, whether it has been exercised by making regulations prohibiting the disclosures sought. If this power exists, it must be found in the statutes. If it has been exercised, it must be found in the regulations made in pursuance thereof by those having power to make them.

Rev. St. § 3244 [U. S. Comp. St. 1901, p. 2096] requires that all retail liquor dealers shall pay a special tax. Rev. St. § 3238 [U. S. Comp. St. 1901, p. 2093], requires that this special tax shall be paid by stamps denoting the tax.

Rev. St. § 3240 [U. S. Comp. St. 1901, p. 2093], provides that:

"Each collector of internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid."

Rev. St. § 3239 [U. S. Comp. St. 1901, p. 2093], provides that:

"Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax; and any person who shall, through negligence, fail to so place and keep said stamps shall be liable to a penalty equal to the special tax for which his business rendered him liable, and the costs of prosecution; but in no case shall said penalty be less than ten dollars. And where the failure to comply with the foregoing provision of law shall be through willful neglect or refusal, then the penalty shall be double the amount above prescribed. \* \* \*"

Rev. St. § 3164 [U. S. Comp. St. 1901, p. 2057], requires every internal revenue collector "to report within ten days to the district-attorney of the district in which any fine, penalty, or forfeiture may be incurred for the violation of any law of the United States relating to the revenue, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, and which may come to his knowledge from time to time, stating the provisions of the law believed to be violated and on which a reliance may be had for condemnation or conviction, \* \* \*"; and upon failure to do so he forfeits his right to any compensation, benefit, or allowance.

Rev. St. § 3169 [U. S. Comp. St. 1901, p. 2059], inflicts the penalty of dismissal from office, and a fine of not less than one or more than five thousand dollars, and imprisonment not less than six months or more than three years, upon any revenue officer who negligently or dishonestly permits any violation of the law by any other person.

The reading of these statutes will make it clear that one of the duties imposed upon a deputy internal revenue collector is to see to it that retail liquor dealers shall place and keep conspicuously in their establishments or places of business stamps denoting the payment of said special tax (section 3239), and that the failure of the person who paid the special tax to comply with this provision of the statute subjects him to a penalty. It is therefore manifest that the information obtained by the internal revenue collector, and which he was required by the Boone circuit court to disclose, was information clearly within the scope of his official duties, and within the sections of the statute to which I have referred, and tend to show what is required of the internal revenue collector, as well as, in a measure, to indicate the public policy of the United States.

Rev. St. § 251 [U. S. Comp. St. 1901, p. 138], provides:

"The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss; he shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing. \* \* \*

Rev. St. § 321 [U. S. Comp. St. 1901, p. 186], provides that:

"The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue. \* \* \*

In pursuance of section 251, under date April 15, 1898, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated certain regulations for the government of the collectors of internal revenue, as follows:

"All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby prohibited from giving out any special tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to subpoenas duces tecum or otherwise. Whenever such subpoenas shall have been served upon them, they will appear in court and answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy, and not to be permitted. As to any other records than those relating to special-tax payers,

collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies are desired for the use of parties to a suit, whether in a state court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely: In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary of the Treasury requesting the same. Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy."

John T. Boske, Sheriff of Kenton Co., Ky., v. D. M. Comingore, 177 U. S. 460, 20 Sup. Ct. 701, 44 L. Ed. 846.

No doubt can be entertained as to the power of the Secretary of the Treasury, or of the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, to promulgate this order, the validity of which is upheld in the above case. It will be seen, by a careful reading of this regulation of the Treasury Department, that it does not cover precisely the questions to which answers are sought in this case. It related to the giving of information within the knowledge of the internal revenue collector of Kentucky, and found in the records of his office; and all of the cases, so far as I have been able to find, related to information contained in the records of the office of the internal revenue collector. In *re* Huttman (D. C.) 70 Fed. 699; In *re* Weeks (D. C.) 82 Fed. 729; In *re* Comingore (D. C.) 96 Fed. 552, affirmed in *Boske v. Comingore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846. Opposed to the views expressed in the above opinion is the case of *In re Hirsh* (C. C.) 74 Fed. 928.

While the precise question involved in this case is not decided in any of these cases, I have been unable to distinguish between the principle decided and the principle involved in the case at bar. The very fact that the retail liquor dealer's stamp was required to be posted by the persons buying, in their establishment or place of business, came to the knowledge of the revenue collector by reason of the person buying it making application therefor; and the issuance of it, and the record made of it was contained within the files and records of the collector's office. Having obtained this information in that way, the collector or his deputy, as will be seen by an examination of the section of the statute above referred to, is required to proceed to the place where these stamps are required to be put up, in order that they may see whether they are posted as required by section 3239, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2093]. But for such knowledge on the part of the collector or his deputy, neither the one nor the other, in all probability, would have visited the place where these special-tax stamps are required to be posted. The information, therefore, acquired by the deputy revenue collector in the beginning, is traceable to the records of the collector's office. It has been distinctly held, in the case of *Boske v. Comingore*, *supra*, that the officers in charge of these records cannot be compelled to disclose their contents. It

would be a manifest invasion of the principle decided if the court should hold to the letter of the law, and decide that the internal revenue collector cannot be required to produce his records, or disclose what they contain, but at the same time disregard the reason, and hold that he can be compelled to disclose what he has discovered in the discharge of his duties as the result of information contained in the records. If the one is privileged, clearly the other is. It would therefore seem that the principle involved in the case at bar cannot be fairly distinguished from the Comingore Case.

The result necessarily is that the defendant must be discharged.

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MORSE et al. v. ST. PAUL FIRE & MARINE INS. CO.

(Circuit Court, D. Maine. July 30, 1903.)

No. 131.

1. MARINE INSURANCE—SEAWORTHINESS—VERDICT—NEW TRIAL—WEIGHT OF EVIDENCE.

Where, in an action on a policy for the loss of a vessel, it was contradicted that the vessel was old and had never been repaired throughout, and after loss two witnesses who were uncontradicted testified that they made an examination by boring through her waterways, through the ends of the beams, and at some points into the timbers from the mainmast to the foremast, and that no sound wood was found, but only mud and dirty wood, a verdict finding that the vessel was seaworthy was set aside.

2. NEW TRIAL—VERDICT AGAINST EVIDENCE.

The rules which prevail in the federal courts with reference to setting aside verdicts of juries on the ground that they are against the evidence, or the weight of the evidence, commented on, explained, and applied.

A. Nathan Williams, for plaintiffs.

Charles E. & Arthur S. Littlefield, for defendant.

PUTNAM, Circuit Judge. This is the same suit in which an opinion was given orally on May 25, 1903. 122 Fed. 748. The case went to trial before a jury, and the plaintiffs recovered a verdict.

As stated in the previous opinion, the suit is on certain policies of marine insurance on a cargo not owned by the owners of the vessel which the cargo shipped, for a voyage from Calais, Me., to Philadelphia. The only defense submitted to the jury was that the vessel was unseaworthy at the time the risk was to commence, and the defendant now moves to have the verdict set aside on the ground that it was against the weight of evidence.

The evidence was, for the most part, conflicting; and many of the circumstances brought to the attention of the jury by one side and the other, and which could not be and were not disputed, led also to conflicting inferences. The defendant attacks the credit of the principal witness for the plaintiffs; but, although he was contradicted on some points by other witnesses, and failed to absolutely clear up certain other points, yet the circumstances are such, taken together, that we would not be justified in saying that the jury might not have given him full credit, so far as his integrity was concerned, and accepted his statements in the main. Indeed, this witness made on the court a favorable impression, rather than the reverse.

In this connection it will be well to sum up some expressions and rulings made by the presiding judge on previous motions of the same character as that now before us. In *Daisley v. Dun* (C. C.) 107 Fed. 218, we declined to set aside a verdict with reference to an award of damages; stating that, although we were of the impression that we would not have awarded so large an amount as was given by the jury, yet, after full consideration, we were conscious that our mind wavered. We concluded, therefore, that the court would not be justified in interfering with the verdict. In the same case, reported under the style of *Daisley v. Douglass* (C. C.) 119 Fed. 485, we entered an order diminishing the amount of the verdict; but this was under circumstances which enabled us to make what was substantially a mathematical computation showing that the damages allowed were necessarily excessive. In *Boudrot v. Cochrane Chemical Co.* (C. C.) 110 Fed. 919, we held that we might set aside a verdict even though the question was one of conflicting evidence, and we carefully reviewed the authorities in that regard. The verdict was set aside, but on the ground that the evidence of one witness in a certain particular, whose testimony as to that particular was not questioned by either party, necessarily contradicted the plaintiff's theory of his case as presented by his pleadings and supported by him on the stand. In *Kelley v. Cunard S. S. Co.* (C. C.) 120 Fed. 536, we declined to interfere with the verdict, observing "that the question which arises between the almost absolute improbability of the plaintiff's case from the defendant's point of view, and the somewhat like improbability of the defendant's case from the plaintiff's point of view, is one to be solved by a jury, and not by a judge presiding at a common-law trial, either before or after verdict." If, in the case at bar, we were compelled to pass between the proofs and the inferences on the one side and the other which contradict each other, we would be left as we were in *Kelley v. Cunard S. S. Co.*; but we think there is one particular in which the evidence for the defendant was uncontroverted, and which puts the case beyond doubt. This conclusion we reach notwithstanding, to our personal observation, the jurors who rendered this verdict were intelligent, attentive, and evidently anxious to reach a proper conclusion. They surely were not governed by prejudice, but we think in the particular referred to they must have failed to understand the proper application of the law to the evidence.

Each of the cases cited received a practical solution according to the peculiar circumstances, without developing any general statement to guide the court on motions of the kind at bar. In the federal courts, questions of setting aside verdicts are necessarily determined by a single judge, without any opportunity of appealing from his decisions. Therefore, unless the presiding judge is exceedingly careful in his determinations of motions of the kind at bar, he may almost indefinitely obstruct justice and prevent final disposition of a suit, because there is no relief against his rulings if they are erroneous. Therefore in the federal courts the reluctance to disturb verdicts is so great that it has sometimes led to the formulating of extreme rules. For example, on the question of negligence, it was said in *Warner v. Baltimore & Ohio Railroad Co.*, 168 U. S. 339, 348, 18 Sup. Ct. 68, 42 L. Ed. 491,



497, that the question is not one of law for the court when "the record is not one where the facts inferable from the evidence were such that all reasonable men would of necessity draw the same conclusion from them." Perhaps so extreme a statement would not answer practical uses, but it illustrates the reluctance of which we speak. It is safe, however, to be guided by the expression repeated in *Pythias Knights' Supreme Lodge v. Beck*, 181 U. S. 49, 52, 21 Sup. Ct. 532, to the effect that cases are not lightly taken from the jury. No other proposition can be safely formulated into a general rule. Without undertaking to sum up the various phases of the case as presented pro and con by the proofs offered by the plaintiffs and by the defendant, it is enough to say that we could not disturb the verdict except for one fact, which we will explain. There is no question that the vessel was of considerable age—what might be called an old vessel; and the case fails to show that she had ever received any thorough general overhauling, or that she had such frequent renewals as may well maintain craft which have navigated the ocean for many years in a seaworthy condition. Apparently, she had been left in this respect to live her life. On the other hand, it was shown that she carried safely all her cargoes until that in question—sometimes ice and sometimes kiln-dried hard pine finished lumber. She must have been reasonably dry to have done this. Nevertheless, without occasional thorough overhauling, the time would certainly come when her ability to transport cargoes of any kind would cease, so that the presumption arising from such prior existing ability could not negative a case which in other respects may have furnished clear proofs against her.

In the present instance she made her run along the coast of Maine from Calais to Rockland, and after leaving Rockland she put into Port Clyde, in the town of St. George, also in Maine. These runs were short—such as might be made by a vessel of her class, under favorable circumstances, in the better portion of a single day, or certainly two days. The weather was stormy, but the evidence is clear that it was not of an extraordinary character for the season; that is, November, 1901, in which month the voyage was commenced. All the proofs of a positive character show that at Port Clyde she was in an unseaworthy condition, and leaking rapidly. Therefore the presumption arising from the manner in which she had previously transported her cargoes was met. Nevertheless neither of these facts, placing, as they do, one inference against another, would justify a court in setting aside a verdict of a jury based on them, whichever way it might have been rendered.

In the January and February previous to the beginning of the voyage to which this suit relates, she had received at New York considerable repairs, which had been rendered necessary by her going ashore on the Tuckernuck Shoals. So far as the exterior of the vessel was concerned, these repairs seem to have been very general. The boss calker who did that part of them testified for the plaintiffs; and, while the defendant criticises because they produced only him, and not the carpenter, yet, as he testified, and as is well known, a proper calking of the vessel required that her seams and wood ends should be examined, and the planking made sound, if not sound. The testimony

of the boss calker as to this was of such a character that the court would not be justified in disturbing a verdict based on the statements made by him that the planking of the vessel was in good condition. If the record stopped there, the court would be powerless to act favorably on the defendant's motion. But it does not.

The result of the voyage out of which this suit arose was a stranding of the vessel on shoals in New York Bay, her subsequent raising, and a salvage sale of the cargo and hull. Pending this, or soon after, the defendant caused the vessel to be examined by two gentlemen whose depositions were read to the jury, and whose competency was not questioned. It is claimed that, as they were employed by the underwriters, their testimony should be weighed as that of interested and prejudiced witnesses. This may be conceded, so far as they undertook to give mere impressions of the appearance of what they found, or so far as they are contradicted by the proofs offered by the plaintiffs. Therefore, for present purposes, we reject all that portion of their testimony, and thus obviate the objection of the plaintiffs, so far as it maintains that their evidence was a matter of theory against fact, and that the court could not properly say the jury was wrong in accepting the latter. What we rest on is the evidence furnished by them of particular facts of a fundamental and serious character, which the plaintiffs made no attempt to contradict by proofs, the force of which, also, they have not undertaken to obviate at bar or in the brief which has been submitted to us. One of these witnesses testified as follows:

"We bored down through the waterways, striking into the ends of the lower deck beams, and, if I remember aright, into some of the timbers, too, and we couldn't find any sound wood at all—nothing but mud and rotten wood."

The other one testified as follows:

"And we bored down in the waterway till we struck the end of the beams, and we couldn't get any sound wood whatever. It was a kind of mud and dirty wood, that came right up into the barrel of the auger, and stayed there. They bored from the mainmast to the foremast."

We lay aside the characterization of what came up out of the borings, but we are compelled to accept the uncontradicted statements that the vessel was bored through her waterways, through the ends of the beams, and, at some points into the timbers, from the mainmast to the foremast, and that no sound wood was found. We also observe on the fact that the record is absolutely lacking in evidence of any other borings made either by the plaintiffs or the defendant, and we cannot reject the well-known consideration that this is the ordinary and most efficient way of determining whether or not a vessel is sound.

Notwithstanding the observations we made with reference to the jury, it will be borne in mind that this evidence, as the result of boring the vessel, stands uncontradicted and unexplained; and, whatever may be the condition of her planking, a vessel with a frame such as was exhibited by these borings cannot be regarded as seaworthy. Consequently either the jury failed to properly note this evidence, or to connect it with the definition of seaworthiness as given by us. Public

policy requires that courts shall not encourage the navigation of the ocean by craft in such a condition as this evidence shows this vessel to have been in. Therefore, on the strength of the testimony of these two witnesses, disclosing a fact which speaks for itself, and overlaps all the other facts in the record, and which stands absolutely uncontradicted, either directly, indirectly, or by inference, we are compelled to grant the defendant's motion. Of course, it is to be understood that our decision is based strictly on the case as it now stands, so that on a new trial the proofs which now control us may be directly met or avoided in such manner as to put this particular portion of it beyond the reach of the court on another motion for a new trial, if one is made, precisely as all the rest of it is beyond such control on the present record.

The verdict is set aside, and a new trial ordered.

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In re LUCIUS.

In re CAWTHON-COLEMAN CO.

(District Court, S. D. Alabama. July 25, 1903.)

No. 158.

1. BANKRUPTS—EXEMPTION—LIENS ON EXEMPT PROPERTY—DETERMINATION—JURISDICTION.

Under Bankrupt Act July 1, 1898, c. 541, § 2, subd. 11, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], providing that the bankrupt court shall have jurisdiction to determine all claims of bankrupts to their exemption, etc., the court of bankruptcy had jurisdiction to determine a creditor's claim to an equitable lien on money of the bankrupt collected by the trustee, and claimed by the bankrupt as exempt.

In Bankruptcy.

William J. Johnson and Pillans, Hanaw & Pillans, for bankrupt.  
Davis & Gunn and R. H. & N. R. Clarke, for petitioners.

TOULMIN, District Judge. The real question in this case is not whether the bankrupt court has jurisdiction to pass on the validity of a lien on property exempt by law to the bankrupt, as contended by counsel for the bankrupt and the trustee, but is whether it has jurisdiction to determine the claim of the bankrupt to an exemption of certain money in the hands of the trustee collected by him as assets of the bankrupt estate, on which the petitioner alleges it has an equitable lien, and to which it is entitled. The bankrupt law allows to the bankrupt the exemption provided by the law of the state, but the manner in which the exemption is to be claimed, set apart, and awarded is regulated by the bankrupt law. The voluntary bankrupt must claim the exemption to which he is entitled at the time of filing his petition. Bankrupt Act July 1, 1898, c. 541, § 6, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]; In re Friedrich, 100 Fed. 284, 40 C. C. A. 378.

This bankrupt claimed at the time of filing his petition \$2,000 as exempt—\$1,000 in certain specific articles of personal property, and \$1,000 as real property exemption in money due by London & Lancashire Fire Insurance Company, the money now in dispute.

The trustee has collected the money from the insurance company, and holds it subject to the order of the court. The bankrupt's claim of exemption has not been determined and set apart to him as required by the bankrupt law. A dispute has arisen as to his right to exempt the money in question. The court of bankruptcy is given jurisdiction to determine the right to and the valuation of the property claimed. The bankrupt court has jurisdiction to determine all claims of bankrupts to their exemption, and has exclusive jurisdiction to determine such claims. Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 11, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]; *In re Turnbull* (D. C.) 106 Fed. 667; *In re Mayer*, 108 Fed. 599, 47 C. C. A. 512; *McGahan v. Anderson*, 113 Fed. 115, 51 C. C. A. 92; *In re Butler* (D. C.) 120 Fed. 100; *Cannon v. Dexter Broom & Mattress Co.* (C. C. A.) 120 Fed. 657; *In re Boyd* (D. C.) 120 Fed. 999; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814.

Upon the determination of this question the court formally sets apart to the bankrupts and segregates from the estate that which the state law exempts. When the exemption has been set apart by the trustee, and he has reported it to the court for its approval, and when approved and the bankrupt's right to it has been finally determined, the property embraced in the exemption ceases to be a part of the assets to be administered by the court in connection with the bankrupt's estate, and the bankrupt court would have no jurisdiction to entertain a plenary suit in equity by a creditor of the bankrupt to reach and subject to his claim such exempt property. *Woodruff v. Cheeves*, 105 Fed. 601, 44 C. C. A. 631; *In re Wells* (D. C.) 105 Fed. 762. The bankrupt's right to exemption is not to any specific personal property or money, but to \$1,000 in value, to be selected, etc. His right to the money in question has never been determined, awarded, and set apart to him as exempt.

I am unable to perceive the applicability of the case of *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, to this case. That case was an independent suit brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to the proceedings in bankruptcy. The court held that the bankrupt court had no jurisdiction of the suit, and said that controversies not strictly or properly a part of the proceedings in bankruptcy did not come within the jurisdiction of the bankrupt court. Under the recent amendment of the bankrupt act, the courts of bankruptcy have jurisdiction in such cases concurrent with the state courts. However, the decision in *Bardes v. Bank* did not involve the claim or right of a bankrupt to an exemption.

In the case of *Lockwood v. Exchange Bank*, 23 Sup. Ct. 751, 47 L. Ed. —, the question was whether the bankrupt court had jurisdiction to protect or enforce against the bankrupt's exemption the rights of creditors not having a judgment or other lien, whose obligation to pay contained a written waiver of the homestead exemption authorized and prescribed by the law of the state. The Supreme Court held that the title to the property of a bankrupt exempted by state laws remained in the bankrupt, and did not pass to his representative in bankruptcy; that although the bankrupt act conferred upon the court of

bankruptcy authority to control exempt property, in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, it affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act declares shall not pass from the bankrupt or become part of the bankrupt assets. The Supreme Court was there dealing with property prescribed as exempt by the laws of the state, which had been applied for and set apart to the bankrupt, and which the creditor was seeking to subject to the payment of his debt, on the ground that the bankrupt had waived his right of exemption to it. The statute of the state prescribed the proceeding to be taken to accomplish the end sought. The decision of the Supreme Court was, in effect, that the court of bankruptcy had no jurisdiction in such proceedings to enforce the rights of the unsecured creditor.

In the case in hand the state law has not prescribed the specific money or any specific personal property to be exempt, and this specific money has not been set apart to the bankrupt as exempt, and has not been defined as that upon which the law operates as exempt. And here the creditor is secured—has a lien on the particular money. That the petitioner has such lien is hardly controverted.

The court of bankruptcy has jurisdiction of the petition of a creditor of the bankrupt, asserting a lien on the proceeds of a sale of property belonging to the bankrupt which have come into the hands of the trustee, or on money collected by him as assets of the bankrupt estate. Such a petition is a bankrupt proceeding, under the bankrupt act. *Hutchinson, Trustee, v. Otis, Wilcox & Co.*, 23 Sup. Ct. 778, 47 L. Ed. —. As in the case of a mortgage, the court of bankruptcy will entertain the summary petition of the mortgagee for the sale of the property, and ascertain and liquidate the lien by its sale, and apply the proceeds in payment, etc. *Brandenburg on Bankruptcy*, § 1092.

My opinion is that this court has jurisdiction to determine the matter in dispute, and that on the facts reported by the referee his decision is correct. Hence I concur in and affirm the same.

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#### BORGFELDT v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,666.

#### 1. CUSTOMS DUTIES — CLASSIFICATION — TOYS — OPTICAL INSTRUMENTS—MAGIC LANTERNS.

Certain slightly made magic lanterns, not sufficiently substantial to be used by mature persons, but rather by children as toys, are dutiable as "toys," under paragraph 321, Schedule N, § 1, c. 349, Tariff Act Aug. 27, 1894, 28 Stat. 533, and not as "optical instruments," under paragraph 98, Schedule B, § 1, of said act (28 Stat. 514).

Appeal by the importers, George Borgfeldt & Co., from a decision of the Board of General Appraisers affirming the assessment of duty by the collector of customs on certain merchandise imported at the port of New York.

The merchandise in question consists of cheap magic lanterns, which were assessed for duty under the provision in paragraph 98, Schedule B, § 1, c. 349, Tariff Act Aug. 27, 1894, 28 Stat. 514, for "optical instruments." The importers contended that they were dutiable under the provision in paragraph 321, Schedule N, § 1, of said act (28 Stat. 533), for "toys \* \* \* not specially provided for." The board made the finding that the articles are both toys and optical instruments, and held that "as paragraph 321 contains, and paragraph 98 does not contain, the clause 'not specially provided for in this act,' \* \* \* the provision for 'optical instruments' under paragraph 98 is the more specific." The importers' contention was accordingly overruled.

Comstock & Brown, for importers.  
Harry P. Disbecker, Asst. U. S. Atty.

WHEELER, District Judge. These are small, slightly made magic lanterns. They do not appear to be substantial enough to be considered optical instruments, for mature persons, under paragraph 98, Schedule B, § 1, c. 349, of the act of August 27, 1894 (28 Stat. 514), where they were assessed, but rather to be toys for children, under paragraph 321, Schedule N, § 1, c. 349 (28 Stat. 533).

Decision reversed.

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#### THE C. W. COWLES.

(District Court, N. D. Iowa, E. D. July 22, 1903).

##### 1. ADMIRALTY—EARNINGS OF VESSEL WHILE IN CUSTODY OF MARSHAL.

Earnings made by a vessel after her seizure by the marshal on process, and between that date and the date of her sale, under an agreement by which the marshal, with the approval of the court, permitted her use by a charterer in carrying out contracts previously entered into by him, on his giving security for her return, stand on the same footing as though they had been made by the use of the vessel by the marshal himself, and are to be paid into court, to be applied on the claim of the libellant.

In Admiralty. On question of right to money earned by vessel since date of seizure.

Husted & Michel, for libelants.  
R. W. Stewart, for respondent.

SHIRAS, District Judge. On the 5th day of May, 1903, the steamboat C. W. Cowles was seized by the marshal of this court upon a warrant issued on the libel filed by the Empire Coal Company. At that time the boat was owned by the Valley Navigation Company, but was being operated by one George Winans, under a charter which expires by its terms May 15, 1903. At the date of the seizure the steamboat was engaged in towing logs down the Mississippi river, principally, if not wholly, for the use of the Standard Lumber Company, of Dubuque, Iowa. The charterer, George Winans, and the Standard Lumber Company were desirous of having the boat used in bringing down the logs pending the proceedings taken in court to secure a sale of the steamboat, and to that end they applied to the marshal for leave to use the boat for the purpose named, and with

the approval of the court the marshal permitted the use of the steamer by the charterer, upon security being given to the marshal for the safe return of the boat to the Ice Harbor in Dubuque. The boat was sold under decree of the court on July 11th to the Standard Lumber Company. During the time the boat was used by the charterer after May 5th, she earned a certain sum of money, and the question at issue is, whether this sum should be paid by George Winans into court for the benefit of the libelant, or whether it should be paid to the owner of the boat, to wit, the Valley Navigation Company. It will be borne in mind that the boat was not released from the warrant of seizure, nor taken from the possession of the marshal, by virtue of a stipulation or bond filed by the owner under the rules of admiralty. The use of the boat was arranged for through an agreement made with the marshal, security being given him to protect him from loss in case the boat was burned, sunk, or otherwise destroyed, or in case the boat was not properly brought back to Dubuque in time for the sale on the day advertised. If for any reason the boat was not returned in good condition, the libelants would have looked to the marshal and his official bond for recompense for any loss caused them by the destruction or nonreturn of the boat, while the marshal would have relied on the bond given him by the parties using the boat for his reimbursement. The rule, therefore, that when a vessel is released from a warrant of arrest by a stipulation or bond filed by the claimant or owner, the earnings of the vessel will belong to the owner, is not applicable to the situation arising in this case. It was not the intent or purpose of the parties that the boat should be released from the warrant of seizure, or be taken from the custody of the marshal, or that the bonds given him should stand in place of the boat for the use and benefit of the creditors. The expectation was that the boat would be sold under the warrant of seizure, but for the benefit and accommodation of the charterer and the Standard Lumber Company, and to prevent possible claims arising from a failure to carry out the towing contracts made by the charterer, the marshal was willing to permit the boat to be used up to the day fixed for the sale thereof; security being given him to protect him from loss. Under these circumstances, it cannot be claimed by the owner or the charterer that the boat was in fact released from possession and control of the marshal. The use made of the boat by the charterer was under and by virtue of the agreement made with the marshal, and not by virtue of any contract between the owner and the charterer. The situation is not other nor different from what it would have been if the marshal himself, at the request of the Standard Lumber Company, had hired Capt. Winans and his crew, and with their aid had brought down the logs that were in fact rafted by the boat. If the marshal, by such use of the steamer, had earned several hundred dollars, he certainly could not retain the money for his own use, but it would clearly be his duty to return the same, as part of the proceeds realized from the property in his possession; as much so as if the money had come from a sale of some portion of the attached property. The money in dispute was earned from the use of the boat after it had passed into the custody

of the marshal. The use of the boat was secured by virtue of a contract or agreement entered into with the marshal, and the libelants have the right to insist that the amount of earnings resulting from the use of the boat while in the care of the marshal should be paid into court for their benefit. The owner of the boat has the right to insist that the sums earned by the use of the boat shall not be retained by the marshal or by the charterer, but its rights and equities are fully met by requiring the earnings of the boat to be used for the benefit of the owner in the payment of the debts of the owner due to the libelants.

In the written argument filed on behalf of the respondent, it is claimed that of the \$732 in dispute the sum of \$132 was in fact earned before the 5th day of May, 1903, when the warrant of seizure was served. In the written stipulation filed by the respondent George Winans, and dated July 11, 1903, it is stated that since May 5, 1903, the steamer has earned \$732. These statements seem to be inconsistent. Any money actually earned before the 5th day of May would be payable to the owner of the boat. The libelants are entitled only to the money earned after the seizure of the vessel, and by virtue of the use of the boat under the contract with the marshal.

I presume counsel can agree upon the facts in this particular, and upon the proper order to be entered under the foregoing opinion.

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#### HOLLAND GULF STEAMSHIPPING CO. v. HAGAR.

(District Court, E. D. Pennsylvania. July 20, 1903.)

##### No. 57.

#### 1. SHIPPING—DEMURRAGE—SETTLEMENT OF CLAIMS.

The acceptance by a master of demurrage under protest leaves the settlement of the amount rightfully due an open question, and the owner is entitled to urge his claim in accordance with his own views, without regard to the grounds of the master's protest.

#### 2. SAME—TIME FOR LOADING—EXCLUSION OF HOLIDAYS.

The Pennsylvania statute relating to holidays and half holidays does not make them obligatory, and where it is not shown that the stevedores engaged in loading a vessel refused to work on Saturday afternoons because of the statute such half days are not to be excluded in computing demurrage.

In Admiralty. Suit against charterer for demurrage.

Convers & Kirlin, for libellant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. Early in February, 1900, Barker & McCall, the Philadelphia agents of the libellant, entered into

¶ 1. General principles of demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

¶ 2. Quick despatch, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 342.



an agreement whereby the respondent chartered the Dutch steamship *Wilhelmina*, of 2791 tons net register, for a voyage from Philadelphia to Vladivostok. Among other items of the charter party, it was provided as follows:

"Steamer to be loaded and stowed at charterer's risk and expense. \* \* \* Twenty weather working days, viz., Sundays, holidays, and bad weather days, excepted, allowed for loading. \* \* \* Lay days for loading not to commence to count before March 1, 1900. \* \* \* Demurrage, if any, 4d per net register ton per day (or \$226.37). \* \* \* Stowage of deck load to be approved by Lloyd's surveyor."

The ship arrived in Philadelphia late in February, and was tendered to the respondent on March 1st. It is agreed, however, that the lay days did not begin to run until March 2d, and also that the loading was not finished until April 9th. The respondent did not deny that demurrage to some amount had accrued, and paid the master the stipulated rate for six and a half days. The libelant's present claim is for five days additional, and to this the respondent sets up two defenses: First, that a full settlement was made by the master on a basis of six and a half days only; and, second, that a due allowance for half holidays and for bad weather shows the claim to be unfounded.

The first defense is not supported by the evidence. There is no doubt that the ship's agents, Barker & McCall, rendered bills to the respondent for six and a half days' demurrage, or \$1,472.15, and that the master accepted this sum before the vessel sailed. It may be, also, that the master intended to acquiesce in the respondent's contention concerning the allowance of half holidays; and if he had attempted to make a settlement in full on this basis, and had formally discharged the respondent from further liability for demurrage, the question suggested by the libelant would arise, whether the master had exceeded his authority in surrendering part of a valid claim without consideration and without communicating with his owners. But he made no such settlement. No doubt he took the money for six and a half days' demurrage, but it is clear that he did not intend to receive it as payment in full of the libelant's claim; for on March 31st he made a formal protest before a notary concerning what he regarded as the improper stowage of the ship, and also "against all delays in consequence of misunderstanding as to commencement of lay days with respect to the question of demurrage." This was followed by another protest on April 9th "against settlement of demurrage upon basis of lay days not commencing before March 1, 1900 (as expressed in charter party), as this condition was not agreed to by owners. The acceptance of charterer's (W. F. Hagar & Co.) settlement is therefore received under protest, and is but a temporary arrangement made without prejudice to the owners' rights in the premises, in accordance with which final settlement is subsequently to be made." Notice of both these protests was duly received by the respondent. It seems clear to me, therefore, that, while the master's expressed reasons for protesting are not the reasons now advanced by the libelant in support of its claim, the result of the master's action (no matter what may have influenced him) was to leave the settlement of demurrage an open question, upon which the libelant was therefore at liberty to urge its own

views, as is now being done, without regard to the views that the master may have previously entertained.

This brings me to the second defense, viz., that in any event the proper demurrage has already been allowed and paid for. I have considered the evidence on this point, and am of opinion that the following table, prepared by libelant's counsel, correctly states the facts, and establishes the validity of the claim:

| Date.<br>1903.                | Lay<br>Days. | Bad Weather<br>Days. | Demur-<br>rage.<br>Days. |
|-------------------------------|--------------|----------------------|--------------------------|
| Thursday, March 1 .....       | .....        | 1                    | .....                    |
| Friday, March 2 .....         | 1            | .....                | .....                    |
| Saturday, March 3 .....       | 1            | .....                | .....                    |
| Sunday, March 4 .....         | .....        | .....                | .....                    |
| Monday, March 5 .....         | 1            | .....                | .....                    |
| Tuesday, March 6 .....        | .....        | 1                    | .....                    |
| Wednesday, March 7 .....      | 1            | .....                | .....                    |
| Thursday, March 8 .....       | 1            | .....                | .....                    |
| Friday, March 9 .....         | 1            | .....                | .....                    |
| Saturday, March 10 .....      | 1            | .....                | .....                    |
| Sunday, March 11 .....        | .....        | .....                | .....                    |
| Monday, March 12 .....        | 1            | .....                | .....                    |
| Tuesday, March 13 .....       | 1            | .....                | .....                    |
| Wednesday, March 14 .....     | 1            | .....                | .....                    |
| Thursday, March 15 .....      | .....        | 1                    | .....                    |
| Friday, March 16 .....        | ½            | ½                    | .....                    |
| Saturday, March 17 .....      | 1            | .....                | .....                    |
| Sunday, March 18 .....        | .....        | .....                | .....                    |
| Monday, March 19 .....        | 1            | .....                | .....                    |
| Tuesday, March 20 .....       | 1            | .....                | .....                    |
| Wednesday, March 21 .....     | 1            | .....                | .....                    |
| Thursday, March 22 .....      | 1            | .....                | .....                    |
| Friday, March 23 .....        | 1            | .....                | .....                    |
| Saturday, March 24 .....      | 1            | .....                | .....                    |
| Sunday, March 25 .....        | .....        | .....                | .....                    |
| Monday, March 26 .....        | .....        | 1                    | .....                    |
| Tuesday, March 27 .....       | 1            | .....                | .....                    |
| Wednesday, March 28 .....     | 1            | .....                | .....                    |
| Thursday, March 29 .....      | ½            | .....                | ½                        |
| Friday, March 30 .....        | .....        | .....                | 1                        |
| Saturday, March 31 .....      | .....        | .....                | 1                        |
| Sunday, April 1 .....         | .....        | .....                | 1                        |
| Monday, April 2 .....         | .....        | .....                | 1                        |
| Tuesday, April 3 .....        | .....        | .....                | 1                        |
| Wednesday, April 4 .....      | .....        | .....                | 1                        |
| Thursday, April 5 .....       | .....        | .....                | 1                        |
| Friday, April 6 .....         | .....        | .....                | 1                        |
| Saturday, April 7 .....       | .....        | .....                | 1                        |
| Sunday, April 8 .....         | .....        | .....                | 1                        |
| Monday, April 9 .....         | .....        | .....                | 1                        |
| Total lay days .....          | 20           | 4½                   |                          |
| Total demurrage days .....    |              |                      | 11½                      |
| Demurrage days paid .....     |              |                      | 6½                       |
| Demurrage remaining due ..... |              |                      | 5 days.                  |

The respondent's contention that Saturday afternoon is a half holiday, both by the custom of the port and by the Pennsylvania statute of 1893, has not been made good. The statute does not oblige men

to be idle on Saturday afternoon, and there is no evidence that in this particular case the stevedores refused to work because of the state law on this subject. *Uren v. Hagar* (D. C.) 95 Fed. 493. If it be the custom of the port to treat this part of Saturday as a half holiday, so that all persons concerned are bound to take notice of that fact, I can only say that the custom was not proved by evidence of the proper quantity and quality. Neither is there any evidence establishing a custom to except the day of clearing (April 9th) from the count of demurrage days, even if the testimony did not show that this day was largely occupied by the charterers in stowing the deck load to the approval of Lloyd's surveyor, as they were bound to do. The only allusion to a custom concerning the day of clearing is found in a letter written by Barker & McCall to the respondent in July, 1901, more than a year after the transaction now in controversy, and I think it is not necessary to discuss the legal proposition that this letter is incompetent, both as hearsay and as the declaration of an agent made after the agency had apparently come to an end.

The libellant is entitled to a decree for five days' demurrage, with costs.

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JOHN DONAT & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 21, 1900.)

No. 2,982.

1. CUSTOMS DUTIES—PRACTICE—FAILURE TO PRODUCE EVIDENCE BEFORE THE BOARD OF GENERAL APPRAISERS.

The importers, in a protest case pending before the Board of General Appraisers, having failed, after due notice, to introduce the evidence necessary to sustain their contention, the board thereupon overruled the protest, and the importers appealed to the Circuit Court. *Held*, that the decision of the board should be affirmed, though it appeared that the contention of the importers was correct.

Appeal by the importers, John Donat & Co., from a decision of the Board of General Appraisers affirming the assessment of duty by the collector of customs at the port of New York on imported merchandise.

Howard T. Walden, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question were sheaves of wheat, which were assessed for duty at 25 per cent. ad valorem, under the provisions of paragraph 251, Schedule G, § 1, c. 11, Act July 24, 1897, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650], as "natural flowers of all kinds, preserved or fresh, suitable for decorative purposes." Such merchandise has been admitted free under paragraph 566, Free List, § 2, of said act, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684] as "grasses and fibers: \* \* \* and all other textile grasses or fibrous vegetable substances, not dressed or manufactured in any manner," under the decision of Judge Wheeler in *U. S. v. Richard* (C. C.) 99 Fed. 262. It appears, however, that in this case, while the importers protested against the assessment of duty by the collector,

and asked for a continuance in order to be heard, they did not appear at the adjourned hearing, that no samples of the merchandise were introduced by them, and that no evidence was introduced to show that they were identical with the merchandise passed upon by Judge Wheeler. In these circumstances, the importers must suffer the penalty of their failure to appear. This question is directly covered by the decision of the Circuit Court of Appeals in *U. S. v. China & Japan Trading Company*, 18 C. C. A. 335, 71 Fed. 864, where the court says:

"The whole scheme of the customs administrative act would be defeated, if the importer who complains of the action of the collector can obtain a review of that action by the Circuit Court without first resorting to the Board of General Appraisers, and obtaining its decision upon the facts and the law of the case."

The decision of the Board of Appraisers is affirmed.

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ANGLO-AMERICAN LAND MORTGAGE & AGENCY CO., Limited, v.  
CHESHIRE PROVIDENT INSTITUTION.

(Circuit Court, C. D. New Hampshire. July 27, 1903.)

No. 453.

1. CORPORATIONS—DISSOLUTION—EFFECT OF STATUTORY INSOLVENCY PROCEEDINGS.

Judicial proceedings on petition of the bank commissioners under Pub. St. N. H. 1891, c. 162, for winding up a banking corporation, in which an assignee is appointed in whom the title to all its property vests, do not operate to dissolve the corporation at once, so as to preclude the rendition of a judgment against it by a federal court.

2. FEDERAL COURTS—ACTION AGAINST CORPORATIONS—EFFECT OF STATUTORY INSOLVENCY PROCEEDINGS.

The vesting of the property and assets of a corporation, by virtue of a state statute, in a trustee or assignee appointed by a state court in proceedings for the purpose, does not place such property and assets in custodia legis in such sense as to prevent a federal court from entertaining an action and rendering a judgment against the corporation, whatever may be the proper proceeding for its enforcement.

At Law. Trial to the court by stipulation.

Omar Powell and Sargent & Niles, for plaintiff.

Batchelder & Faulkner and J. M. Mitchell, for defendant.

PUTNAM, Circuit Judge. This case is submitted to be tried before the court without a jury, on a stipulation conforming to the statutes of the United States with reference thereto. The liability of the defendant has been ascertained, and the amount thereof fixed, and the case is ripe for judgment, unless it be for the matters explained in this opinion.

After this suit was commenced, namely, on March 14, 1899, by a decree of the Supreme Judicial Court of the state of New Hampshire on petition of the bank commissioners for that state, under the pro-

¶ 1. See *Banks and Banking*, vol. 6, Cent. Dig. § 170.

¶ 2. Jurisdiction of federal courts as affected by possession of the subject-matter, see note to *Adams v. Mercantile Trust Co.*, 15 C. C. A. 6.

visions of chapter 162 of the Public Statutes of 1891, Alfred T. Batchelder was duly appointed and qualified assignee of the defendant corporation, and thereupon all its property and assets were transferred to and vested in Mr. Batchelder as such assignee, and still so remain, to be converted into money, and distributed according to the future decrees of the state court in accordance with the statute referred to. Subsequently the Supreme Judicial Court appointed a commissioner in accordance with the statute named to examine and allow the claims against defendant corporation of its depositors and other creditors, and that commissioner is still acting under that appointment. It is claimed that the decree and appointment dissolved the defendant corporation, so that no judgment can be rendered against it; and it is further claimed that the case comes within the ordinary rule by virtue of which adverse proceedings cannot be taken against assets in the hands of receivers appointed by a judicial tribunal, except with the consent of the tribunal making the appointment.

Prior to the commencement of this suit, on applications of the commissioners in accordance with the provisions of the statute of New Hampshire referred to, the Supreme Judicial Court issued its injunction restraining the defendant corporation from receiving and paying out deposits; and again, subsequent to the commencement of this suit, the same court issued a general injunction restraining all creditors from instituting, or further prosecuting, any actions at law against it. These injunctions, however, are not properly pleaded in the case; and, even if they were, the orders of the Supreme Judicial Court so far as they are concerned, were *coram non judice* with reference to the plaintiff, a nonresident of the state of New Hampshire. Moreover, the injunctions are futile under the well-known rule which prohibits such injunctions against proceedings in the federal courts, and also because they are purely incident to the main questions which we are asked to consider, and stand or fall with it.

Nothing can be found in the statutes of New Hampshire which declares a dissolution of this corporation. On the other hand, the statutes, which have long existed, and which are now found in Pub. St. 1891, c. 148, § 18, like similar statutes in nearly all the states, if not in all of them, continue the corporate existence, for the purpose of prosecuting and defending suits, beyond the forfeiture or termination of the charter for a period not yet expired. Section 19 also contains a provision that the repeal of a charter shall not impair a liability previously incurred; and, although this is ineffectual, either one way or the other, in the federal courts (*Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705), yet it illustrates the character of the legislation of New Hampshire in the aspects to which we have referred.

Neither is there anything in the decisions of the Supreme Judicial Court of New Hampshire which supplements the statutes to the effect that this corporation has been dissolved. What the court has constantly said is that it is "practically dissolved," which, of course, is a direct implication that it is not dissolved as a matter of law. The court, however, has made this clear by stating that corporations in the condition of the one at bar still "have legal existence and the usual officers," though "only for the purpose of carrying into effect the ob-

jects of the assignment." So long as it has a legal existence, that, on well-settled rules, is sufficient for the federal courts, whatever qualifications the local courts may attach thereto for the purposes of a peculiar local policy. This corporation is in a condition analogous to that of a national bank which has gone into the hands of a receiver appointed by the Comptroller of the Currency. *Chemical Bank v. Hartford Deposit Company*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595. Its condition is expressed by the quaint, but effective, language of Mr. Justice Barrows with reference to a corporation organized under the laws of the state of New York whose assets were in process of distribution under a statutory system like that of New Hampshire, as follows:

"Like the apocalyptic church in Sardis, when its existence was recognized, and it was addressed in the language of reproof by the apostle, though in some sort it may be said to be dead, 'it has a name to live'; and, for the furtherance of justice, it is best to 'strengthen the things that remain that are ready to die.'" *Hunt v. Columbian Insurance Company*, 55 Me. 290, 296, 92 Am. Dec. 592.

It is clear that the defendant corporation has not been dissolved. There is no obstacle arising out of its statutory condition to prevent judgment being rendered against it.

As to the other proposition of the defendant, the condition is not analogous to the status where claims are sought to be maintained against assets in the hands of a receiver appointed by a chancery court under the general rules of equity procedure. The property of the defendant corporation is not in custodia legis in any such sense. The title is vested in a statutory trustee, and the condition is the same as that relative to the assets of any individual or corporation which have passed to a trustee selected by the Legislature or by the decree of a court, whether he be so named or designated as assignee or receiver. Judgment may be rendered in the federal tribunals as against an administrator or executor of an insolvent estate of a deceased person, notwithstanding provisions of local statutes as to the method of procedure with reference thereto. We are not now required to determine whether or not execution can issue, or whether the judgment, if rendered, can be enforced against the assets of the corporation in any way except by listing it as a debt proved before the commissioner. Probably, in this respect, the case stands as would a suit against an executor or administrator of the estate of a deceased person, or against a national bank after it has passed into the hands of a receiver. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 402, 20 L. Ed. 840. However, for the present, we are only required to reserve the question of what shall be done with the judgment when entered.

The plaintiff has submitted to us certain propositions with reference to interest. We find no question concerning the same made by the defendant. Therefore the amount of the judgment will be as stated in the stipulation between the parties dated May 28, 1903, and filed at a time not shown by the record before us.

It is ordered that a judgment for plaintiff shall be entered for the amount of principal and interest, as agreed by stipulation dated on May 28, 1903, with costs; that no execution issue therefor until fur-

ther order; and that either party has to and including August 7, 1903, to file a draft bill of exceptions, and to and including August 14, 1903, to file corrections thereof, all the same to be presented to the presiding judge on or before August 17, 1903.

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GULF BAG CO. v. SUTTNER et al.  
(Circuit Court, N. D. California. July 27, 1903.)  
No. 13,412.

1. STRIKES—INJUNCTION—INTIMIDATION.

Where, in a suit to restrain certain strikers from intimidating plaintiff's employes, it appeared from the affidavits that defendants and others assembled about complainant's factory and applied to complainant's employes vile epithets and other unseemly language, threatened, and in a few instances made actual personal assaults on, such employes, in order to prevent their continuance at work, while defendants' denials consisted merely of denials of the acts of violence, but did not deny defendants' presence when such acts were committed, a preliminary injunction issued should be continued until the case could be heard on its merits.

H. B. Montague and Houghton & Houghton, for complainant.  
H. W. Hutton and Bert Schlesinger, for defendants.

BEATTY, District Judge. The complainant alleges the existence of the San Francisco Labor Council of Federated Trades, of which defendants Benham and Zant are respectively president and secretary; that its objects are to compel the employers of labor to employ only union laborers; that the Cotton Bag Workers' Union, No. 10,648, is a union association of which defendants Hanback and Tiedemann are respectively president and secretary, and some of whose members worked for complainant, and quit complainant's service on June 8, 1903; that all of defendants have conspired and combined to injure complainant's business, unless it shall employ only the members of such union; that on and after the 8th day of June, 1903, defendants assembled in large numbers about complainant's premises, and by unlawful threats, intimidations, and other unlawful means so intimidated complainant's employes as to prevent them from working. There are numerous affidavits attached to the complaint showing various unlawful acts by defendants, consisting of the application to complainant's employes of vile epithets and language, of threats against them, and in a few instances of actual personal assaults. Upon such showing a restraining order was issued, and the question now is whether it shall be continued until the case can be heard upon its merits.

By their affidavits the defendants specifically deny every unlawful act, the use of every threat, of every vile epithet or language charged to have been done or used by them, and they allege, as is the rule in such cases, "that the principal object of their union is, by mutual arrangements with the employers of its members, to secure satisfactory rates of wages, and to improve the efficiency of its members, and that it does not approve or tolerate violence for any purpose." There is no doubt that all the written stated objects in their records of or-

ganization are worthy and commendable, but the question is not as to the objects of their organization, stated or otherwise; it is what they do. While, as stated, defendants deny the commission of any unlawful acts, there are many admissions of their presence about complainant's premises about the times charged; but they say they were there only for the purpose of peaceably persuading others not to work for, and to quit the service of, complainant—there is one admission of the use of epithets, but not by any of the defendants. Ida Banchemo says:

"It is true that some people in the vicinity called some of the employes of the Gulf Bag Company, they having about eight at work during the week above mentioned, 'scabs,' but it is untrue that any of the defendants herein ever called any one 'scab.' We have called the Gulf Bag Company 'scab,' which is a fact, but we or either of us have not told any of the present employes of the Gulf Bag Company that they would be done up, or that we would have it in for them. All that was done in our behalf was to use peaceable persuasion, and tell said people and request others not to take our places," etc.

There is no doubt that some of the defendants were there, and it is charged that at times the numbers were great.

The law does give the right of peaceable persuasion. It is the abuse of this right which leads to all the trouble. In their desire to succeed they too often go in great numbers. Among them are generally some who are lawless and reckless of rights or consequences. They do that which the conservative and better classes do not approve of, and the general result is that the conscious power of great numbers leads along from one act to another, to the usual end that violence and abuse are resorted to when advice and persuasion fail. But it must be understood that when any assemble in numbers for some object they must be held responsible for what their associates do, whether they approve of or advise it or not.

We have, then, upon one side the specific charge of lawlessness; upon the other, the specific denial thereof. It seems improbable that complainant would make the showing that it has, without any substantial facts as a basis. On the contrary, it is seldom that any defendants or others admit the error of their ways. There are, however, established facts corroborating the showing made by complainant. It is not in doubt that disagreement existed between complainant and its employes, and that the latter quit work; that some of such employes and some of their friends, after the strike, collected in the vicinity of complainant's works, and at least interviewed other employes, and that this occurred during several successive days; that one man at least—Jensen—was violently assaulted with a bludgeon and knocked down in that vicinity by somebody; that there is fair evidence of other assaults, there and at other places, upon the employes who continued to work; that it had grown so dangerous that the police officers found their presence necessary to preserve the peace. Objection was made to the use of a certified copy of a police officer's official report to his chief. It bears upon the issues, and bears the evidence of truth. The truth is what we want, and it will not be excluded for merely technical reasons, but it may be added that the result reached does not at all depend upon this report.



One individual case may be referred to. It is charged that defendant Suttner was especially vile in his conduct and in his use of language toward a female operative, Agnes Fallon. He denies it all, and that he was present at the time charged, but her statements are so confirmed by others that I prefer believing them to his denials.

Fortunately, in this case, no extremely serious results, such as we are growing somewhat accustomed to, followed. It may have been the interposition of the timely restraining order, but of the fact that unlawful acts were done the whole record of the case is convincing. It was an effort on the part of defendants to force higher wages for their associates by unlawful interference with the rights of others to labor who were not associated with them. All laboring people fully understand that whenever they please, and for any cause, they have the right to quit work, whether as individuals or as organizations. They must also understand that all men, whether associated with them or not, have equal rights with them in the laboring world. The right to labor, or to cease it, must be as free to all as it is to water to seek its level. This government is one of liberty under the law, and its people are free men; neither will tolerate the attempt of any to enforce assumed rights by crushing the inalienable rights of others. Until all recognize and obey that law the contest must and will go on.

I think, in the interest of peace and law, this restraining order should be continued. It is complained that it is too comprehensive in that it includes the members of both associations hereinbefore named. There is no question that the Cotton Bag Workers' Union is interested, for the striking employes of complainant were members thereof, and defendant Hanback, who is president of this union, says in his affidavit that the president and secretary of the other associations interceded in this matter to procure better wages for these employes. As these organizations work largely through their officers, it is not extravagant to conclude that both organizations took more or less interest in this contest.

Moreover, this restraining order does not deprive any one of any right, nor require of him any wrong. It only requires that no wrong shall be committed, that no right shall be infringed. The order can do no harm, even if not clearly and absolutely justified, but I think the facts justify it, and, as it was made, so it is continued.

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IN RE BUSBY.

(District Court, M. D. Pennsylvania. July 30, 1903.)

No 206

**1 BANKRUPTCY—PREFERENCE—SURRENDER—FOUR MONTHS' LIMIT.**

Under the bankruptcy act as it stood prior to the amendment of 1903, it did not matter when the preference, required by the act to be surrendered by the creditor to enable him to come in on the rest of the estate, was given, provided the debtor was insolvent at the time; the four months' limit applying only to the question whether it could be avoided by the trustee.

**2. SAME—SECURED DEBT.**

At the time a debt is created the creditor has the right to dictate the terms under which he will part with his money or property, and may therefore demand that he shall first be secured to such an extent as satisfies him; and with this the bankruptcy act does not interfere. Where, therefore, at the inception of a loan at bank, a life insurance policy was assigned as security, the creditor was only required to account for and credit its value.

**3. SAME—PREFERENCE—COLLATERAL SECURITY FOR A PRE-EXISTING DEBT.**

But where, later on, at a time when the debtor was clearly insolvent, on demand for additional security, certain shares of stock were put up by the debtor as collateral, being pledged as they were to secure a pre-existing debt, the transaction was a preference, which must be given up before any of the notes held by the bank could be proved.

In Bankruptcy. Exceptions to report of referee.

John B. McPherson, for exceptions.

C. J. De Lone, for preferred creditor.

ARCHBALD, District Judge. At the time a debt is created the creditor has the right to dictate the terms on which he will part with his money or property, and may therefore demand that he shall first be secured to such an extent as satisfies him. With this the bankruptcy law does not undertake to interfere, the creditor being allowed to retain without question whatever advantage he has acquired thereby. Bankr. Act, § 57, cls. e, h (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]). But, when a debt is once contracted, payment on account, or the transfer of property for the purpose of better securing it, constitutes a preference if the debtor is insolvent at the time, and the result will be to enable the creditor to obtain a greater percentage of his claim than others of the same class. Section 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. This, in case of the subsequent bankruptcy of the debtor, the law does not allow to go unchallenged. The creditor so preferred must surrender the preference if he desires to participate in the rest of the bankrupt's estate. Section 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]. And if the preference was given within four months of the proceedings in bankruptcy, and the creditor had reason to believe that a preference was intended, the trustee may bring action and recover it back. Section 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. As the law stood at the time the present controversy arose, it did not matter when the preference was given, provided the debtor was insolvent. It had to be surrendered to enable the creditor to come in, the four-months limit applying only to the question whether it could be avoided by the trustee. In *re Jones*, 4 Am. Bankr. Rep. 563, 110 Fed. 736; In *re Abraham Steers Lumber Co.* (D. C.) 110 Fed. 738; *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. This has now been changed by the amendatory act of February 5, 1903, c. 487, 32 Stat. 797; but whether the spirit of the law is as well preserved thereby is a question.

The facts are not in serious controversy. In August, 1899, Charles H. Busby, the bankrupt, obtained the discount at the Hanover Savings Fund Association of several notes, assigning at the time as collateral security therefor a life insurance policy of \$3,000. These notes were

indorsed or signed as co-maker and surety by S. L. Johns, and they were renewed and continued in this form down to the time of bankruptcy. How much they amounted to in the beginning is not shown. The money was used in Mr. Busby's business, and they may have varied. But, at all events, on August 8, 1901, a note of \$2,000, at four months, with Mr. Busby as maker and Mr. Johns as surety, formed a part of the line of discounts allowed by the bank. This note became due December 8th, but lay over unattended to until January 20, 1902. At that time Mr. Busby's paper amounted to about \$18,000 or \$20,000, and the bank examiner, who was there, demanded that he should pay off some of the loans or give additional security. Mr. Busby thereupon put up, as collateral for the \$2,000 note, four shares of the Conawago Cigar Box Company, of the par value of \$250 each, and the loan was renewed in that form for another four months, and again on May 24th for 30 days longer. On July 8th following he went into voluntary bankruptcy, and Mr. Johns was compelled to take up the note along with others on which he was liable; the life insurance policy and the Cigar Box stock being turned over to him at the same time. Whether Mr. Johns knew it or not, there is no question that in January, 1902, Mr. Busby was insolvent. Objection is made on this showing to the allowance of the claims which he seeks to prove until the preference secured has been surrendered.

As to the life insurance policy which was assigned to the bank at the inception, the debt stands as a secured and not a preferred matter, and all that is required of Mr. Johns is that he account for and credit its value. But as to the stock the case is different. It was pledged to secure a pre-existing debt at a time when the debtor was clearly insolvent, and was therefore a preference, which must be given up before any of the notes taken up by Mr. Johns can be proved. The referee holds that the transaction is saved because it occurred more than four months prior to the bankruptcy. While this, as is pointed out above, is now the law, it was not at the time the stock was pledged, and it took an amendatory act to make it so; and, as the law as it stood when the property was turned over is to govern, a preference was thereby clearly obtained.

The action of the referee in allowing the claim is reversed, and the claim is directed to be disallowed unless a surrender of the preference secured shall first be made.

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ROBERTS et al. v. CENTRAL OF GEORGIA RY CO.

(Circuit Court, N. D. Georgia, N. W. D. July 11, 1903.)

No. 24.

1. HOMICIDE OF WIFE—CIVIL ACTION—PARTIES.

Under Act Ga. Oct 27, 1887 (Acts 1887, p 43, Civ. Code 1895, § 3828), providing that the husband may recover for the homicide of his wife, and, if she leave child or children surviving, said husband and children shall sue jointly, with the right to recover the full value of the life of deceased, children, though adults, are necessary parties.

Goodwin, Anderson & Hallman, for plaintiffs.  
Joel Branham, for defendant.

NEWMAN, District Judge. This is a suit for the homicide of Mrs. Lucinda W. Roberts, which it is alleged was caused by the negligence of the defendant railway company. The suit was brought originally by David P. Roberts, husband, and by seven children of the deceased; all of the seven children being adults, the youngest, Thomas F. Roberts, being 28 years of age at the time the suit was brought. The declaration shows that all of the plaintiffs are citizens of Alabama, except one of the sons, Columbus P. Roberts, who is a citizen of Georgia. By an amendment all the children are stricken as plaintiffs, allowing the suit to proceed in the name of David P. Roberts, the husband, alone.

The first question presented in the case is whether, under the act of the Legislature of Georgia of October 27, 1887 (Acts 1887, p. 43; Civ. Code 1895, § 3828), the children, all being of full age, are necessary parties to the suit. The language of the act is:

"The husband may recover for the homicide of his wife, and if she leave child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action."

There is nothing in this language to show that only minor children need be joined in such a suit. The language is "child or children," without any qualification. It is claimed for the plaintiff, however, that the decision of the Supreme Court of the state in *Mott v. Central Railway*, 70 Ga. 680, 48 Am. Rep. 595, indicates the proper construction which should be given this act of 1887. It was held in that case that under the law as it stood after the passage of the act on December 16, 1887, the right of the widow or children to recover for the homicide of the husband or parent was confined to minor children. The law as it then stood with reference to the right of the widow, or, if no widow, the child or children, to recover for the homicide of the husband, is now embodied in section 3828 of the Code of 1895, and immediately precedes the language under consideration here.

The decision in *Mott v. Central Railway*, 70 Ga. 680, 48 Am. Rep. 595, was based largely on the former decisions of the Supreme Court, especially *M. & W. R. R. Co. v. Johnson*, 38 Ga. 433; and *David v. Southwestern R. Co.*, 41 Ga. 223. In the *Mott* Case Mr. Justice Hall, in the opinion, treats these former cases as having settled the question that only minor children could recover prior to the passage of Acts 1878, p. 99, and the real question in the *Mott* Case apparently was as to whether the act of 1878 had made any change in the law. This act of 1878 provided that the plaintiff, whether widow or child or children, "may recover the full value of the life of the deceased, as shown by the evidence." This was a very material change on the subject, because by the decisions of the Supreme Court prior to that time the widow could only recover the present value of what would be a reasonable support for her from her husband, considering his circumstances and condition in life; and the children could only recover "the present worth of a reasonable support for them during minority, according to the expectation of the father's life, in view of his condition in life, prospects, industry," etc., and the court held that

the act of 1878 had not affected the law on the present question. The opinion says:

"A very broad construction would be required to deduce from these changes as to the measure of damages and the descent of the property, in case of the widow's death, the right of an adult child to recover, where there was neither widow nor minor child. Such a construction, it seems to us, would be a wide departure from the manifest purpose of the Legislature, as it is to be gathered from the scope and design of this act, taken in connection with the decisions that led to its passage."

A careful examination of that case has satisfied me that it is not controlling here, and does not in any way affect the proper construction of the act of 1887, allowing a recovery for the homicide of the wife. This act gave an entirely new right. It put the right to recover in the husband, but provided that, if the wife leave child or children surviving, the husband and the children should sue jointly, and not separately, with the right to recover the full value of the life of the deceased. The right to recover is not any loss to the husband of service or loss to the child or children of support. It provides that from the evidence shall be ascertained the full value of the life of the wife and mother, and that it may be recovered by the husband, except that the children, if she leave children surviving, shall be joined in the action. "Child or children surviving" is very broad language. There is no limitation or qualification of any kind, and I do not believe that the decisions of the Supreme Court of the state construing the act with reference to the right to recover for the death of the husband and parent are applicable to this act. Counsel have not called my attention to any decision of the Supreme Court of the state construing this act providing for a recovery for the homicide of the wife, and I have been unable to find any such decision myself.

My conclusion, therefore, is that this act is not confined to minor children, and that the children of Mrs. Roberts, although adults, are necessary parties to this suit. That being true, and one of the children being a citizen of Georgia, this court is without jurisdiction.

It is unnecessary, in view of what has been said, to pass upon the merits of the case, and determine whether the declaration sets forth any cause of action.

The court, in my opinion, is without jurisdiction, and the case is dismissed for that reason.

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## BORGFELDT v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,745.

### 1. CUSTOMS DUTIES—CLASSIFICATION—MUSICAL INSTRUMENTS—TOYS.

Certain metallophones and mouth organs or harmonicas, having at least one full octave, and capable of playing a musical air, but not so finished as to musical qualities that they would be used by musicians, being fitted rather for the amusement of children, are dutiable as "toys," under paragraph 418, Tariff Act July 24, 1897, c. 11, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674], and not as "musical instruments," under paragraph 453 of said act (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]).

Appeal by the importers, George Borgfeldt & Co., from a decision of the Board of General Appraisers which affirmed the assessment of duty by the collector of customs on certain merchandise imported at the port of New York.

The opinion of the Board in *Re Ilfelder et al.*, G. A. 4122, follows:

Wilkinson, General Appraiser. The goods are jew's-harps, harmonicas, metallophones, and similar articles of a musical character of the kind chiefly used by, or for the amusement of, children. They were assessed for duty as musical instruments at 45 per cent., under paragraph 453, schedule N, § 1, Act July 24, 1897, c. 11, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], and are claimed to be dutiable as toys at 35 per cent., under paragraph 418, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]. In the case of all previous tariff conflicts between the provision for musical instruments and that for toys, the rate for musical instruments was the lower, and importers contended, and successfully prosecuted their claim, that articles like those in question should be classified as musical instruments, rather than as toys. For instance, under the Revised Statutes for 1874, toys were dutiable at 50 per cent., and musical instruments at 30 per cent. In the case of *Schwartz v. Hartranft*, 124 Fed. —, the United States circuit court at Philadelphia held that jew's-harps came within the category of musical instruments, and sustained the claim that they were dutiable at 30 per cent. In Treasury Decision 4,859, the department cites the case of *Foote v. Arthur*, in which the court held that a musical instrument was "an implement or structure artificially constructed, and ordinarily used for the production of a succession of musical and harmonious sounds," and that certain harmonicas, which contained one and a half octaves, were entitled to entry at the lower rate, as musical instruments. In Treasury Decision 5,938, the department, in reply to an inquiry as to the status of jew's-harps under the act of 1883, decided that they should be classified as musical instruments, rather than as toys, in conformity with the Philadelphia judicial decision. Treasury Decision 9,685 orders a refund to the importers in the present case on jew's-harps and one octave harmonicas, as a result of suit N. S. 8,431 (*Borgfeldt v. Robertson*), in which the court held that the articles should be classified as musical instruments, rather than as toys. Reference to decisions under the act of 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat. 567) would be misleading, as the act did not enumerate musical instruments. But the act of 1894 (Act Aug. 27, 1894, c. 349, 28 Stat. 509) provided for both musical instruments and toys. For a little more than four months, under this act, the rate on toys was the higher, and importers successfully contended that jew's-harps, toy bugles, toy drums, harmonicas, etc., were entitled to the lower rate. Indeed, the learned counsel in the present case said in their brief, when making the contention under the act of 1894: "First. A provision for musical instruments is more definite and of greater enumerating force than a provision for toys. Its range is more limited, its specifications greater. Jew's-harps are at the same time toys and musical instruments," etc. This contention was sustained in G. A. 2903. We are now asked by the counsel to reach a different conclusion, although the only change in conditions of which the board is aware is a change in rates. But this reversal in rates is not a sufficient reason for a reversal in rulings founded upon a series of judicial decisions and upon the settled customs practice of almost 20 years.

We find: (1) That the goods are musical instruments, having at least one full octave, or playing, or capable of playing, a musical air. (2) That the goods are toys. Following the judicial decisions referred to, we hold that the provision for musical instruments is more specific than that for toys not specially provided for. We overrule the protests accordingly.

Comstock & Brown, for importers.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. These articles are harmonicas or mouth organs and metallophones. They have been assessed as mu-

sical instruments, under paragraph 453, Schedule N, § 1, Act July 24, 1897, c. 11, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], against the claim that they are toys, under paragraph 418, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]. They are not so finished as to musical qualities that they would be used by musicians, but their musical effect is rather such as fits them for the amusement of children. They do not rise to the dignity of musical instruments.

Decision reversed.

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COWL v. UNITED STATES.

(Circuit Court, S. D. New York. July 2, 1900.)

No. 3,007.

**1. CUSTOMS DUTIES—PRACTICE—FAILURE TO PRODUCE EVIDENCE BEFORE THE BOARD OF GENERAL APPRAISERS.**

Where the Board of General Appraisers overruled a protest in a case in which the importer has failed to produce any evidence in support of his contention, and the importer appeals to the Circuit Court, the court will permit the importer to introduce evidence on the appeal, if it appears that it was not the importer's fault that the evidence was not presented to the board.

**2. SAME—CLASSIFICATION—CRUDE DRUGS—GUARANA.**

Guarana, a medicinal drug, consisting of a dried paste in the form of sausage-shaped rolls, this being the crudest state in which it is ever imported, and which, before being used as a medicine, must be further prepared, is not dutiable as a "medicinal preparation," under paragraph 68, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631), but is free of duty under the provision in paragraph 548, Free List, § 2, c. 11, of said act, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683), for articles "which are drugs and not edible and are in a crude state."

Appeal by the importer from a decision of the Board of General Appraisers affirming the classification by the collector of customs at the port of New York in assessing duty on the importation in question.

The merchandise consists of a drug known as guarana. It was classified by the collector as dutiable at the rate of 25 per cent. ad valorem under the provision in paragraph 68, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631), for "medicinal preparations not containing alcohol or in the preparation of which alcohol is not used, not specially provided for." The importer filed a protest, contending that the article should have been classified as free of duty under the provisions of paragraph 548, Free List, § 2, c. 11, of said act, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683), relating to various articles "which are drugs and not edible and are in a crude state, and not advanced in value or condition by refining, grinding, or by other process, and not specially provided for." Guarana is a product of Brazil, imported in the form of dark-brown, hard, sausage-shaped rolls a foot or more in length and from two to three inches in diameter, and consisting of a paste prepared from the seeds of *paullinia sorbilis*, the process consisting in shelling the seeds and moistening them in water, removing a papery film over the kernel, pounding them in a mortar, sufficient water being added to reduce it to a semisolid consistency, the article then being made into the form of rolls, and wrapped in leaves and dried in the sun or by the fire. The testimony of the witnesses is to the effect that the article is known in trade as a crude drug, this being the crudest form in which it is ever imported, and that it is sold to manufacturers and wholesale dealers, but not

to retail druggists, as it is never used as a medicine in the condition in which it is imported, but before being used as a medicine is prepared as a powder, elixir, or extract, crushed leaves and other impurities being removed in the process of preparation.

Hatch & Wickes, for importer.

Chas. D. Baker, Asst. U. S. Atty.

LACOMBE, Circuit Judge (after stating the facts). The testimony in this case was all taken in the Circuit Court, none having been introduced before the board, and the government raises the objection that it cannot, therefore, be considered here under the decision of the Circuit Court of Appeals in *U. S. v. China & Japan Trading Company*, 18 C. C. A. 335, 71 Fed. 864.

The two cases, however, are not alike. In *U. S. v. China & Japan Trading Company* it appeared from the record that the board affirmed the collector because the importer failed to appear pursuant to its notification to show cause why the collector should not be affirmed. In the case at bar, however, the return states:

"This case was continued and held open for the importer to produce testimony, which their attorneys stated they desired to offer in regard to the crudity of the merchandise and its mode of treatment before it could be used as a medicinal preparation; but, it appearing from the facts stated herein that such testimony would not be material, the case was decided on that ground, without waiting for the production of such evidence."

It would seem, therefore, that it was not the importer's fault that the evidence now in the cause was not presented to the board, and the reasoning in the *China & Japan Trading Company* Case does not apply.

The testimony brings the case clearly within the decision of the Circuit Court of Appeals in this circuit as to elaterium. *U. S. v. Merck*, 13 C. C. A. 432, 66 Fed. 251. The article is a crude drug, and not a medicinal preparation.

Decision of the board and of the collector reversed.

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#### JOHNSTON v. TURNBULL.

(District Court, E. D. Pennsylvania. July 15, 1903.)

##### No. 42.

#### 1. ADMIRALTY—INJURIES TO STEVEDORE—DEFECTIVE APPLIANCES—NEGLIGENCE.

Plaintiff's intestate received injuries, from which he died, while assisting in unloading a vessel, by the breaking of a chain attached to the hoist. The chain was  $\frac{9}{16}$  of an inch in size, the breaking strength of which was about 10 tons. Three months prior to the accident the chain had been used in lifting tubs of phosphate weighing about 1,200 pounds, and at no time was there any reason to suspect its weakness. Two days before the vessel reached port the chain was used to lift an anchor weighing  $2\frac{1}{2}$  tons, and after the vessel reached the dock was properly greased and inspected, link by link, without any defect being found. The chain broke while lifting an iron bucket of ore weighing from 2,000 to 2,500 pounds; and, while two experts testified that the crack in the link could have been seen by a careful observer, and that the chain was incapable



of lifting more than 300 pounds, their evidence was disputed by the physical facts. *Held*, that the evidence was insufficient to establish negligence on the part of the owner of the vessel.

In Admiralty.

Joseph H. Brinton, William J. Conlen, and Jasper Yeates Brinton, for libellant.

Convers & Kirlin, for respondent.

J. B. McPHERSON, District Judge. The libellant is the widow of a stevedore who was killed on July 26, 1902, while helping to unload a cargo of iron ore from one of the holds of the steamship Fairmead. The ore was lifted out in large iron buckets, weighing when full about 2,000 or 2,500 pounds, attached to a chain fall that was operated by a winch in the usual way. Upon this occasion the chain had been in use for more than two days, when it suddenly broke while a full bucket was being hoisted, precipitating the bucket and its contents into the hold, and so injuring the decedent that he died within a few hours. The respondent is said to have been negligent in failing to inspect the chain properly; and, as no other breach of duty is alleged, this point alone needs to be examined upon this branch of the case. A careful consideration of the testimony has satisfied me that the charge of negligence cannot be sustained. Undoubtedly, the cause of the break was a defective weld in the chain, as is now apparent from inspection of the broken link; but I think it is by no means clear that the defect could have been detected either by the eye or by the touch. Two expert witnesses have testified in behalf of the libellant that a crack must have been present, and could have been seen by a careful observer; but I do not think it would be safe to rely on these inferences, in the face of the positive testimony concerning the examination of the chain and the test to which it was subjected after the examination was finished. Two witnesses swear—and I see no reason to doubt their truthfulness and their accuracy—that they both examined the chain, link by link, two days before reaching port; that it was then used to lift an anchor weighing  $2\frac{1}{2}$  tons from the forward well-deck to the forecastle head, and, after the vessel reached the dock, was properly greased before it was employed in the work of discharging the cargo. Three months before the accident it had been used at a Georgia port lifting tubs of phosphate weighing about 1,200 pounds, and at no time, so far as appears, was there any reason to suspect its weakness. The size of the chain was  $\frac{9}{16}$  of an inch, and the breaking strain of a link as large as this is about 10 tons. One of the experts for the libellant testified that, owing to the crack, which he declares must have been present, the link could not have withstood a strain of more than 300 pounds; but the accuracy of this opinion is much discredited by the facts that the chain had actually lifted 1,200 pounds repeatedly three months before, had lifted an anchor weighing 5,000 pounds just before reaching port, and had been hoisting an average of 2,000 pounds for two days immediately before the break finally came.

On the whole case, I cannot avoid the conclusion that the charge of careless inspection has not been made out. The testimony does

not establish to my satisfaction that the defective weld could have been seen, or otherwise detected, by careful examination, and I am of opinion that the ship's officers fulfilled their duty in this respect. They certainly were not put upon notice that this chain might break under a strain of 2,000 or 2,500 pounds, when the breaking strain of a chain of that size is about four times as much, and when this particular chain, after a scrutiny that had failed to find a flaw, had actually lifted two tons and a half only a few days before.

There being no sufficient evidence of the respondent's negligence, the libel must be dismissed.

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THE L. F. MUNSON.

(District Court, E. D. Pennsylvania. July 25, 1903.)

No. 1 of 1898.

1. SHIPPING—DAMAGE TO CARGO—CUTTING OF LOGWOOD ROOTS TO FACILITATE STOWAGE.

In a suit by a vessel to recover freight for carrying a cargo of logwood roots, the evidence *held* to sustain in part the claim of the cargo owner for damages because of the lessened market value of the roots caused by their being cut by the vessel, to facilitate their stowage, in excess of the amount allowable by the custom of the port of loading.

In Admiralty. Suit to recover freight.

Horace L. Cheyney and John F. Lewis, for libellant.

J. Rodman Paul and Howard H. Yocum, for respondent.

J. B. McPHERSON, District Judge. This action is brought to recover a balance of freight due for carrying a cargo of logwood roots from the port of Montego Bay, on the north shore of the island of Jamaica, to the port of Chester, on the Delaware river. The cargo was stowed by the ship, and the defense is that the roots were so much injured by improper cutting, due to the anxiety of the master to load the vessel as compactly as possible, that their market value was diminished by an amount at least as great as the balance of freight remaining unpaid. There is no doubt that the shippers of the cargo, J. E. Kerr & Co., made an allowance to the consignee, the Sharpless Dyewood Extract Company of Chester, by reason of the deficient size of the roots as they were delivered upon the consignee's wharf, and the dispute requires the court to decide whether such defect in quality was found in the roots that were delivered to the ship by Kerr & Co., or was due to excessive cutting in order to stow the cargo more solidly, and therefore more to the advantage of the vessel.

There is some conflict in the testimony, but I think the weight of the evidence is decidedly in favor of the respondent, so far as concerns most of the sum in controversy. It is agreed that logwood roots decrease in value as they diminish in size. For example, this cargo was sold at \$18 per ton, but for pieces under 5 pounds in weight the Dye Works Company was to pay only \$8 per ton; and I think the testimony establishes clearly that the size of the roots is regarded by the

trade as so essential that a ship loading at Montego Bay is forbidden by the custom of the port to cut more than 5 per cent. of the cargo for purposes of stowage, and may not cut even this small percentage to a less weight than 5 pounds to the piece. When the ship arrived in Chester she unloaded 353 tons 60 cwt., of which 34 tons 120 cwt., or nearly 10 per cent., was in pieces weighing less than 5 pounds each. This was a fault of the ship, if the small size of the pieces was due to cutting for purposes of stowage, and upon all the evidence I am of opinion that this explanation of the matter should be accepted. The rest of the cargo, 287 tons 130 cwt., while it was composed of pieces and roots weighing more than 5 pounds each, was of such inferior sizes that the consignee claimed, and received from the shippers, an allowance of \$1 per ton. The respondents claim that this defect in quality was wholly due to improper cutting by the ship, but I am unable to sustain this contention altogether, although I have no doubt that it should be sustained in part. The testimony leaves it somewhat conjectural what proportion of this deficient quality is due to the fault of the ship, and what proportion is probably due to the comparatively small size (although above 5 pounds) of the roots as they were shipped by Kerr & Co., but I think I may not be far wrong if I charge one-half against each of the parties.

The libellant is therefore entitled to a decree for one-half of \$287.06, with interest from January 31, 1898, two-thirds of the total costs to be paid by the libellant, and one-third by the respondent.

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LEHMAN v. SALZGEBER.

(Circuit Court, D. Oregon. July 30, 1903.)

No. 2,752.

1. CONTRACTS—MUTUALITY OF OBLIGATION—CONSTRUCTION.

Defendant contracted to sell plaintiff 12,000 pounds of hops of the crop of 1902, and to deliver the same at a certain warehouse at plaintiff's direction. The contract provided for the picking and curing of the hops, and declared that plaintiff agreed to advance to defendant \$1 on the signing of the contract, and for picking purposes the sum of 6 cents a pound, provided that the hops on the poles, in the plaintiff's opinion, promised a good quality, etc., "and upon delivery and acceptance of said hops" the plaintiff would pay a certain amount per pound, etc. *Held*, that the clause on "delivery and acceptance of the hops" the plaintiff would pay, etc., did not confer on plaintiff the arbitrary right to refuse to accept hops of the quality described, and that the contract was therefore not void for want of mutuality of obligation.

Cotton, Teal & Minor, for plaintiff.

W. L. Boise and John T. McKee, for defendant.

BELLINGER, District Judge. This is an action for damages for the failure to deliver certain hops in accordance with an agreement between the parties, in substance as follows: The defendant, in con-

¶ 1. Mutuality in contracts, see note to *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 543.

sideration of the sum of \$1 paid, agreed to sell and deliver to the plaintiff 12,000 pounds of hops of the crops of the year 1902, and to deliver said hops to the Reedville warehouse depot, or on board the cars, at such time between the 1st and 31st days of October in said year as the plaintiff might direct—

"Each bale of said hops to contain from one hundred and eighty to two hundred pounds of hops (seven pounds tare per bale to be allowed) and are to be put up in new bale cloth; the said hops shall be of choice quality of even color, well and cleanly picked and well cured, but not high dried, free from mould or black blight and not broken. And the said party of the first part further agree that this contract shall have preference, both as to quantity and quality, over all other contracts made as to said growth of hops by the party of the first part with any other purchaser. The said parties of the second part agree to advance to the said party of the first part one (1) Dollars upon the signing of these presents, and for picking purposes on or about the first September of said year, the sum of Six (6) cents per pound at Aurora, Oregon, provided that at that time the said hops on the poles, in the opinion of the parties of the second part, promise a good quality, and provided that at that time no lien superior to the one hereby created exists on said crop of hops; and for such advances with six per cent. interest a lien is hereby granted to parties of the second part on said crop of hops prior and preferable to all other liens; and upon the delivery and acceptance of said hops, the said parties of the second part will pay in current funds of the United States or their equivalent five one-half ( $5\frac{1}{2}$ ) cents per pound, the balance due on said hops at ( $11\frac{1}{2}$ ) eleven one-half cents per pound, that being the agreed price for said hops, and all money advanced for the purposes aforesaid, with six per cent. interest to be deducted from the purchase price of said hops."

It is alleged that the defendant made default in this agreement, by refusing to deliver the hops contracted for, and that the plaintiff has been damaged by such refusal in the sum of \$2,581, with interest.

To this complaint defendant demurs upon the ground that the plaintiff, by the terms of the contract, is under no obligation to accept the hops contracted for, and that, inasmuch as there is no obligation on the plaintiff's part, the defendant is not obliged to deliver.

I am of the opinion that the clause, "and upon the delivery and acceptance of said hops, the said parties of the second part will pay," etc., does not confer upon plaintiff the right arbitrarily to refuse to accept hops when of the quality described; that this clause is intended to fix the time of payment, not to make such payment discretionary on the plaintiff's part; that if the hops are of the quality stipulated for in the contract, and are baled as required by its terms, the obligation of the plaintiff to accept them is absolute. The plaintiff has the discretion under this contract not to make the advance of six cents per pound about the 1st day of September. As to this advance the plaintiff is authorized to act upon his own opinion as to whether the hops have the promise of a good quality. But without this, he is still required to accept the hops when they are harvested and delivered, if they are of the quality provided for.

The demurrer to the complaint is overruled.

BRUCE v. RAYNER, Atty. Gen. of Md., et al.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1903.)

No. 483.

**1. INTERSTATE EXTRADITION—MATTERS REVIEWABLE ON HABEAS CORPUS—FLEEING FROM JUSTICE.**

The question whether a person arrested on a governor's warrant for return to another state on requisition from its Governor is a fugitive from the justice of such state is one of fact, which may be inquired into by the courts on a writ of habeas corpus, the decision of the Governor in issuing his warrant being *prima facie* evidence of the fact, but not conclusive; although, when such decision was made after a hearing and on conflicting evidence, it will not be reversed by a court.

**2. SAME—EVIDENCE RECEIVABLE.**

In habeas corpus proceedings for the discharge of a person held under an extradition warrant issued by the Governor of a state, the court will not receive evidence tending to show the guilt or innocence of the person whose surrender is sought in determining the question whether or not he is a fugitive from justice.

**3. SAME.**

In habeas corpus proceedings for the discharge of a person held under an extradition warrant for return to another state to answer to an indictment for bigamy, where, under the statute of such state, a prosecution for bigamy is barred in two years after the date of the offense, unless the accused flees from justice, and the indictment upon which the requisition was based was found more than two years after the date of the offense laid therein, it is competent for the petitioner to show that he remained in such state, without being concealed, for more than two years after the date of the alleged offense, since such evidence does not go to any matter of defense, but tends to prove that petitioner is not a fugitive from justice.

Appeal from the Circuit Court of the United States for the District of Maryland.

This case comes up on appeal from the Circuit Court of the United States for the District of Maryland. Thomas Bruce, the appellant, being in custody of an agent of the state of New Jersey under the warrant of the Governor of Maryland, applied on the 2d January, 1903, to the Circuit Court of the United States for a writ of habeas corpus. His petition sets forth his arrest and alleged unlawful detention under a warrant issued by the Governor of Maryland in response to a requisition of the Governor of New Jersey, and proceeds as follows: "Third. Your petitioner is advised and believes and charges that the said requisition is based upon an indictment alleged to have been found by a grand jury in and for the county of Essex, in the state of New Jersey, which indictment your petitioner charges is defective, illegal, null and void, and without reasonable or adequate foundation in law or in fact, and without probable cause; and your petitioner charges that said indictment does not show that any crime has been committed by him under the laws of the state of New Jersey, although professing so to charge him with the crime of bigamy." The writ of habeas corpus having been issued, the body of the prisoner was produced, and a return made to the writ. This return avers that the prisoner, Thomas Bruce, is lawfully in custody by virtue of a warrant issued to the agent of the state of New Jersey by the Governor of the state of Maryland, upon the request of the Governor of New Jersey, on the ground that said Thomas Bruce is within the state of Maryland as a fugitive from justice of the state of New Jersey, under an indictment charging him with bigamy, a crime committed by him within the state of New Jersey, against the laws of New Jersey; the papers accompanying the

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¶ 1. See Habeas Corpus, vol. 25, Cent. Dig. § 90.

demand by said Governor of New Jersey being certified as authentic by him. To this return the petitioner, Thomas Bruce, replied that he is not lawfully in custody, has not been properly indicted for any offense against the laws of New Jersey, especially and particularly of the crime of bigamy, and also denying that he is a fugitive from justice of the said state. Hearing the return, the court discharged the writ, and remanded the petitioner into custody. Leave to appeal was granted, and the cause is here on eight assignments of error. The first six of these allege for error that the court did not hold that the indictment presented to the Governor of Maryland did not properly and legally charge the petitioner with a crime against the laws of New Jersey. The laws of New Jersey on this subject appear hereafter. The seventh and eight assignments of error charge errors in the court in excluding testimony offered by the petitioner for the purpose of showing that within the two years succeeding 11th March, 1897, the date charged in the indictment as the date of the alleged offense, the petitioner was a resident of the state of New Jersey, and, except at intervals, when absent on business, was not without the reach of criminal process in said state. And, further, that the petitioner was a resident of the said state of New Jersey, living there, except at intervals when absent on account of business, prior to said alleged offense, until about December 1, 1900. The warrant of the Governor of Maryland does not disclose whether he considered any evidence bearing upon the question was the petitioner, Thomas Bruce, a fugitive from justice; nor whether he considered the sufficiency of the indictment. When the cause was heard in the Circuit Court no testimony was received upon the question was the petitioner a fugitive from justice. Apparently the court did not go behind the warrant of the Governor of Maryland.

Richard B. Tippet and Wilson J. Carroll (Thomas I. Elliott, on the brief), for appellant.

Edgar Allan Poe (Robert M. McLane, on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and KELLER, District Judge.

SIMONTON, Circuit Judge (after stating the facts as above). Was this error on the part of the court? Section 2, cl. 2, art. 4, of the Constitution of the United States, declares:

"That a person charged in any state with treason, felony or any other crime who shall flee from justice and be found in another state, shall on the demand of the executive of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime."

Provision for executing this mandate of the Constitution is made in sections 5278-5279, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3597]. Whenever, however, a person charged with being a fugitive from justice is arrested under a warrant of the governor of a state for delivery to the authorities of the demanding state, he is entitled to invoke the judgment of the judicial tribunals, either federal or state, by writ of habeas corpus upon the lawfulness of his arrest and imprisonment. *Roberts v. Reilly*, 116 U. S. 94, 6 Sup. Ct. 291, 25 L. Ed. 544; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542; *Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 25 U. S. App. 22, 28 L. R. A. 801. When a demand of this character is made on the Governor of a state, two questions are presented to him: First. Is the person demanded substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled by an indictment or affidavit properly certified? Second. Is he a fugitive from justice from the state demanding him?

The first is a question of law, and as such always open to judicial inquiry on the face of the papers on application for discharge under a writ of habeas corpus. *Roberts v. Reilly*, *supra*. The second is a question of fact, and the issuance of a writ of remand by the Governor is *prima facie* and presumptively conclusive of this fact, whether he makes an express finding thereon or not. *Roberts v. Reilly*, *supra*. In this case it is said:

"How far the decision of the Governor on this question of fact may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of the Supreme Court of the United States."

But the learned judge delivering the opinion treats the conclusion of the Governor as *prima facie* and presumptively correct only until such presumption is overthrown by contrary proof. To the same effect is *Ex parte Reggel*, 114 U. S. 653, 5 Sup. Ct. 1148, 29 L. Ed. 250. Both of these cases go into an examination of the facts, and coincide in the conclusion of the Governor. A fugitive from justice is one who, having committed a crime within a state, either conceals himself within the state or departs therefrom so that he cannot be reached by ordinary process. Therefore, in determining whether he be delivered on the demand of the state in which he is charged with crime, it must appear not only that he was properly indicted; it must also appear that he was within the state when the crime charged was committed, and also that he had concealed himself, or had absconded, so that he could not be reached by ordinary process. *Ex parte Reggel*, 114 U. S. 651, 652, 5 Sup. Ct. 1148, 29 L. Ed. 250. So it would seem that the question of fact is always open to inquiry. The mere requisition of the Governor of the demanding state cannot be accepted as conclusive of the facts, else the accused person may be remanded, notwithstanding incontestable proof that he had never been within the state whose executive is demanding him. *Ex parte Reggel*, 114 U. S. 652, 5 Sup. Ct. 1148, 29 L. Ed. 250. It is clear, therefore, that this fact is open to proof and examination. *Hyatt v. New York*, 23 Sup. Ct. 456, 47 L. Ed. 657. And if one fact which constitutes the term "fugitive from justice" can be inquired into, why should not the other facts, equally necessary, be also inquired into? It is no doubt true that, if conflicting evidence has been submitted to the Governor of the state in which the person is found upon the question of fact, and he, considering it, had decided to deliver the person demanded, the presumption being always in favor of the Governor's decision, the courts will not inquire into and reverse his decision. As is said in *Hyatt v. New York*, *supra*:

"If, upon a question of fact made before the Governor, which he ought to decide, there were evidence pro and con, the courts might not be justified in reversing the decision of the Governor upon the question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the Governor as conclusive."

In the case at bar the record does not disclose whether any evidence was offered before the Governor of Maryland, or whether he acted solely on the requisition. If the delivery of Bruce had been perfected, and he had been restored to the jurisdiction of New Jer-

sey, then no inquiry into the action of the Governor of Maryland could be made. "His warrant, unassailed by competent authority, is complete justification of the arrest and surrender of the alleged fugitive. When so delivered by virtue of such warrant, his surrender is lawful, and the demanding state has rightful possession of his person, and may lawfully subject him to criminal process for the offense charged. The executive warrant has then spent its force. It is no longer operative." *In re Cook* (C. C.) 49 Fed. 841. See, also, *Streep v. United States*, 160 U. S. 128, 16 Sup. Ct. 244, 40 L. Ed. 365. In the case *In re Cook*, above quoted, Jenkins, J., speaking for the Circuit Court of Appeals says:

"It is essential to compliance with such executive demand that the person whose surrender is demanded be adjudged a fugitive from justice of the demanding state. The decision of the executive is not conclusive of that fact. And so we are of the opinion that the action of the executive is reviewable by federal tribunals, and it is competent for the courts to determine whether in fact the demanded person is a fugitive from justice."

He sustains this doctrine by quoting from a number of state cases. An important question in this connection is, what kind of testimony can be admitted? It would seem that it is not competent either for the Governor or for the court to go into evidence tending to show the guilt or innocence of the party whose surrender is sought. This would, in effect, be a trial of the case, although the manifest design of the Constitution and the act of Congress is that the party demanded should be remitted for trial exclusively in the state in which he stands charged with having committed the offense. *In re Leary*, Fed. Cas. No. 8,162. See, also, *In re White*, 55 Fed. 54, 5 C. C. A. 29, which says:

"Nor upon principle and in the absence of controlling authority should the statute be construed as authorizing an inquiry into the guilt or innocence of the person in the tribunals of the state in which he is found."

And, also, in *Re Bloch* (D. C.) 87 Fed. 981, it is said:

"In habeas corpus proceedings for the discharge of a person held under an extradition warrant issued by the Governor of a state, the federal courts will not consider or pass upon any matters of defense to the indictment upon which extradition is based, nor a charge that the requisition proceedings are instigated by malice, and intended to annoy or harass the petitioner. Whether the charge is legally and sufficiently laid in the indictment is a judicial question to be decided by the courts of the state in which the crime was committed, and not by the executive authority of a state upon whom the demand was made."

*Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717.

So, also, such inquiry cannot be made by the court reviewing the action of the governor.

The indictment presented to the Governor of Maryland was in these words:

"Essex Oyer and Terminer and General Jail Delivery. September Term, A. D., 1902. Essex County, to-wit:—The grand jurors of the State of New Jersey, in and for the County of Essex, upon their oath, Present, that Thomas Bruce, late of the City of Newark, in the County of Essex aforesaid, on the twelfth day of November, eighteen hundred and seventy-nine, at the City of Richmond, in the State of Virginia, did marry and have for his wife, one Louisa Howard, and afterwards while the said Thomas Bruce was so married



to the said Louisa Howard, did on the eleventh day of March, in the year of our Lord, one thousand eight hundred and ninety-seven, with force and arms at the City of Newark aforesaid, in the County aforesaid, and within the jurisdiction of the court, unlawfully marry and take to wife one Mary Cecilia Hannon, the said Louisa Howard then and there being still alive and the lawful wife of the said Thomas Bruce, contrary to the form of the Statute in such case made and provided, and against the peace of the State, the government and dignity of the same."

It is stated in the petition of Thomas Bruce that he was living in New Jersey anterior to and at the time of the commission of the crime charged in the indictment, and that he continued to live in the state of New Jersey, occasional absence for business excepted, up to December, 1900. Does this allegation go to the sufficiency of the indictment? Is it a matter of defense, or is it an allegation bearing upon the question, is he a fugitive from justice? The petitioner is indicted for the crime of bigamy under the statute of New Jersey above quoted. The crime alleged is that, being already married to a living wife, he went through the ceremony of marriage with another person. That act constituted the crime. And it is not a continued crime. The cohabitation after the second marriage is not involved in the charge of bigamy. The date of the marriage is essential, for the second marriage, to be a crime, must have been entered into whilst the accused has a wife living. A statute of the same state of New Jersey (Gen. St. p. 1145, § 130) declares as follows: "Nor shall any person be prosecuted, tried or punished for any offense not punishable by death" (of which bigamy is one), "unless the indictment shall be found within two years from the time of committing the offense. \* \* \* Provided further, that nothing herein contained shall extend to any person fleeing from justice." The indictment in this case, as we have seen, was found September term, 1902, and charges bigamous marriage of the petitioner as of the 11th March, 1897. It thus appears that, in order to prosecute, try, or punish one charged with bigamy in New Jersey, it must appear that he or she, having a wife or husband living, has been guilty of the act of marriage to another person within two years of the finding of the indictment; and that, unless such indictment is so brought within the said two years, the prosecution will not lie, unless the person accused be a fugitive from justice. Now, we have seen that, to make one a fugitive from justice, it must appear, first, that he was within the state when the crime charged is alleged to have been committed; second, that, being amenable to criminal process, he either concealed himself, or avoided it so that he could not be served, or that he departed the state, and so avoided service. If, therefore, it could be shown that he did not conceal himself within the state during the period which he was amenable to criminal process, this would be evidence tending to establish the fact that he was not a fugitive from justice. This testimony would not go to the sufficiency of the indictment, or to any manner of defense; it would be directed solely to the question whether he was a fugitive from justice—a question of fact. The court, as has been seen, can inquire whether the accused was within the state at the date of the alleged crime, and pursuing its inquiry it can ascertain if, being within the State at that time, he remained within

reach of its criminal process during the whole period for which such process could run. If this be established, then it could reasonably be concluded that he is not a fugitive from justice, and so not within the provisions of the Constitution or of the act of Congress. It is not a question of pleading, presented to the court on the trial of the accused, as in *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538, but a question of fact to be disposed of before remanding the accused to the demanding state. He cannot be remanded unless he be a fugitive from justice.

To sum up: We are of the opinion that the Circuit Court hearing the case on the petition, return, and replication in habeas corpus could judicially inquire into the sufficiency of the indictment under which petitioner was demanded (*Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 25 U. S. App. 22, 28 L. R. A. 801); that it could also judicially inquire into the facts bearing upon the question whether the petitioner was or was not a fugitive from justice, and that the court erred in not permitting testimony to be introduced touching this question.

It is ordered that the cause be remanded to the Circuit Court, with instructions to receive such testimony as will properly bear upon the question whether or not the petitioner in this case was a fugitive from justice.

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CANDA et al. v. MICHIGAN MALLEABLE IRON CO.

(Circuit Court of Appeals, Sixth Circuit. August 14, 1903.)

No. 1,182.

**1. PATENTS—ASSIGNMENT.**

An assignment by a sole patentee of all his right, title, and interest in the patent, "being an entire interest therein," is sufficient to vest the title in the assignees.

**2. SAME—CONTRIBUTORY INFRINGEMENT—MAKING PART OF INFRINGING STRUCTURE.**

One who manufactures an essential part of an infringing structure, which is adapted to no other use, and sells it to another to complete the structure, is a contributory to and liable for the infringement.

**3. SAME—VALIDITY AND CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.**

A claim of a patent is not void because the element therein claimed does not by itself constitute a complete operative structure, where those familiar with the art would understand its use, and especially where the claim refers to the specification, which in such case may be looked to for the purpose of ascertaining the connection in which the device is used, and the other parts necessary to complete the structure and render it operative, although such parts cannot be imported into the claim.

**4. SAME—ANTICIPATION.**

A patent otherwise valid is not void for anticipation because a prior patent covers a device which might be so constructed as to be capable of the same use as that of the later patent, where the prior patent gives no sign that such use was contemplated, and no specific directions for such construction.

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¶ 2. Contributory infringement of patents, see note to *Edison Electric Light Co. v. Peninsular Light, Power & Heat Co.*, 43 C. C. A. 485.

¶ 4. See Patents, vol. 38, Cent. Dig. §§ 66, 79.

## 5. SAME—INFRINGEMENT—DRAWBAR ATTACHMENTS.

The Canda patent, No. 460,426, for a drawbar attachment for railroad cars, claim 1, covering a spring casing for attachment to the draft timbers, construed, and *held* not anticipated, valid, and infringed by the device of the Thornbrough patent, No. 588,722.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is an appeal from a decree dismissing the bill in a suit brought by the appellants complaining of the infringement of claims 1, 2, and 7 of letters patent No. 460,426, granted September 29, 1891, to Ferdinand E. Canda, the assignor of the complainants, and praying for an injunction, and for profits and damages. The patent was granted for improvements in the construction of drawbar attachments for railroad cars. The defendant answered, denying the title of the complainants to the grant contained in the patent, and denying also that the patentee was the first and real inventor of the supposed improvements, or that the patent was valid, or was of any utility or value, and further denying infringement thereof. A large number of patents of prior date were specified as anticipations of the alleged invention described in the patent in suit. A replication was filed and proofs taken. At the hearing the Circuit Court held all the above-mentioned claims invalid upon the ground that the alleged invention was anticipated by former inventions for which patents had been granted, several of which are particularly discussed in the opinion of the Circuit Court which is sent up in the transcript. In accordance with its said opinion, the bill was dismissed. 123 Fed. 95.

Parker & Burton (James C. Chapin, of counsel), for appellants.  
W. H. Singleton, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

SEVERENS, Circuit Judge, having made the foregoing statement, delivered the opinion of the court.

The invention for which the Canda patent was granted relates to the attachments at the inner end of the drawbar in railroad cars, whereby the connection is made between the drawbar and the draft timbers of the car. It is commonly known that provision is made by such attachments for easing the shock in starting and stopping railroad cars, and that this is done by allowing a sliding motion of the drawbar between the draft timbers running lengthwise of the car and providing a spring or springs at or near the inner end of the drawbar, and so associated with it as to resist the inward thrust of the drawbar as well as the lengthwise pull in forward draft, one end of the springs being secured to or in contact with the drawbar or some of its attachments—as, for instance, a follower fixed thereon—and the other to the draft timbers or something thereto attached. A casing is necessary to contain and hold in place such springs and the tail of the drawbar sliding between them and the followers, and sometimes perhaps other parts. The casing is necessary not only as a housing for the apparatus, but also to keep the parts in place, and to serve as the medium by which the force applied to the drawbar is communicated to the car. It is particularly this casing which is the subject of the Canda patent. The inventor states that his object is to construct a casing of such form as to secure the best anchorage in the draft timbers, and also to admit easy access to the parts within it for the pur-

pose of removing them, and this without taking down the casing itself, which is rigidly attached to the draft timbers, and cannot, without much labor and loss of time, be removed. Accordingly he makes his casing with rigid sides and top, and adapted to be let into the inner sides of the draft timbers, and the casing firmly bolted thereto. To provide easy access to the parts contained, he leaves the bottom of the casing open, and adapted to receive a bottom plate; the expectation being—though that is not made an element of his first claim—that the bottom will be supplied by the builder.

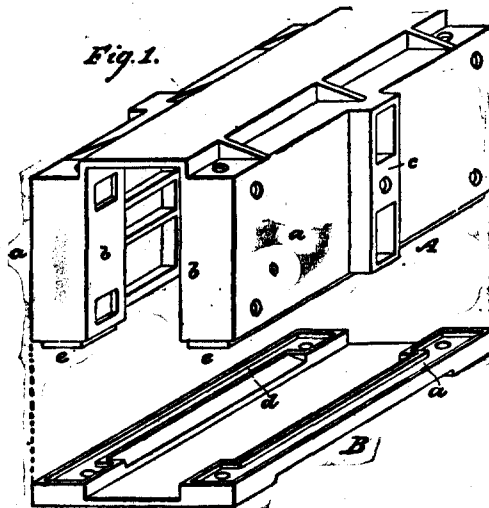


Fig. 1 of the drawings here produced illustrates the casing and the bottom plate.

The claims involved in the present controversy are as follows:

"(1) In a drawbar attachment for railroad cars, a spring casing formed integrally with a single casting having a closed top and an open bottom and constructed for attachment to the longitudinal draft timbers, substantially as herein shown and described.

"(2) In a drawbar attachment for railroad cars, the combination, with the draft timbers, of a spring casing permanently attached to the timbers, and provided with a removable bottom plate extending the entire length of the casing, and locked to the sides of the casing, substantially as specified."

"(7) In a drawbar attachment for railroad cars, a spring casing adapted to be permanently attached to the draft timbers, and provided with one or more removable plates that lock with the sides of the casing, substantially as and for the purposes herein shown and described."

1. The first ground taken by the defendant against the maintenance of the suit is that the assignment offered in evidence is not, in legal effect, a transfer of the entire interest in the patent, but only of the interest of the assignor. The language of the assignment is as follows:

"I, the undersigned, Ferdinand E. Canda, of the borough of Manhattan, in the city of New York, for and in consideration of one dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto Canda Brothers, a firm composed of Charles J. Canda and

myself, all my rights, title, and interest in and to six certain letters patent issued to me by the United States of America, and numbered and dated as follows, viz.: No. 460,426, dated September 29, 1891 [and five others enumerated], being an entire interest therein, for the sole use of said firm of Canda Brothers and its legal representatives, successors, and assigns."

The following statement of his point is taken from the brief of counsel for the appellee:

"If 'my' interest was 'the' entire, and not simply 'an' entire interest, then it was incumbent upon appellants to prove this, which, if true, might be done by oral testimony."

The assignor was sole patentee. It will be noticed that the assignor is one of the assignees. But no criticism is made upon that circumstance. We think the objection stated is hypercritical, and that the intent and effect of the assignment was to transfer a one-half interest to the other partner, nothing appearing to show that the partners stood upon unequal terms.

2. It is contended for the appellee that the evidence does not show that the appellee participated in the alleged infringement. In support of this contention it is urged that the proof shows that the appellee made only the casing for the springs and other contents without any bottom, and had never associated it with the other parts with which it must be connected in order to make it of any use. This objection can have no application to the first claim, for that is on the casing without a bottom. Nor has it proper application to the other claims; for, if the defendant constructed and sold an essential part of the infringing structure for the purpose of enabling another person to infringe the patent by adding something else to make the entire infringing article, it made itself a contributory to, and liable for, the infringement. And we have no doubt that this was the fact. The casings without bottoms which the defendant made and sold were good for nothing else. Their form and characteristics plainly indicated their purpose. The case is not like one where the thing made is also adapted to use in other ways. It would be wholly inadmissible to shut out the manufacture or sale of things adapted to a proper and lawful use. That would interfere with the rights and privileges of the public. But it has been held that, even in that case if it were proven that the thing, although adapted to other uses, was nevertheless intended by the seller to go into, and contribute to, the infringement by another, the furnisher could not escape the consequences of the infringement. *Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Edison Electric Light Co. v. Peninsular Light, etc., Co.* (C. C.) 95 Fed. 669, 673, affirmed in 101 Fed. 831, 43 C. C. A. 479. The test in all cases is whether the facts show an actual participation in the wrongful act complained of. We cannot resist the impression that upon the application of this test the defendant must stand upon the same footing with the party who completes the infringement by adding the other element necessary to the completion of the former.

3. The counsel for appellee makes the point that claim 1 does not describe an operative structure, and he contends that, because a casing without a bottom would serve no purpose, and could be put to no use,

this claim must fail. But it is erroneous to suppose that because the element, or the combination of elements, in a claim, do not of themselves constitute an operative thing, or one capable of any use, the claim is, therefore, void. No doubt that would be the result if no useful place for it was known to those familiar with the art, and the inventor himself disclosed no relation in which it would be useful. All that is plain enough. But a man may invent a single element, or an improvement in some element, in a machine or some other product, or he may invent an entire machine or product, and he may claim according to his invention, and explain its adaptations, if they are not likely to be understood. Nobody familiar with the subject could have any doubt from reading this claim, without more, as to the particular thing which the patentee claimed as new, or in what relation to other parts, and what other parts, it was designed to be used. Aided by the specification, all doubt is removed as to what the more general statements of the claim mean. It is well settled that for such purpose, and especially when the claim refers to the specification for further description, it is proper to resort to the specification, if explanation is necessary. *Soehner v. Favorite Stove, etc. Co.*, 84 Fed. 182, 28 C. C. A. 317; *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 54 C. C. A. 584; *Klein v. Russell*, 19 Wall. 433, 466, 22 L. Ed. 116; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* (C. C. A.) 120 Fed. 267, 269. The claim cannot be broadened or be made to include things not therein included, but to know what is included we may resort to the specification for the purpose of interpreting the claim. And this is really nothing else than applying the general rule applicable to all written instruments. This is entirely consistent with the rules stated by Mr. Justice Brown in *McCarty v. Lehigh Val. Ry. Co.*, 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358, which is cited to sustain the objection to referring to the specification to help out the claim. The learned justice says:

"There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present for the purpose of making out a case of novelty or infringement."

In accordance with this statement we may refer to the specification "with a view of showing the connection in which the device is used, and proving that it is an operative device," and we learn that the article described is intended to be used with a bottom plate, and that the patentee shows a suitable bottom plate. Thus everything is supplied to the hand of the workman for making the thing invented operative. The somewhat figurative, but now familiar, expression of Mr. Justice Bradley in *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303, is also cited:

"Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring

to the specification, so as to make it include something more than, or something different from, what its words express."

But when the language used and its context is carefully examined, it means nothing else than that we may not look to the specification for the purpose of calling in elements not at all included in the claim, but may do so for the purpose of explaining it. *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co. et al.*, 54 C. C. A. 584, 117 Fed. 410. If, when thus explained, the specification answers the calls of the claim, there is no difficulty. But one may not read into a claim an element not contained in it when its meaning is once settled by construction. So this first claim cannot include the bottom plate, though it may refer to it either in terms, or by the suggestions which it imparts to one familiar with the subject. And, since the open bottom would suggest the necessity of a bottom plate, the skill of the mechanic will supply it in adapting the invention to a useful purpose. *Deering v. Winona Harvester Works*, 155 U. S. 286, 302, 15 Sup. Ct. 118, 39 L. Ed. 153; *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.*, 19 C. C. A. 13, 92 Fed. 67, 73, 74; *Roberts v. Nail Co.* (C. C.) 53 Fed. 920; *Campbell Printing Press Co. v. Duplex Printing Press Co.* (C. C.) 86 Fed. 315, 321.

4. There were many previous patented constructions of apparatus designed for the same general purpose as that of the *Canda* patent. It is not necessary to consider all of them, but we will examine such of them as seem most pertinent, and most relied upon by the defendant as anticipations of the first claim for invention for which *Canda's* patent was granted. Substantially, as shown and described, this claim is for a spring casing having its sides and top cast in a single piece adapted for attachment to the draft timbers, and having an open bottom, adapted to the attachment of a bottom plate, of the peculiar construction indicated. A patent (No. 104,704) was granted in 1870 to *Carll and Shute* for improvements in car couplings. This patent is concerned with the coupling apparatus, the drawbar, and springs which affect the movements of the bar. A bracket, which in some respects resembles the modern casing, is shown. It consists of the sides and top in one piece, the sides being intended for attachment to draft timbers, and has an open bottom. The springs shown are attached to the inside of the bracket, and extend through it at the fore end. There is no suggestion of its having an open bottom for any purpose, and no claim is made which involves it as an element, and no specifications are given for adapting it to the particular use contemplated by the patent in suit, and the contents could not be taken out without more or less dismantling the structure. A patent to *Ustick* in 1875, No. 164,113, was also for couplings. The only reference to a casing is in the mention of it as a box, which serves as a guide for the slide springs which connect the fore end of the drawbar and its tail part, and as containing the resisting spring, and no further description is given; nor is it mentioned in the claims; nor is there any requirement in the specification for adapting its construction to the purposes of the patent in suit.

The next patent to which our attention is invited by the brief and argument of counsel is one granted to *Starr* May 15, 1888 (No. 382,-

840), which relates to draw gear for railway cars. It consisted of improvements in the means provided for obtaining a secure attachment between the cage and the draft timbers of the car. No reference is made either in the description of the invention or in the claims to the bottom of the cage, or to so constructing it as that such a use as Canda proposed could be made of it. We do not by this mean that, if Starr had devised, and in his patent given directions for the construction of, a cage which could be used for the purposes of the patent in suit, and was so similar to it as to be an equivalent, such a device would not have been an anticipation. We have on many occasions said that in such case, if the patent gave reason to suppose that the inventor may probably have contemplated that his device was capable of other uses, and made adequate provision therefor, his invention should be regarded as covering them, whether he mentioned them or not, or whether he contemplated any other particular use or not. For example, in *Goshen Sweeper v. Bissell Carpet Sweeper Co.*, supra, and *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co.*, supra. But if the patent gives no sign of such contemplated use, and makes no provision adapting it to other uses, the patentee cannot be said to have invented that for which he has given no specific directions for construction. And such is the necessary deduction from the statutory requirement that the patentee shall give such clear, full, and concise instructions as shall enable any one skilled in the art to make, construct, conform, and use the thing invented. Rev. St. § 4888 [U. S. Comp. St. 1901, p. 3383]. Nor can we think that the existence in the Patent Office of something which might merely supply a hint, but was not specifically described or claimed as intended to be covered by a patent, ought to be held as an anticipation of an otherwise valid invention. Inventors are not precluded by the embryonic and shapeless ideas found in former patents, any more than they are by such undeveloped matter existing elsewhere.

Another patent especially referred to is that granted to Post July 2, 1889 (No. 406,305), also for improvements in car coupling. The invention, as stated by the patentee, was of devices "to improve and simplify the means of attaching such coupling to the cars; a further object being to so construct the devices that the cars will be automatically uncoupled in the event of the derailment of one of the cars." The patent does not make any reference to anything else than the coupling heads, the drawbars, and certain devices contrived to improve their operation in emergencies. There is nothing in it relevant to the case before us.

And, lastly, there is a patent to Hardy, dated September 8, 1891 (No. 459,041), upon an application filed April 16, 1891, also for improvements in car couplings. The application for the patent in suit was filed May 4, 1891, and the patent issued September 29, 1891. Thus it will be seen that Hardy's application was earlier than Canda's, and his patent was issued earlier than the latter. Counsel for appellants contends that, having regard to the form of pleading in the answer, and certain evidence offered to show that Canda's invention antedated that of Hardy, the Hardy patent must be treated as



subordinate to that of Canda, and not an anticipation of it. We have some doubt whether either of the grounds taken for giving priority to the Canda patent are maintainable. But we do not decide that question, and so do not go into the particulars of it; because we think that the Hardy patent stands on the same grounds, as regards its effect as anticipation, as some of those already considered. It was not constructed with a view to the special purpose of the patent in suit. It is true that it might happen that a casing would be made under the Hardy patent which would be adapted to the use contemplated by Canda. But, if so, it would be merely accidental. It would not result from any preconception, nor from anything specifically directed by the patentee for organizing his invention. The patent does not show a casing having its sides and top case in one piece, and this feature is one of the dominant characteristics of this first claim of the Canda patent. While it is true that there is no invention in making into one whole that which was before in the same form, but in detachable parts, when there is no further consequence, yet it is also true that, if such change produces a more useful result, there may be a quality of invention in making it. And that is what is claimed to be the fact by the patentee in the patent in suit. None of the prior patents show the peculiar adaption of the Canda patent at the bottom of the casing for connection with a bottom plate having recesses to receive the lower edges of the sides of the casing, thereby contributing to its strength.

We have examined the other patents shown in the record sufficiently to satisfy ourselves that there is nothing else which comes nearer to the claim in the Canda patent we are now considering than those we have enumerated. It must be admitted that, if there were no other considerations, some of the previous patents might raise grave doubt in respect to the novelty of this invention. But in aid of it stand several facts which are always persuasive in such a case. There is the presumption arising from the granting of the patent, which, in this case, was issued, as the proceedings in the Patent Office show, after full and critical examination, and this after rejections and references to previous patents of a character very similar to those we have in the present record—indeed, some of them are the same. The invention has gone into extensive use. It was stated at the hearing that it is used on about 20 railroads in this country. The defendant says its casings are in use on about 60 railroads, and, since infringement is hardly denied, perhaps some further credit to the Canda patent ought justly to be taken from the public approbation of the defendant's structure. The defendants' casing is manufactured under a patent issued to Thornbrough (No. 588,722), of date August 24, 1897. A leading feature of this patent is this very peculiarity of the Canda patent of an open bottom adapted to receive a bottom plate. Thus the patentee, in stating his invention, says:

"To make it possible, in case of a breakage of the drawbar or spring, to easily and readily replace the same by simply removing the carrier iron and one bolt which holds up the spider in engagement with the draft-spring housing, and thereby to take out the broken part, and to replace it without further disturbance of the other parts of the apparatus, which is an impossibility with the most modern attachments or draft apparatus now in use."

He calls the bottom plate of his casing a "spider," although in another place he states that "when the spider is fastened in position, the follower plates play back and forth thereupon, and are supported thereby." Further on in his specification, he says:

"When it became necessary or desirable to remove the follower plates, the spring, the yoke, or other parts from the housing, it may obviously be readily accomplished by simply removing the forward bolt, H<sup>1</sup>, allowing the spider to swing down, the bolt, H<sup>2</sup>, acting as a hinge bolt, allowing the spider to be dropped down out of the way, and the ready removal of said parts, so that in case of the breakage of the drawbar spring or other parts they may be easily removed and replaced, requiring only the removal of the carrier iron, J, and the one bolt which holds the forward end of the spider in engagement with the housing."

And in each of his six claims he makes this casing a leading factor. We make this reference here to the defendant's structure for the purpose of showing the credit due to the Canda patent from the use which the defendant has been able to make of it. For these reasons we are constrained to think the validity of the first claim should be recognized. We have already said enough to show the infringement of this claim; and it is in substance admitted, if the claim is to be held valid.

5. And what we have said would also probably sustain the second claim, which adds a bottom plate having the corresponding features of the lower edges of the casting adapting it for attachment therewith. But we refrain from discussing it, for the reason that we do not find in the record evidence to show that the defendant's "spider" has those peculiar features, though there is a significant hint of the "interlocking" of those parts in the specification of the Thornbrough patent wherein he says, in speaking of the means of fastening the bottom plate to the casing, "These bolts may engage the spider with the sides of the housing in any suitable manner; as, for example, by providing the housing with ears, Q, and the spider with ears, Q, through which the bolts may pass." As this is not the only one way in which the parts may be attached, it was incumbent on the plaintiff to show that the defendant used casings and bottom plates of that fashion; otherwise infringement is not proved.

The seventh claim was not insisted upon at the hearing, and we therefore do not consider it. The decree is therefore reversed as to the first claim, and affirmed as to the seventh. As to the second claim, the decree is also affirmed, but upon the ground solely that infringement is not proven.

## THOMSON-HOUSTON ELECTRIC CO. v. BLACK RIVER TRACTION CO.

(Circuit Court, N. D. New York. August 12, 1903.)

## 1. PATENTS—TWO PATENTS FOR SAME INVENTION—SECOND PATENT FOR ELEMENT OF FORMER COMBINATION.

If the structure described in a patent be a complete and an operative one, composed of several coacting parts, and it is described and claimed and patented as a whole, especially when each part is separately described and claimed, no other valid patent can be issued to the inventor for one of those parts.

## 2. SAME—TRAVELING CONTACT FOR ELECTRIC RAILWAYS.

The Van Depoele reissued patent, No. 11,872 (original No. 495,443), for a traveling contact for electric railways, the essential feature of which is a long arm, hinged and pivoted so as to be capable of swinging both vertically and horizontally through long arcs, mounted on the top of an electric car, and adapted for making contact with the under side of an overhead suspended wire, is void, for the same reason as the original, because such swinging arm was fully described and claimed in patent No. 424,695 to the same inventor, as an essential part of the combination of such patent. The invalidity of the original patent, declared in a number of decisions, was not because it was rendered inoperative by reason of defective or insufficient specifications, or for any other reason which could be obviated by a reissue.

In Equity. The bill of complaint in this suit was filed February 7, 1901, by the complainant against the defendant, to enjoin and restrain the defendant from infringing reissued letters patent No. 11,872, dated November 13, 1900, issued to A. Wahl and C. A. Coffin, administrators of C. J. Van Depoele, assignors to Thomson-Houston Electric Company, for improvement in traveling contacts for electric railways. The original of this patent is No. 495,443, dated April 11, 1893.

Betts, Betts, Sheffield & Betts (Frederic H. Betts and L. F. H. Betts, of counsel), for plaintiff.

Harding & Harding (John R. Bennett, George J. Harding, and Frank S. Busser, of counsel), for defendant.

RAY, District Judge. The claims of the reissued letters patent are as follows:

"(1) In an electric railway, the combination of a car, an overhead conductor above the car, an upwardly extending and laterally swinging arm mounted on the roof of the car, and carrying a contact device at its free end, and making underneath contact with the conductor, substantially as described.

"(2) In an electric railway, the combination of a car, an electric overhead conductor above the car and parallel with the line of travel, an upwardly extending trailing arm carrying a contact device at its free end, adapted to make underneath contact with the conductor, said arm being supported on the car on vertical and transverse axes, so as to permit said contact device to follow the position of the conductor, notwithstanding great variations of height and of lateral displacement thereof substantially as described."

In the specifications we find the following:

"The said invention relates to electric railways of the class in which a suspended conductor is used to convey the working current, a traveling contact carried by the car for taking off the current for use in operating the motor

by which the car is propelled, and the return circuit completed through the rails. The invention consists more particularly of an improved traveling contact. This is shown, however, in connection with an improved arrangement and construction of the switches by which the said traveling contact is directed onto the proper conductor; but these devices for switching the traveling contact from one conductor to another have been already claimed in letters patent of the United States No. 424,695, which was issued as a division of this application on April 1, 1890, and said devices are not claimed herein, but the description and illustration of them are here retained to show how the traveling contact is adapted to meet one of the essential requirements of railway service without special arrangements or other complications. The invention also consists in various details of construction and arrangement, which will be hereinafter pointed out. \* \* \* The contact-carrying arm described and claimed in the present application possesses substantial practical advantages over any other means yet proposed for establishing moving contact between a vehicle and a stationary supply conductor, in that by the use of a hinged, flexibly mounted arm much greater freedom of movement is compatible with the maintenance of a positive mechanical connection and electrical contact between the vehicle and supply-conductors. In a previous application, filed June 22, 1885, serial No. 169,410 (see patent No. 403,801), said Charles J. Van Depoele, deceased, has shown and described a contact device consisting of a grooved roller mounted upon a spring, and sustained thereby a short distance above the roof of the car; but this was, in practice, found deficient in capacity to follow the sinuosities and deflections of the overhead conductor as ordinarily put up, and, moreover, necessitated the conductor being supported in inconvenient proximity to the ground, and it also required for its operation a conductor suspended with substantially impracticable accuracy above an ideal track. By the use of such an arm as herein described, which may be of any suitable length, the conductor is supported at a height entirely out of the way of passing teams and the like, and, moreover, the outer end of the arm, being the longest, may also swing laterally through a distance of several feet, to follow deflections or bends in the conductor, without undue or injurious strain upon its pivotal connections. Another great advantage is found in the fact that the outer end of an arm such as described will maintain its contact under great variations of height of conductor, as well as lateral displacement thereof, and may even be depressed to a horizontal position where it is desired to pass under bridges, into buildings, or other places where it may be desirable to place the conductor in a lower plane than in the other portions of the track. Many modifications and minor changes in the invention just described will readily suggest themselves to persons skilled in the art, and the improvement is not limited to the precise details of construction or arrangement shown, as they may be modified without departing from the scope of the invention. The combination with the contact-carrying arm of a weighted spring, or of a weight and spring, as the special means for holding the contact arm pressed upward, and of enabling the motorman to lower the contact wheel, are not claimed herein, because this special improvement has been already claimed in the patent No. 424,695, dated April 1, 1890, which was issued as a division of this application. Nor is there claimed herein the so arranging of a weight or spring (as by causing it to work through suitable grooves or rollers arranged in the car-roof) as to tend to cause the arm to assume a normal central position, or one parallel with the longitudinal center of the car, as that has also been already claimed in said divisional patent, No. 424,695, being an arrangement which is of especial value only in connection with the switches to which said divisional patent more particularly relates. In the present application no special form or arrangement of tension device is essential to or a part of the invention claimed."

The claims of the original patent, No. 495,443, dated April 11, 1893, are as follows:

"(1) The combination of a car, and overhead conductor above the car, an upwardly extending and laterally movable arm carried by the car, and hav-

ing its upper end free, and a contact device carried by the arm at its free end, and making underneath contact with the conductor.

"(2) The combination of a car, an overhead conductor above the car, a contact device making underneath contact with the conductor, and an arm carried by the car and carrying the contact device, and pivoted so as to swing freely around a vertical axis.

"(3) The combination of a car, an overhead conductor above the car, a contact device making underneath contact with the conductor, and an arm hinged to the car on a transverse axis and carrying the contact device, and a spring to press the contact device upward against the conductor.

"(4) The combination of a car, an overhead conductor above the car, a contact device making underneath contact with the conductor, and an arm on the car movable on both a vertical and a transverse axis, and carrying the contact device.

"(5) The combination of a car, an overhead conductor above the car, a contact device making underneath contact with the conductor, an arm on the car movable on both a vertical and transverse axis, carrying the contact device, and a spring for pressing the contact device upward against the conductor.

"(6) In an electric railway, the combination with a suitable track, and a supply conductor suspended above the track, of a car provided with a swinging arm carrying a contact device in its outer extremity, and means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the under side of the supply conductor, substantially as described.

"(7) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a swinging arm supported on top of the car, a contact device carried by one extremity of the arm, and held thereby in contact with the under side of the electric conductor, and a tension device at or near the other end of the swinging arm for maintaining said upward contact, substantially as described.

"(8) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a contact engaging the under side of the suspended conductor, and a tension spring at or near the inner end of the arm for maintaining said upward pressure contact substantially as described.

"(9) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a contact carrying arm pivotally supported on top of the car, and provided at its outer end with a contact roller engaging the under side of the suspended conductor, and a weighted spring at or near the inner end of the arm for maintaining said upward contact, substantially as described.

"(10) The combination of a suitably suspended conductor, a railway track below said conductor, switches in the track and in the conductor, a car traveling upon the track and provided with an upwardly extending swinging arm pivotally supported upon the car, a contact device carried by the arm for establishing contact with the suspended conductor, said device engaging the conductor, at a point in rear of the front wheels of the car, substantially as described.

"(11) The combination of a conductor suitably suspended along the line of travel, a railway track below said conductor, similar switches in the track and in the conductor, a car traveling upon the track, and provided with a pivotally supported laterally movable swinging arm, carrying a device for establishing contact with said suspended conductor, the connections between the said contact device and the car being positive and in fixed relation thereto, substantially as described.

"(12) In an electric railway, the combination with a car, of a post extending upward therefrom and carrying a suitable bearing, an arm or lever carrying at its outer end a suitable contact roller, and pivotally supported in said bearing, and provided at its inner end with a tension spring for pressing the outer end of the lever carrying the contact wheel upward against a suitable suspended conductor, substantially as described.

"(13) In an electric railway, the combination of an electrically propelled car, a supply conductor suspended over the line of travel of the car, a swinging arm mounted upon the car, and carrying a contact device at its free end, said contact arranged to bear against said conductor, suitable switching devices upon the track traversed by the wheels of the car, and corresponding switches on the suspended conductor located above those on the track, and arranged to engage the contact devices, substantially as described.

"(14) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a rearwardly extending arm pivotally supported on top of the car, and provided at its outer end with a contact device engaging the under side of the suspended conductor, and a tension spring for maintaining an upward pressure contact with the conductor, substantially as described.

"(15) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a rearwardly extending arm pivotally supported on top of the car so as to swing laterally, and provided at its outer end with a contact device engaging the under side of the suspended conductor, and a tension spring for maintaining an upward pressure contact with the conductor, substantially as described.

"(16) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a grooved contact wheel engaging the under side of the suspended conductor, and a tension spring for maintaining an upward pressure contact with the conductor, substantially as described."

And among the specifications we find the following:

"My present invention relates to electric railways of the class in which a suspended conductor is used to convey the working current, a traveling contact carried by the car for taking off the current for use in operating the motor by which the car is propelled, and the return circuit completed through the rails. The invention consists more particularly in an improved traveling contact, and in improved arrangement and construction of the switches by which the said traveling contact is directed onto the proper conductor. These devices for switching the traveling contact from one conductor to another have been already claimed in my patent No. 424,695, which was issued as a division of this application on April 1, 1890. I therefore do not lay claim to them herein, but the description and illustration of them is retained to show how my traveling contact is adapted to meet one of the essential requirements of railway service without special arrangements or other complications. It also consists in various details of construction and arrangement, which will be hereinafter pointed out. In the accompanying drawings, Fig. 1 is a side elevation of a car provided with my improved contact devices, and otherwise embodying my invention. Fig. 2 is an enlarged detail showing the contact wheel in position in the switch box. Fig. 3 is a sectional detail showing the construction of the contact wheel. Fig. 4 is a top plan view of a portion of track showing the conductor, the switch box, and the rails. Fig. 5 is also a plan view, and is similar to the preceding, with the addition of a car shown in dotted lines. Fig. 6 is a diagrammatic representation of an electric railway system. Fig. 7 shows a modified form of contact wheel. Fig. 8 is a diagrammatic representation thereof. Fig. 9 is an elevation on an enlarged scale, partly in section, showing the vertical and transverse axes upon which the contact-carrying arm is sustained. Similar letters denote like parts throughout. The car, A, is supported upon the track, B, and provided with a motor, C, which is connected with the wheels thereof in any of the methods already described by me. D is the suspended working conductor, E is the traveling contact wheel, and F is a hinged arm supported upon a post, f, secured to or extending upward from the roof of the car. To the lower end of the arm, F, is attached a spring, G, to the lower extremity of which is secured a cord which passes downward through suitable grooves or over suitable rollers, and is provided with a weight, H, which serves to hold the spring down

and keep the contact wheel, E, always pressed up against the under side of the conductor, D, at the same time the spring will instantly yield to allow the wheel to pass under the switches or any obstruction. Being held in position by the weight, the motorman can at any time lower the contact wheel by raising the same, rendering the arrangement very convenient for many purposes. In order that the contact wheel, E, shall be compelled to pass from one conductor to a branch, or one attached thereto leading in a different direction, I provide the inverted open bottom metallic boxes, I, which are formed with branching compartments, and constructed in the form of switches, conforming to the grooves and angles of the track switches by which the direction of the car is controlled. These boxes are in the form of open, smooth curved passages, and are free from obstructions within, so that the contact wheel, E, which is slightly depressed on meeting the end of the switch box, may roll freely therethrough in the desired direction without hindrance. The conductors, D, follow the line of the track or tracks, and are preferably located centrally above them, and, at points where the tracks diverge or join the main line, switch boxes, I, are placed, the conductors, D, coming to the said boxes, and being firmly attached to the tops or sides thereof, so that, were there no other support provided them, the said conductors would sustain the box in its proper position, which is directly over the ground or track switch. \* \* \* The contact-carrying arm described and claimed in the present application possesses substantial practical advantages over any other means yet proposed for establishing moving contact between a vehicle and a stationary supply conductor, in that by the use of a hinged, flexibly mounted arm, much greater freedom of movement is compatible with the maintenance of a positive mechanical connection and electrical contact between the vehicle and supply conductors. In a previous application, filed June 22, 1885, serial No. 169,410, I have shown and described a contact device consisting of a grooved roller mounted upon a spring, and sustained thereby a short distance above the roof of the car; but this was, in practice, found deficient in capacity to follow the sinuosities and deflections of the overhead conductor as ordinarily put up, and, moreover, necessitated the conductor being supported in inconvenient proximity to the ground, and it also required for its operation a conductor suspended with substantially impracticable accuracy above an ideal track. By the use of such an arm as here described, which may be of any suitable length, the conductor is supported at a height entirely out of the way of passing teams and the like, and, moreover, the outer end of the arm, being the longest, may also swing laterally through a distance of several feet, to follow deflections or bends in the conductor, without undue or injurious strain upon its pivotal connections. Another great advantage is found in the fact that the outer end of an arm such as described will maintain its contact under great variations of height of conductor, as well as lateral displacement thereof, and may even be depressed to a horizontal position, where it is desired to pass under bridges, into buildings, or other places where it may be desirable to place the conductor in a lower plane than in the other portions of the track."

Infringement of the letters patent in suit is conceded, provided they be valid. The defendant states its position thus:

"Positions of Respondent. The positions of respondent are as follows:

"First. That the reissue describes and claims the same invention as patented in patent No. 424,695, and is therefore invalid.

"Second. That the reissue patent differs from the original patent in breadth or scope, only, and is invalid, in covering the same invention as that covered by patent No. 424,695.

"Third. That if the reissue patent claims or attempts to cover an invention not claimed in the original patent, it is invalid for that reason.

"Fourth. Under complainant's construction of the claims of the reissue patent in suit, as requiring no means for maintaining contact, it is clearly lacking in invention."

The complainant states its position as follows:

"The complainant's position in this case may be briefly stated as follows:

"(1) Van Depoele made at least two perfectly distinct and separable inventions in the trolley art. The generic invention of a long arm, hinged and pivoted so as to be capable of swinging both vertically and horizontally through long arcs, and mounted on the top of an electric car, and adapted for making contact with the under side of an overhead suspended wire. This arm was capable of being actuated by a great variety of mechanism to make and keep underneath contact.

"(2) The subordinate invention was of a special kind, and a special arrangement of mechanism, consisting of a tension spring fastened at the upper end to the arm, and at the lower to a weight hung on a cord which passes through guides in the car roof, so that the lateral swing of the spring (with the arm) was restrained. When thus arranged, or in some equivalent manner, and not otherwise, it acted to 'centralize' the arm, or pull it back to a central position. This special improved kind and arrangement of tension devices was advantageous in passing switches.

"(3) Van Depoele filed on March 12, 1887, an application in which he described and illustrated both the generic invention and the subordinate improvement as embodied in one structure. He claimed the generic invention and the subordinate improvement separately when the application was originally filed.

"(4) The generic claims became involved in a long interference, known as 'Interference A.' Other claims of the application were involved in another interference. The applicant, by a most bungling division of the claims, attempted to separate the two inventions, and the Patent Office acquiesced in his action. The subordinate improvement was patented in and by divisional patent No. 424,695, dated April 1, 1890. It expressly therein stated that it was not intended to patent by it the generic invention, that being reserved. After the result of a successful interference, the applicant took out his patent with the generic claims, but he retained in it as the descriptive portion the same description as had appeared in the prior patent for the specific form or improvement. The complainant has always contended that, as the two inventions had been illustrated together as a single structure in the original application, this was correct practice, although the inventions, as inventions, were separable and distinct.

"(5) The courts have held that, the descriptions being the same, no 'proper line of demarcation had been preserved,' and that the generic claims must be construed as claiming the same thing that had been claimed in the prior patent, and nothing else. Complainant then reissued to correct the mistake in practice."

From the statement of the complainant it is apparent that a mistake in practice was made by the patentee in taking out the original letters patent, No. 495,443, and, those letters patent having been held void, he has obtained a reissue to correct the practice, not to correct an error in the claims or specifications of such letters patent. It would seem plain that the applicant knew what he was doing, but did not understand the effect of his action with the courts, or upon his patents when they came before the courts on the question of their validity.

Section 4916, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3393], provides as follows:

"Sec. 4916. Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the



corrected specification, to be issued to the patentee, or, in the case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent. The Commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a re-issue for each of such re-issued letters patent. The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so re-issued, together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in case of a machine-patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

After a careful reading of *Thomson-Houston Electric Co. v. Hoo-sick Ry. Co.*, 82 Fed. 461, 27 C. C. A. 419 (Second Circuit), which holds that letters patent No. 495,443, the original of those now in suit, are invalid as to claims 6, 7, 8, 12, and 16, because for the same invention covered by the prior patent, No. 424,695, to the same inventor, so far as concerns the claims which relate to the combinations between the contact device and the suspended conductor, and to the structural features of the contact device (other of the claims now in question being also discussed), and of *Thomson-Houston Electric Co. v. Jeffrey Mfg. Co.*, 101 Fed. 121, 41 C. C. A. 247 (Sixth Circuit), holding that the said patent No. 495,443, for a traveling contact for electric railways, is rendered invalid by patent No. 424,695, previously issued to the same inventor for precisely the same devices, the only difference being that the earlier patent states an additional function to be performed by one of the elements, and of *Thomson-Houston Electric Co. v. Union Ry. Co.*, 86 Fed. 636, 30 C. C. A. 313, which holds that patent No. 495,443, for a traveling contact for electric railways, must be construed, as to claims 2 and 4, as including, by implication, means for maintaining the contact device and the conductor in their normal working relations, and, so construed, are void, as being for the same invention as letters patent No. 424,495, to the same inventor, this court is at a loss to discover just how or when the difficulty is overcome or remedied by the reissued letters patent No. 11,872, dated November 13, 1900. The complainant seems to contend that the inventor really had three inventions described in, but not covered by, letters patent No. 424,695, and No. 495,443, while not intending it, and that by reissued letters patent No. 11,872 he covers the third or generic invention, omitted by mistake, accident, or inadvertence from the original letters patent. Omitting from consideration the improvement in switches for electric railroads, complainant says he had the generic invention of a long arm hinged and pivoted so as to be capable of swinging both vertically and horizontally through long arcs, and mounted on the top of an electric car, and adapted for making contact with the under side of an overhead sus-

pended wire. He says this arm was capable of being actuated by a great variety of mechanism to make and keep underneath contact. However this may be, certainly to make it operative there must be some sort of connecting mechanism. It matters little how fine an invention (?) a person has, it is not the subject of a valid patent if not operative either in itself, or in connection with the structure of which it is to form a part. And if not operative, as stated, a person who by changes and new combinations makes it operative is entitled to a patent thereon, which cannot be defeated on the ground of anticipation, nor does he infringe the inoperative device if patented.

The complainant says that the subordinate invention was of a special kind, and a special arrangement of mechanism, consisting of a tension spring fastened at the upper end to the arm (long arm above mentioned), and at the lower to a weight hung on a cord which passed through guides in the car roof, so that the lateral swing of the spring (with the arm) was restrained; that when thus arranged, or in some equivalent manner, and not otherwise, it acted to centralize the arm, or to pull it back to a central position. He says that this was advantageous in passing switches. Both the so-called generic and the subordinate inventions were described and illustrated as embodied in one structure, but the inventor claimed them separately when the claim was first filed. Then the applicant (so says the complainant), "by a most bungling division of the claims, attempted to separate the two inventions, and the Patent Office acquiesced in the action." If they were actually claimed separately when the claim was originally filed, how was it that any further separation was necessary? It would seem that the one might easily have been distinguished from the other. The complainant says the subordinate invention, tension spring with weight, etc., was patented (No. 424,695) April 1, 1890. Then were taken out letters patent No. 495,443 (the original of the reissue), for the generic invention (long arm hinged and pivoted, etc., and mounted, etc., and adapted for making contact with the under side of an overhead suspended wire), retaining in this patent the same description, etc., used in taking out letters patent No. 424,695, for what complainant calls the "subordinate invention."

The specifications and claims of letters patent No. 424,695, of April 1, 1890, are in part as follows:

"Be it known that I, Charles J. Van Depoele, a citizen of the United States, residing at Lynn, in the county of Essex, state of Massachusetts, have invented certain new and useful improvements in suspended switches and traveling contacts for electric railways, of which the following is a description:

"This application is a division of serial No. 230,649, filed March 12, 1887. My present invention relates to electric railways of the class in which a suspended conductor is used to convey the working current, a traveling contact carried by the car being employed for taking off the current for use in operating the motor by which the car is propelled. The return circuit is preferably completed through the rails of the track. My invention consists in certain devices, and their relative arrangement, by means of which a contact device carried by a rod or pole extending from the car, and pressed upwardly into contact with the conductor, is switched from one line to another correspondingly with the vehicle. To illustrate my invention, I have shown it applied to a contact device of this description, which forms the subject-matter of my application, serial No. 230,649, of March 12, 1887; and,

while I do not intend to claim generally in this application a contact device of this construction, I have made claims herein to certain details thereof which are of especial value in connection with my improved switching devices, but which are not essential features of the contact device itself, considered without reference to the switch. I also make claims in this application to a switch plate particularly designed for the arrangement which forms the principal subject-matter of this application. More particularly my invention consists in a track switch for the vehicle, a conductor switch for the contact device or 'trolley,' as it is termed, and the trolley itself, attached to the vehicle, these elements being so arranged relatively to one another that in operation the vehicle reaches the track switch and is diverted laterally before the trolley reaches the conductor switch, whereby the trolley, which partakes of the lateral movement of the vehicle, has imparted to it a laterally moving tendency before its switch is reached, and it therefore passes through the switch in the proper direction, corresponding to the movement of the vehicle. My invention also consists in various details of construction and arrangement, which will be hereinafter pointed out.

"In the accompanying drawings, Fig. 1 is a side elevation of a car provided with my improved contact devices, and otherwise embodying my invention. Fig. 2 is an enlarged detail showing the contact wheel in position in the switch box. Fig. 3 is a sectional detail showing the construction of the contact wheel. Fig. 4 is a top plan view of a portion of track, showing the conductor, the switch box, and the rails. Fig. 5 is also a plan view, and is similar to the preceding with the addition of a car shown in dotted lines. Fig. 6 is a diagrammatic representation of an electric railway system. Similar letters denote like parts throughout. The car, A, is supported upon the track, B, and provided with a motor, C, which is connected with the wheels thereof in any of the methods already described by me. D is the suspended working conductor. E is the traveling contact wheel, and F is a hinged arm supported upon a post, f, secured to or extending upward from the roof of the car. To the lower end of the arm, F, is attached a spring, G, to the lower extremity of which is secured a cord which passes downward through suitable grooves or over suitable rollers, and is provided with a weight, H, which serves to hold the spring down and keep the contact wheel, E, always pressed up against the under side of the conductor, D. At the same time the spring will instantly yield to allow the wheel to pass under the switch or any obstruction, and while the arm, F, is movable laterally with respect to the vehicle, the spring and weight will constantly tend to restore the arm to its normal central position, and assist in causing the contact arm to partake of the lateral movement of the vehicle. Being held in position by the weight, the wheel has a much greater range of action, and, moreover, the motorman can at any time lower the contact wheel by raising the same, rendering the arrangement very convenient for many purposes. \* \* \*

The arm, F, is of a length that will place the contact wheel, E, about over the rear pair of wheels of the car, and the position of the post, f, and the length of the arm, F, itself, will therefore vary with the length of the body of the car, the particular proportions shown being only by way of illustration. The arm, F, is hinged, and should in most instances be also pivoted to the top of its post, f, although a reasonable amount of looseness in the hinged joint will answer the purpose of the pivot, and prevent binding or straining at that point due to the swaying of the vehicle or deflection of the conductor. The outer end of the arm, F, is forked, and provided with an axle bolt, K, passing through the hub of the contact wheel, E. A fender spring, L, is also attached to the arm, F, and passes on each side of the wheel, E, as far as its hub, and, in case of detachment of the wheel from the wire, D, prevents its getting caught between the hub of the wheel and the forks of the arm, F, rendering it an easy matter for the motorman, by raising the weight, H, to lower the contact wheel and replace it again in operative position. It also prevents any transverse wire being caught in the angle between the arm and the wheel. \* \* \*

I believe myself to be the first to devise this arrangement of contact device and switches, whereby the lateral movement of the vehicle is first imparted to the trailing contact arm and the contact wheel is then flexibly, yet without interruption of contact,

drawn into the switch, and guided thereby into engagement with the desired branch conductor; and I intend herein to claim broadly any relative arrangement of track switch, conductor switch, vehicle, and contact device by means of which the former switch will act in advance of the latter, and the vehicle impart a lateral tendency to the trailing contact by the time it engages with the conductor switch. The contact-carrying arm described in the present application possesses substantial practical advantages over any other means yet proposed for establishing moving contact between a vehicle and a stationary supply conductor, in that by the use of a hinged, flexibly mounted arm much greater freedom of movement is compatible with the maintenance of a positive mechanical connection and electrical contact between the vehicle and supply conductors.

"Having described my invention, what I claim, and desire to secure by letters patent, is:

"(1) The combination, with crossing or branching overhead wires, of a plate along the top of which said wires pass, and deflecting ribs at the lower side of said plate at its extremities.

"(2) The combination, with an overhead conductor arranged to receive a traveling underneath contact, of a switching device secured to and depending from the conductor.

"(3) The combination, with an overhead wire for receiving an underneath contact, of a switch-plate attached to the wire in about the same horizontal plane as the wire.

"(4) The combination of a track having switches, an overhead conductor above the track and having switches, and a car on the track provided with a contact-carrying arm arranged to engage the conductor at a point in rear of the front wheels of the car.

"(5) In an electric railway, the combination of a track having suitable switches, an electric conductor suspended above said track, and having switches located above the track switches, and a car on said track provided with an upwardly extending arm carrying a contact wheel arranged to engage the suspended conductor at a point in rear of the front wheels of the car, substantially as described.

"(6) In an electric railway, the combination of an electrically propelled car, a supply conductor suspended over the line of travel of the car, a swinging arm mounted upon the car and carrying a contact device at its free end, said contact arranged to bear against said conductor, suitable switching devices upon the track traversed by the wheels of the car, and corresponding switches on the suspended conductor located above those on the track, and arranged to engage the contact devices, substantially as described.

"(7) In an electric railway, the combination of a track having suitable switches, an electric conductor suspended above said track, and having switches located above the track switches, a car on said track, provided with a swinging arm carrying a contact wheel arranged to engage the suspended conductor, and switches at a point in rear of the front wheels of the car, whereby the contact wheel is directed through the proper part of the suspended switch, substantially as described.

"(8) In an electric railway, the combination of a switch or turn-out on the track, and a corresponding one on the overhead line, the same being so arranged relatively that the car will reach the switch or turn-out before the trolley does, substantially as described.

"(9) In an electric railway, a switching device for suspended conductors, comprising two or more branching compartments or ways corresponding to the direction of the track, and of the main and branch conductors, and secured to the said suspended conductors, substantially as described.

"(10) In an electric railway, a switching device for suspended conductors, consisting of an open-bottom box formed with two or more branching compartments, corresponding to the direction of the track, and arranged to be secured to the conductor, substantially as described.

"(11) The combination, with an overhead line wire, of a grooved contact device pressed against the wire, and receiving the wire between the flanges of the groove, and a guiding switch plate connected to the wire, against which the said flanges bear in passing from one line to another.

"(12) In an electric railway having an electric conductor suspended above the track, a switching device supported by the conductor, and formed with downwardly open compartments or ways corresponding with the direction of the track, said ways being substantially flat at their upper sides to form paths for the flanges of the contact trolleys, substantially as described.

"(13) In an electric railway, a switch for suspended conductors, consisting of a box formed with branching compartments, corresponding with the branches of the conductor, and of the track switches, and secured to the said suspended conductors, substantially as described.

"(14) In an electric railway, a switch for suspended conductors, consisting of a box formed with branching compartments, corresponding with the branches of the conductor, and of the track switches, and secured to and depending from the said suspended conductor, substantially as described.

"(15) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a contact-carrying arm pivotally supported on top of the car, and provided at its outer end with a contact roller engaging the under side of the suspended conductor, and a weighted spring at or near the inner end of the arm for maintaining said upward contact, substantially as described.

"(16) In an electric railway, the combination of a car provided with a pivoted arm, as F, having a contact at its outer extremity, a tension spring, as G, attached at its inner extremity, and a vertically moving weight connected to said spring for holding the same in operative relation to the arm throughout its entire range of movement, substantially as described.

"(17) In an electric railway, the combination of the car having suitably pivoted arm, F, carrying a contact wheel at its outer extremity, a spring, G, secured to its lower extremity, and a connection extending from said spring, and provided with a weight at its lower end, substantially as described.

"(18) In an electric railway, the combination, with suitable contact-carrying arm, of the grooved contact wheel, and the fender spring, L, substantially as described.

"(19) In an electric railway, the combination, with branching overhead conductors, of an upwardly pressed contact arm carrying a grooved wheel embracing the conductor, and a switch plate at the branching point, adapted to receive the tips of the wheel flanges, and provided with depending ribs, between which the wheel is free to move laterally to engage with one of the branch conductors.

"(20) In an electric railway, the combination, with an overhead switch plate having depending ribs, but open at its extremities, of main and branch conductors, extending from its two extremities, respectively, a vehicle, an upwardly pressed contact arm attached to the vehicle, and tending to move laterally therewith, and a track switch for the vehicle, located so as to operate in advance of the conductor switch.

"(21) In an electric railway, the combination, with main and branch overhead conductors, of a vehicle, an intermediate contact arm thereon movable laterally with respect thereto, a spring tending to return the arm to its normal central position, a guiding switch at the branching point of the conductor, and a track switch for the vehicle, located so as to operate in advance of the conductor switch, whereby the lateral tendency of the contact device at the branching point is imparted to it by the vehicle, while its outer extremity is flexibly guided by the overhead switch from main to branch conductor.

"(22) In an electric railway, the combination, with main and branch conductors, of a vehicle, a contact arm thereon having vertical and lateral spring pressure, a switch plate for the conductors, and a track switch for the vehicle, located so as to operate in advance of the conductor switch, whereby the lateral tendency of the contact device at the branching point is imparted to it by the vehicle, while its outer extremity is flexibly guided by the overhead switch from main to branch conductor.

"(23) The combination, with branching overhead conductors, of a vehicle having a laterally swinging contact arm pressed upward to engage the conductors, and a switch plate at the branching point, having depending sides,

but open at its extremities, the interior width of the plate between the sides being greater than the thickness of the contact wheel, whereby the wheel is free to move laterally with relation to the main conductor and engage one of the branching conductors.

"(24) In an electric railway, the combination, with branching line conductors, of a track switch, a vehicle, an intermediate contact arm swinging laterally with respect to the vehicle, but provided with a spring tending to restore it to its normal central position, and a lateral deflecting switch at the branching point of the conductors, whereby the extremity of the contact arm may be flexibly guided from main to branch conductor.

"(25) In a branching electric railway, the combination of a track switch, an overhead conductor switch, and a vehicle having a rearwardly extending contact arm, whereby the track switch will operate in advance of the conductor switch.

"(26) In a branching electric railway, the combination, with a vehicle, of a track switch, an overhead conductor switch, and a contact arm extending upward from the vehicle to the conductor, and so located relatively to the length of the vehicle and the two switches that the lateral movement of the vehicle will give a corresponding movement of the contact device on the conductor switch.

"(27) In a branching electric railway, the combination, with a vehicle, of a track switch, a contact device consisting of a trailing spring-pressed arm having a grooved contact piece embracing the conductor and guided thereby, the said arm being jointed to the car and tending to move laterally therewith, and an overhead conductor switch adapted to engage the contact piece, and whereby the extremity of the arm is flexibly guided from main to branch conductor.

"(28) In a contact device, the combination, with a contact wheel, of a supporting arm therefor, having a fender for the wheel to prevent its engagement with overhead wires in case of derailment.

"(29) The combination, with wheel, E, of a supporting arm, F, provided with a fender around the wheel to prevent its engagement with overhead wires in case of derailment.

"(30) The combination, with a contact wheel for an overhead conductor, of a supporting arm therefor, having a fender bridging the angle between the wheel and arm.

"(31) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a trailing arm having a grooved contact wheel at its outer end, and moving laterally relatively to the vehicle, but provided with a spring tending to retain it in its normal central position.

"(32) In an electric railway, the combination, with an overhead conductor, and a vehicle, of a trailing contact arm guided at its outer end by the overhead conductor, and movable laterally relatively to the vehicle, but having a normal centralizing tendency by means of a spring or weight.

"(33) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of an upwardly pressed trailing arm having a grooved contact wheel at its outer end, by which it is guided by the conductor, the said arm being free to swing laterally relatively to the vehicle, but tending to remain in its normal central position by means of a spring or weight.

"(34) The combination, with a vehicle and an overhead conductor, of a trailing contact arm guided normally by the conductor, but having a spring connection with the vehicle, tending constantly to maintain it in a definite position, while at the same time it is free to swing laterally with respect to the vehicle against the pressure of the said spring.

"(35) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a rearwardly extending arm guided at its outer extremity by engagement with the conductor, and movable laterally relatively to the vehicle, but having a spring or weight tending to restore it to its normal central position."

The long arm, F, hinged and pivoted, etc., to a standard, f, is plainly and distinctly shown in the drawings forming a part of letters

patent No. 424,695. This precise thing is shown in letters patent No. 495,443, and also the reissue, No. 11,872. Now let us compare and ascertain what is described and patented in the reissue. Claim 1 (No. 11,872) says:

"In an electric railway, the combination of a car, an overhead conductor above the car, an upwardly extending and laterally swinging arm mounted on the roof of the car, and carrying a contact device at its free end, and making underneath contact with the conductor, substantially as described."

This omits all mention of the tension spring attached to the long arm at one end, and to a weight at the other, which is now termed the "subordinate invention."

Claim 2 (No. 11,872) says:

"In an electric railway, the combination of a car [same language as claim 1], an electric overhead conductor above the car, and parallel with the line of travel ["electric" precedes "overhead," and the words "and parallel with the line of travel" follow "car"], an upwardly extending trailing arm, carrying a contact device at its free end, adapted to make underneath contact with the conductor, said arm being supported on the car on vertical and transverse axes, so as to permit said contact device to follow the position of the conductor, notwithstanding great variations of height, and of lateral displacement thereof, substantially as described."

It is a question whether the inventor intended to make this arm a part of the contact device. He says that the arm carries a contact device. Here we have a "trailing arm" in place of a "laterally swinging arm," and in claim 1 it makes contact with the conductor, while in claim 2 it is "adapted" to make such contact; and in claim 1 it is simply mounted on top of the car, while in 2 the mode and manner of mounting the arm on the car is described, with the purpose of such mode, etc., given. Claim 2 also omits all mention of the tension spring and weight attached to the long arm, etc. In the original we find, in claims 6, 7, 8, 12, and 16 (held invalid), this arm mentioned and described, not in the exact language, but substantially the same; and, when read with the drawings and specifications, there is no doubt that it is the same, and serves the same purpose, and was intended so to do. We also find that this arm is provided at its outer end with "a contact engaging the under side of the suspended conductor [without which it would be absolutely useless and inoperative, and a mere pole or stick hung on a pivot], and a tension spring at or near the inner end of the arm for maintaining said upward pressure contact [and without which or a similar device it would be useless and inoperative]." This tension device is omitted in the reissue.

Now, turning to patent No. 424,695, we find the same arm in the drawings as before stated. We find in the specifications:

"My present invention relates to electric railways of the class in which a suspended conductor is used to convey the working current; a traveling contact, carried by the car [it is carried by the car because attached thereto and upheld by means of this arm in question], being employed for taking off the current for use in operating the motor by which the car is propelled. The return circuit is preferably completed through the rails of the track. My invention consists in certain devices and their relative arrangement, by means of which a contact device, carried by a rod or pole extending from the car [the arm in question], and pressed upwardly into contact with

the conductor, is switched from one line to another correspondingly with the vehicle. [This can only be done by means of this arm. The contact device is not now claimed as the generic invention, but the long arm, hinged and pivoted, is. See claims of complainant.] To illustrate my invention, I have shown it applied to a contact device of this description, which forms the subject-matter of my application, serial No. 230,649, of March 12, 1887; and, while I do not intend to claim generally in this application a contact device of this construction, I have made claims herein to certain details thereof which are of especial value in connection with my improved switching devices, but which are not essential features of the contact device itself, considered without reference to the switch. [The contact device only is disclaimed as a part of this invention claimed and sought to be patented, and the contact device is always described as attached to the long arm at its upper end, and carried by it. It would seem that the inventor is attempting to disconnect this long arm from the contact device entirely and absolutely.]”

Then: “More particularly, my invention consists in a track switch for the vehicle, a conductor switch for the contact device or ‘trolley,’ as it is termed, and the trolley itself, attached to the vehicle [attached by means of the arm]; these elements being so arranged relatively to one another that in operation the vehicle reaches the track switch and is diverted laterally before the trolley reaches the conductor switch, whereby the trolley, which partakes of the lateral movement of the vehicle, has imparted to it a laterally moving tendency before its switch is reached, and it therefore passes through the switch in the proper direction, corresponding to the movement of the vehicle. My invention also consists in various details of construction and arrangement, which will be hereinafter pointed out. [The specifications then proceed to point them out.] In the accompanying drawings, Fig. 1 is a side elevation of a car provided with my improved contact devices, and otherwise embodying my invention. [This swinging arm is fully and prominently shown, and without it there would be no connection and no utility or operative ability.] \* \* \* E is the traveling contact wheel, and F [the arm in question] is a hinged arm supported upon a post, f, secured to, or extending upward from, the roof of the car. To the lower end of the arm, F, is attached a spring, G, to the lower extremity of which is secured a cord which passes downward through suitable grooves or over suitable rollers, and is provided with a weight, H, which serves to hold the spring down and keep the contact wheel, E, always pressed up against the under side of the conductor, D. At the same time the spring will instantly yield to allow the wheel to pass under the switch or any obstruction, and while the arm, F [the arm in question], is movable laterally with respect to the vehicle, the spring and weight will constantly tend to restore the arm to its normal central position, and assist in causing the contact arm to partake of the lateral movement of the vehicle. Being held in position by the weight, the wheel has a much greater range of action, and moreover the motorman can at any time lower the contact wheel by raising the same [the arm in question], rendering the arrangement very convenient for many purposes.”

Then follows a full description of the arm, F, its construction and uses. Then:

“I believe myself to be the first to devise this arrangement of contact device and switches, whereby the lateral movement of the vehicle is first imparted to the trailing contact arm, and the contact wheel [at the end of the arm] is then flexibly, yet without interruption of the contact, drawn into the switch, and guided thereby into engagement with the desired branch conductor; and I intend herein to claim broadly any relative arrangement of track switch, conductor switch, vehicle, and contact device by means of which the former switch will act in advance of the latter, and the vehicle impart a lateral tendency to the trailing contact [the arm in question being an essential part] by the time it engages with the conductor's switch. The contact-carrying arm described in the present application possesses substantial practical advantages over any other means yet proposed for es-



tablishing moving contact between a vehicle and a stationary supply conductor, in that by the use of a hinged, flexibly mounted arm much greater freedom of movement is compatible with the maintenance of a positive mechanical connection and electrical contact between the vehicle and supply conductor."

Then follow 35 claims, and claim 4 reads as follows:

"The combination of a track having switches, an overhead conductor above the track, and having switches, and a car on the track, provided with a contact-carrying arm arranged to engage the conductor at a point in rear of the front wheels of the car."

The next claim (5) has "provided with an upwardly extending arm carrying a contact wheel," etc., "substantially as described." In 22 of these claims this now so-called generic invention is specifically mentioned as claimed, and at least three times it is described as the arm, F, and claim 31 reads:

"In an electric railway, the combination with an overhead conductor and a vehicle, of an intermediate contact device consisting of a trailing arm having a grooved contact wheel at its outer end, and moving laterally relatively to the vehicle, but provided with a spring tending to retain it in its normal central position."

In this patent, No. 424,695, what is now termed the "generic invention" (the arm, etc.) is described and claimed with much greater stress and detail and particularity than is the so-called subordinate invention, the spring and weight, and it is given much more prominence. Indeed, without it the usefulness of the whole structure is gone. If this so-called generic invention was not patented here by No. 424,695, then the so-called subordinate invention was not; and, if the Circuit Court of Appeals were correct in their holdings in the cases cited (*Thomson-Houston Electric Co. v. Hoosick R. Co.*, 82 Fed. 461, 27 C. C. A. 419; *Thomson Houston Electric Co. v. Union Ry. Co.*, 86 Fed. 636, 30 C. C. A. 313, and *Thomson-Houston Electric Co. v. Jeffrey Mfg. Co.*, 101 Fed. 121, 41 C. C. A. 247), it must be held that reissued letters patent No. 11,872 are void.

Letters patent No. 424,695 expressly describe and claim the intermediate contact device, consisting, as the patent expressly says, of this trailing arm carrying a contact wheel.

In *Thomson-Houston Electric Co. v. Hoosick Ry. Co.*, 82 Fed. 468, 27 C. C. A. 419, Judge Wallace, in giving the opinion of the court, and passing on patent No. 495,443, says:

"It is manifest that both patents are intended to, and do, secure to the patentee the same general inventions as are comprised in the combination of suspended conductor and contact devices, and the combination of suspended conductor, contact device, and switching devices, although the earlier patent also covers improvements in the switches and subordinate combinations between these devices and the elements of the principal combination. Claim 13 of the patent in suit, for the combination between the suspended conductor, the contact device, and the switching devices, is identical in its phraseology with claim 6 of the earlier patent. That claim reads as follows: '(13) In an electric railway, the combination of an electrically propelled car, a supply conductor suspended over the line of travel of the car, a swinging arm mounted upon the car, and carrying a contact device at its free end, said contact arranged to bear against said conductor, suitable switching devices upon the track traversed by the wheels of the car, and

corresponding switches on the suspended conductor located above those on the track, and arranged to engage the contact devices, substantially as described.' The later patent describes the switching devices of the earlier patent in all their essential features, except as to the subordinate improvements thereon, and claim 13 must be construed as specifying the identical invention specified in claim 6 of the earlier patent. On the other hand, claim 15 of the earlier patent, for the combination between the suspended conductor and the contact device, is identical in phraseology with claim 9 of the patent in suit. The switching devices having been fully described, the matter of disclaimer inserted in the later patent is of no more value in determining its scope and interpretation as to the claims in which the switches are an element than is the matter of disclaimer inserted in the earlier patent as to the claims in which the contact device is an element. We are of the opinion that claim 15 of the earlier patent describes and embraces everything of substance which is covered by claim 7 of the patent in suit. Claim 15 specifies a combination the elements of which are the car (implied necessarily, and needlessly mentioned), the suspended conductor, and the contact device. The element termed 'a contact-carrying arm pivotally supported on the top of the car, and provided at its outer end with a contact roller engaging the under side of the suspended conductor,' exactly defines all the essential features of the contact device described in each specification, except the tension device. It must be hinged as well as pivoted; otherwise the tension device will be inoperative to maintain upward pressure. The element termed 'a weighted spring' is the complete tension device described in both specifications, and which, as described, necessarily exercises the twofold function of maintaining upward contact between the contact device and the suspended conductor, and of maintaining the pivoted arm in its central or normal position. The 'tension device' of claim 7 is the whole device described in that patent, as the 'weighted spring' of claim 15 is the whole device described in the earlier patent. Claim 15, however, does not specify the combinations of claims 8, 12, and 16 of the patent in suit. The 'tension spring' of those claims is not necessarily the 'weighted spring' of claim 15. We are also of opinion that claim 33 of the earlier patent specifies essentially the same combinations embraced in claims 8, 12, and 16 of the patent in suit, and that the 'spring or weight' of claim 33 is the same thing as the 'tension spring' of claims 8, 12, and 16, the 'weight' being only an alternative element. It would be a waste of time to dwell upon the verbal differences in these claims. The changes in phraseology import nothing of substance into their respective combinations. They describe the same things in different language, and the draftsman seems to have expended great ingenuity in cataloguing a group of synonyms."

This court has examined this case with great care, desiring to sustain the reissue, if possible, giving full weight to the presumption of validity that obtains in the first instance.

In *Thomson-Houston Electric Co. v. Union Ry. Co.*, 86 Fed. 636, 30 C. C. A. 313, means for maintaining the contact device and the conductor in their normal working relations were construed into patent No. 495,443 by implication, because absolutely necessary to an operative combination. In giving the opinion, the court says:

"It is insisted for the appellants that the two claims now in controversy are for the same combination specified in some of the claims which were then held to be void. The appellee contends that they are not, because they omit to specify any means for holding the contact device in underneath contact with a conductor, and consequently can be construed as covering a subcombination in which such means are not employed, or, if such means must be read into the claims by implication, the claims are not limited to the means described in the specification, and that upon either construction they are not the claims of the earlier patent. The court below adopted this view. If the appellants are right, no other question need be

considered. It will be seen that these claims are for identical combinations, except that the arm is differentiated in each by functional characteristics. The specification describes a traveling arm carried by a post on top of the car, 'which is hinged, and should in most instances be also pivoted, to the top of the post, although a reasonable amount of looseness in the hinged joint will answer the purpose of the pivot.' When pivoted, 'it swings freely around a vertical axis,' and meets the terms of claim 2. When hinged and loosely jointed, it is 'movable on both a vertical and transverse axis,' and meets the terms of claim 4. We do not entertain any doubt that there must be incorporated into these claims, by implication, means for maintaining the contact device and the conductor in their normal working relations. Without them, there is really no 'traveling' contact device, and no operative combination, and the claims would cover merely an aggregation of devices which do not coact unless assisted by some instrumentality which must be discovered and supplied. The function of the arm, as constructed and arranged, is to establish 'moving contact,' while maintaining a positive mechanical connection between the vehicle and the conductor. It was devised because, as previously mounted, the contact device was found to be deficient in capacity to follow the sinuosities and deflections of the conductor while the car was in motion. It can only perform this function by the aid of some instrumentality which holds it constantly in the proper relations to bridge the space between the car and the conductor, and keep the contact device and the conductor in electrical connection. As pointed out in the specification, this consists of a tension device operating upon the arm, and maintaining a constant upward pressure, thus holding the contact device to the conductor. This tension device, or its equivalent, is an indispensable element of the respective combinations. That the proper construction of the claims is as thus indicated is evidenced by the proceedings upon interference in the patent office. Claim 2 is a literal statement of the issue defined and formulated by the patent office between what was then claim 1 of the application and the claims of two interfering applications. Claim 1 was as follows: 'In an electric railway, the combination, with a suitable contact, and the supply conductor suspended above the track, of a car provided with a swinging arm, carrying a contact device in its outer extremity, and means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the under side of the supply conductor, substantially as described.' In formulating the issue, the office omitted, as unnecessary, because necessarily implied, the elements enumerated in claim 1 of the application, which are not enumerated in claim 2 of the patent. One of these elements was 'means for imparting upward pressure to the outer portion of the arm and contact.' This element was apparently thought to be as indispensable to the operativeness of the combination of the claim as was 'a suitable track,' an element also omitted. The appellee concedes that the claims are for combinations specified in other claims of the patent, which by our former decision were held to be void, if they require the construction which we have placed upon them. Indeed, claim 6, which we held to be void, is identical in terms with claim 1 of the interference proceedings—the claim which the patent office regarded as embodying the invention covered by present claim 2. The rule of construction which usually obtains, whereby the several claims of a patent are to be differentiated so that effect may be given each, cannot be reasonably invoked in behalf of this patent, where so many of the claims are duplicated."

Then of what avail to take out reissued letters patent, omitting that which the court put in by implication as absolutely necessary to a traveling contact device, and without which there would be no operative combination—only a combination of devices that would not coact? In short, the court put in by implication the means for maintaining the contact device in contact with the conductor, as without it the patent would be void as a mere aggregation of devices destitute of coaction, and held that with such means the device had been al-

ready patented, and was therefore void. The complainant now describes the same device described and claimed in the earlier patent (424,495), leaving out the means for maintaining this contact, and claims a valid patent. This court does not understand that the Court of Appeals in the Sixth and Second Circuits held the original patent void for the reason that the specifications accompanying the claims were in any manner defective, or in failing to distinguish the so-called generic invention—the long arm adapted to make connection with the conductor—from the specific form of it selected for illustration. A reference to those cases, already made, and an examination of them, do not sustain this contention. This court fails to find that the patent in question was either inoperative or invalid by reason of either a defective or an insufficient specification, or by reason of the patentee having claimed as his own invention or discovery more than he had the right to claim as new, or, if such error occurred, that it arose from either inadvertence, accident, or mistake. The reissue attempts to carve out from an invention, complete operative structure, patented as a whole, a part thereof, which, standing alone, shows no novelty or invention, and patent it; something that alone is inoperative and useless in the trolley art—not new, for it is an arm or pole hinged and pivoted on a post in the old way, and might be used in the old way to raise any weight attached to one end by the application of downward pressure at the other.

In *Miller v. Eagle Manufacturing Company*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121, it is decided that:

"No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ. The second patent, in such case, although containing a claim broader and more generic in its character than the specific claims contained in the prior patent, is also void. But where the second patent covers matter described in the prior patent, essentially distinct and separable, and distinct from the invention covered thereby, and claims made thereunder, its validity may be sustained. A single invention may include both the machine and the manufacture it creates, and in such case, if the inventions are separable, the inventor may be entitled to a monopoly of each. A second patent may be granted to an inventor for an improvement on the invention protected by the first, but this can be done only when the new invention is distinct from and independent of the former one."

It will be noted that, to avoid double patenting, the matters described in the prior patent must be essentially distinct and separable, and distinct from the invention covered thereby, and the claims made thereunder. In the case now under consideration the opposite is the fact. The matters described in the earlier patent are not distinct and separable, or distinct from the invention covered thereby or the claims made thereunder. The claims made under the first patent are the same as those made under the original and the reissue. Language is changed, but the same thing is not only illustrated but described in the specifications, and distinctly and unequivocally claimed. See, also, *Suffolk Company v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *James v. Campbell*, 104 U. S. 356, 370, 382, 26 L. Ed. 786; *Mosler Safe Co. v. Mosler*, 127 U. S. 354, 8 Sup. Ct. 1148, 32 L. Ed. 182; *McCreary v. Pennsylvania Canal Company*, 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854,

37 L. Ed. 710; *Odiorne v. Amesbury Nail Factory*, 2 Mason, 28, Fed. Cas. No. 10,430. There are other cases to the same effect.

It is not intended to hold that a distinct part of an operative mechanism or structure may not be patented, or that several distinct parts may not be each the subject of a distinct patent; but they must be patented with reference to and as a part of that structure, or some operative structure as a basis. If the structure described be a complete and an operative one, composed of several coacting parts, and it is described and claimed and patented as a whole, especially when each part is separately described and claimed, no other valid patent for one of those parts (especially to the same inventor) can be issued, although an improvement on the structure or on one or more of such parts may be. Here we have this arm as an essential support for the contact wheel, it being repeatedly stated that the arm supports or carries the contact device, not only described with great particularity of detail in the specifications of the earlier patent, but claimed repeatedly, specifically, and unequivocally in the numerous claims of that patent. It matters little what it was named in the earlier patent, or in the later patent, or in the reissue. The crucial test is, was the same thing clearly described and claimed in the specifications and claims of both patents? If so, the later patent is void.

In *Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.* (two cases) 71 Fed. 396, 18 C. C. A. 145, we find the Circuit Court of Appeals in the Second Circuit holding:

"(1) Patents—Two Patents for Same Invention—Identity of Claims. In determining whether two patents to the same person cover the same invention, so as to render the later one void, the test of identity is whether the claims of both, when properly construed in the light of the descriptions, define essentially the same thing.

"(2) Same. A machine or structure may embody several different inventions; and, while two or more inventions residing in the same combination or structure may be covered by different claims in the same patent, they may, at the option of the patentee, be secured by different patents. And it is immaterial that both inventions originate at the same time, and from a single conception.

"(3) Same—Minor Improvements. The granting of patents for distinct and specific structural improvements pending an application for the broad invention will not invalidate a patent subsequently granted for the latter, although the elements covered by its claims were described and illustrated, but not claimed, in the earlier patents. *Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.* (C. C.) 69 Fed. 257, affirmed."

In the opinion the court said:

"The principles of law applicable to the case may be briefly stated. An inventor, by describing an invention in a patent granted to him, does not necessarily preclude himself from patenting it subsequently. His omission to claim what he describes may operate as a disclaimer or an abandonment of the matter not claimed; but it has no such effect when it appears that the matter thus described, but not claimed, was the subject of a pending application in the Patent Office by him for another patent. This was explicitly adjudged in *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76, and recognized as sound doctrine in the *Barbed Wire Case*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. The invention secured by a patent is that which is secured to the patentee by the claim. The claim is a statutory requirement prescribed for the purpose of making a patentee define what his intention is so distinctly and exactly as to apprise other inventors and the

public what is withdrawn from general use. The claim, however, is to be read in the light of the description contained in the specification, and its literal terms may be enlarged or narrowed accordingly, but not to an extent inconsistent with their meaning. Identity of language in the claims of two patents does not necessarily import that the invention patented by each is identical, nor does a difference in phraseology necessarily import that they are for different inventions. The test of identity is whether both, when properly construed in the light of the description, define essentially the same thing. When the claims of both cover and control essentially the same subject-matter, both are for the same invention, and the later patent is void."

It is evident that in the earlier patent, No. 424,695, the inventor made no attempt and had no purpose to exclude this trailing arm, hinged and pivoted, and make it the subject of a separate patent, but, on the other hand, intended to include and patent it, as he did include it in the claims, and to describe it and its uses, as he did describe it in the specifications of that patent. What was intended to be excluded from No. 424,695, and made the subject of a separate patent, was the "contact wheel"—"E is the traveling contact wheel"—carried by this arm, and not the arm, now claimed as the generic invention, and alleged to be the thing intended to be reserved from No. 424,695, and made the subject of a separate patent. What is now claimed to be the generic invention and described and claimed in reissued letters patent No. 11,872, dated November 13, 1900, to wit (using the description of complainant's counsel), "a long arm hinged and pivoted so as to be capable of swinging both vertically and horizontally through long arcs, and mounted on the top of an electric car, and adapted for making contact with the under side of an overhead suspended wire," was described, claimed, and patented in letters patent No. 424,695, dated April 1, 1890, to the same inventor, and such reissued letters are void, and letters patent No. 495,443, was neither invalid nor inoperative by reason of defective or insufficient specifications, or by reason of the patentee claiming therein as his own invention more than he had a right to claim as his own; and such arm, so hinged and pivoted, standing by itself, even in the combination, is old, displays no novelty, and is clearly lacking in invention.

The bill of complaint must be dismissed, with costs. A decree will be entered accordingly.

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#### HALE & KILBURN MFG. CO. v. ONEONTA, C. & R. S. RY. CO.

(Circuit Court, N. D. New York. July 18, 1903.)

##### 1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

A new combination of old elements, so made as to produce a new result, and to accomplish a purpose long sought to be accomplished, but in which all others have failed, by making a completed structure, which is useful and valuable and superior to all those of the prior art, constitutes invention.

##### 2. SAME—NEW USE OF OLD DEVICE.

The transfer of an old device to a new use in a different art may involve invention.

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¶ 1. See Patents, vol. 38, Cent. Dig. § 29.

**3. SAME—INFRINGEMENT—SPRING SEATS.**

The Hale patent, No. 371,448, for a spring seat, which covers a combination, the principal feature of which is the use of a wide, thin steel plate secured to the top of the springs, and which supports the upholstery was not anticipated, and not only discloses invention, but made a material advance in the art. Claim 6 construed, and *held* infringed by a seat embodying the same construction, the only substantial difference being in the use of ductile iron plates or sheet-iron strips instead of the steel plates, both being well-known equivalents.

In Equity. The bill of complaint in this action was filed to obtain an injunction restraining the defendant from infringing, by making, selling, or otherwise, letters patent No. 371,448, bearing date October 11, 1887, granted to Henry S. Hale, and assigned to the complainant, and to recover damages for alleged infringement, through an accounting.

Samuel Owen Edmonds, for complainant.

George H. Knight (Harry E. Knight, of counsel), for defendant.

RAY, District Judge. October 11, 1887, the letters patent in suit were issued to Henry S. Hale, numbered 371,448, for a spring seat. Thereafter, and before the commission by the defendant of the acts complained of, the complainant became, by due assignments, the owner of such letters patent. Infringement of claim 6 alone is relied on. That claim reads as follows:

"(6) In a spring seat, the combination of the frame, springs supported by the frame, a wide, thin steel plate, covering a large area of the seat, and directly supporting the upholstery, and secured to the springs at their upper parts, and having transverse corrugations, and textile bands extending over said corrugated steel plate, and secured on its ends to frame of the seat, substantially as and for the purpose specified."

In the specifications the inventor, Hale, said:

"My invention has reference to spring seats, etc.; and it consists in certain improvements, all of which are fully set forth in the following specification, and shown in the accompanying drawings, which form part thereof. Heretofore, in the manufacture of spring seats and similar articles, it has been customary to secure to the top of the springs short, narrow, metallic connecting bars, upon which flexible wooden slats, usually combined with textile bands, were secured, the metallic bar acting as a connection between the springs, and also as a support for the flexible wooden or compound slats, as set out in my patents Nos. 259,533 and 256,676, of 1882. This construction is expensive and unsatisfactory, and lacks durability and simplicity. The object of my present invention is to overcome the above objections by providing the tops of the springs with a wide, thin, flexible metal plate, capable of bending readily under the pressure of the person occupying the seat. The wide, flexible plates are preferably covered with still wider bands of textile material, which extend over the lateral edges, and also project over the ends sufficiently to be secured to the box frame, these bands thereby protecting the edges of the spring plate. The spring seat or other frame made up of a number of such elements is covered with a sheet of fabric which rests upon the textile bands, and is thereby protected from being cut by the metal plates, and upon this sheet the upholstery is placed. This construction of spring frame may be used with or without the edge springs, but when the latter are used I have a spring-edge seat of very superior construction. The invention is equally applicable to lounges, chairs, beds, etc. \* \* \* The essential feature of the invention is the wide, thin, flexible metal plates, preferably steel, supported on springs. The covering bands of textile material may be made of any width, but preferably still wider, so that the lateral edges of the

bands will project slightly over the lateral edges of the steel plates, to protect the edges thereof against cutting the sheet of textile material placed above the last-mentioned bands, and designed to support the upholstering. The bands above the plates are also made long, to cover the ends of the plates, as well as their corners, forming a complete shield, and yet not interfering with the flexibility of the seat. If desired, the upholstery may rest directly upon the wide metal plates. I do not limit myself to the exact details, as they may be modified without departing from my invention."

Prior to the granting of the patent in suit, the complainant had a patent for a spring seat consisting of a frame with slats on the under side to support the springs, necessarily high, about 15 in number. Extending over each set of springs (those on each slat being called a "set"), and attached thereto, was a narrow strip of iron or steel; and these, in turn, were covered by a long piece of canvas or buckram, drawn down firmly and attached to the frame on each side. This, in turn, was covered with narrow strips of wood, glued to the canvas, and fastened to the iron or steel strips by means of bolts. Then came the cushion, covered by a willow or rattan webbing, or cane seat covering, covering the whole five sections of springs and strips of iron and wood. This was bulky and costly in construction. The springs were easily gotten out of place, were liable to wobble, and the strips of wood easily became detached. The giving or bending was not uniform, and the seat was liable to become uneven, and wore out quickly. The inventor, Hale, worked long and patiently, expending time, money, and thought, to remedy these defects, and others not necessary to describe, and finally produced and patented the seat in suit, which at once became popular—found a ready and steady market; in other words, proved a success in every respect. In this patent (in suit), the frame, and slats on which the springs rest, are the same. The springs are shorter, and are covered by wide strips of corrugated steel. The strips of wood glued to canvas are discarded, and the cushion rests on the steel strips. Oscillation and displacement of the springs are obviated. The bending under weight or pressure is much more uniform, and when the pressure is removed the springs and whole structure resume their original position. Wear and tear are largely reduced, as are the bulk and cost of the seat. Other advantages might be named. The defendant has hastened to copy this seat in every respect. It claims, however, that it uses indented or grooved ductile iron plates, or ductile sheet-iron strips, in place of steel plates, or strips above the springs, and that this is the substitution of a new material, and there is no infringement in this respect.

In the complainant's seat the wide steel plates covering the springs (in each section) are covered by strips of some tough and durable textile material, attached to the frame on each side, and drawn taut, holding or assisting to hold the springs in place and prevent too great relaxation. In defendant's seat the same thing is used in the same manner, but is made, in actual construction, somewhat narrower than the complainant's patent permits, it is claimed; the defendant's band above the plates being narrower than the plates, while it is contended that the complainant's patent is so limited as to confine these bands to a construction wider than the steel plates.



It will be noted that in the Hale patent the specifications say:

"The essential feature of the invention is the wide, thin, flexible metal plates, preferably steel, supported on springs. The covering bands of textile material may be made of any width, but preferably still wider [meaning wider than the steel plates], so that the lateral edges of the bands will project slightly over the lateral edges of the steel plates, to protect the edges thereof against cutting the sheet of textile material placed above the last-mentioned bands, and designed to support the upholstery. The bands above the plates are also made long, to cover the ends of the plates, as well as their corners, forming a complete shield, and yet not interfering with the flexibility of the seat."

The patentee then says:

"I do not limit myself to the exact details, as they may be modified without departing from my invention."

This court is of the opinion that the substitution of ductile iron plates or ductile sheet-iron strips, slightly grooved or indented, in place of the corrugated steel strips or plates used in the complainant's construction, does not free the defendant from the charge of infringement. This is the mere substitution of a well-known equivalent. Inferior it may be, but it is the same thought, and substantially the same material is used in precisely the same way to serve the same purpose. Neither can the defendant escape the charge of infringement on the theory that its textile bands above these plates are not wider, but in fact narrower, than the iron plates. These bands are in all essential respects and features the same, and are used in the same manner to accomplish the same purpose. Both the bands and the plates are used in the same manner, in the same place, and to accomplish the same result, as are those of the complainant; and, in the opinion of this court, this is a clear infringement. If anything, the defendant's construction is inferior to that of the complainant's; but the defendant has approached the complainant's construction in every material respect, so far as it dare, without making an exact copy, hoping, it is evident, thereby to escape the charge of infringement. Such slight differences and changes do not defeat the charge of infringement, when the construction, combinations, and purposes intended and purposes accomplished are precisely the same.

The value and utility of the complainant's patent is beyond dispute, and is demonstrated by the fact that it has taken the place of most others. This is further evidenced from the fact that the defendant, in order to keep pace with the complainant's construction, has found it necessary to follow and copy in every essential feature.

We find, on a careful examination of the seats themselves and of the evidence, that the complainant has a strong and durable seat, comparatively inexpensive, both in the making and in the installing, and one easily kept in order. The complainant's seat is elastic in all directions, and this elasticity is obtained without the use of excessive upholstery, and the construction is such that the upholstery keeps its shape, and may be kept dry without great difficulty. The complainant's seat is compact, and sufficient space is left below the cushion for heating pipes. The complainant's seat is light and easily handled, and noiseless in its operation, and the

construction is such that an injury or broken part may be removed, and a new one substituted, without disturbing substantially the remainder of the seat. This court has carefully examined the evidence and the state of the prior art in the construction of spring seats, and finds a vast improvement, as well as a wide difference in construction. It is quite true that, taking each element of the complainant's seat by itself, we find nothing particularly new. The frame is the same as that used in the prior art. The slats supporting the springs are the same. The coiled springs are the same, except they are shorter. The wide bands of corrugated steel are new in the construction of spring seats, but bands of corrugated steel of this thickness are not new. We have a new use in a new combination for corrugated steel plates of this thickness. The textile bands used to hold these springs in place are substantially the same as those used in the prior art, but the mode of attachment differs somewhat. The whole is then covered with a wide band of textile material, attached to the frame, above which is placed the upholstery itself. The complainant has not patented any one of these elements, as distinguished from another, but he has secured a patent, as described in claim 6, "in a spring seat, the combination of the frame, springs supported by the frame, a wide, thin steel plate, covering a large area of the seat, and directly supporting the upholstery, and secured to the springs at their upper parts, and having transverse corrugations, and textile bands extending over [that is, above] said corrugated steel plate, and secured on its ends to frame of the seat, substantially as and for the purpose specified." The object and purpose specified need not be repeated here. They already have been quoted. We have here old things, and we may say well-known things, as the frame, the slats, the springs, corrugated steel plates, textile bands, and upholstery; but we have something more, and herein lies the invention and inventive skill and the patentability of the structure, to wit, we have a new combination of these old elements, so made as to produce a new result, and to serve a purpose long sought to be accomplished, but which all others have failed to accomplish. The result is a new seat, a useful seat, a valuable and a durable seat, a seat that supplies the wants of the trade and the wants of the builders and users of cars. It cannot be doubted that this constitutes invention. A careful examination of all the prior patents and structures to which attention has been called demonstrates that this is a new idea and a new combination, and that the complainant is entitled to the benefits of the Hale patent and invention which is new. The defense of anticipation is not sustained.

The complainant starts with the presumption that his patent is valid. "When a device has a new mode of operation, which accomplishes beneficial results, 'courts look with favor upon it,' and are not exacting as to the degree of inventive skill which was required to produce the new result. There must be some, but a little will suffice." *Hoe v. Cottrell* (C. C.) 1 Fed. 603. Experts will necessarily differ as to the degree of inventive skill required to produce the complainant's spring seat, and some might contend that no inventive skill whatever is involved. Such a contention is successfully com-

bated when we find that many have struggled for years to accomplish the result produced by Hale, but that no one succeeded until he brought forward the seat constructed under and pursuant to letters patent No. 371,448, the patent in suit.

The main change between the old Hale patent and the new patent, the one in suit, is the shortening of the springs, and the substitution of the corrugated steel plate for the appliances before used. It may be contended that a corrugated steel plate is an old device. Concede this to be true; still the transfer of an old device to a new use may involve invention. *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. In that case the court said:

"The doctrine invoked by the defendants, that the transfer of an old device to a new use does not involve invention, if applied without qualification or exception, would destroy many of the most valuable patents."

In *Electric Vehicle v. Carriage Co.* (C. C.) 104 Fed. 815, the court said:

"Indeed, it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar inventive genius which is characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*."

In *General Electric Co. v. Wise* (C. C.) 119 Fed. 926, this court said:

"However close the resemblance between some prior alleged invention, even when put in actual use, and the patented invention, if such alleged prior invention was not operative, and failed to produce the beneficial results sought and produced by the patent, it could not constitute prior invention. In such case the patented invention cannot be regarded as old."

The prior inventions in this art, when put in use, were, to an extent, operative, but they were costly, and not durable; nor did they fill the wants of the trade and of users of spring seats. The complainant's patent is a step far in advance of all others, by means of a new combination of old things.

Attention is invited to the language of Judge Coxe in *McMichael & Wildman Mfg. Co. v. Stafford* (C. C.) 105 Fed. 382; also to his language in *George Frost Co. v. Cohn* (C. C.) 112 Fed. 1009, affirmed (C. C. A.) 119 Fed. 505. Again attention is called to the language of Judge Coxe in *Fairbanks Wood Rim Co. v. Moore* (C. C.) 78 Fed. 490.

In the *George Frost Case* he said:

"A woman who was ambitious to have her hosiery intact was liable to find it slouching about her heels. It seemed impossible to secure a supporter that would adapt itself alike to thick and thin stockings. If it succeeded in holding the former, the latter would slip from its embrace. For years an army of inventors and skilled mechanics were at work to remedy these defects. All sorts of expedients were resorted to, but the old difficulties remained. At length Gorton substituted for the metal button a button with a rubber shank, and the thing was done. \* \* \* Rubber, in almost every conceivable shape and form, was everywhere in use, but no one thought of it. Like a jewel lost in a crowded thoroughfare, multitudes pass it unnoticed; some actually tread upon it; others stop and gaze for a moment, but hurry on, deeming it some worthless tinsel; at last comes some one who recognizes its value and picks it up. Others might have done this, it is true, but they did not; he did, and

is entitled to the prize which he has rescued from the mire. \* \* \* It is this capacity for accomplishing results, this faculty of seeing what others fail to see and hearing what others fail to hear, which has always distinguished success from failure, and the inventor from the mechanic. 'In the law of patents, it is the last step that wins,' says the Supreme Court. This is the step which Gorton took."

In the Fairbanks Wood Rim Co. Case he said:

"It was not the mere substitution of wood for iron. It was the substitution for a rim made of a single piece of metal of a laminated rim made of a series of sections, so constructed as to form a compact, durable, symmetrical, and highly efficient structure. After the idea that wood could be used, instead of metal, was conceived, the real work of invention began. \* \* \* Two significant facts stand unchallenged: First, that the patentees were the first, in an art which has attracted a multitude of ingenious inventors, to employ a wooden rim; and, second, that to-day this rim is the only one used, all others, in the construction of first-class machines, having been driven from the market. They certainly have done much to make the modern bicycle a perfect machine."

It is not thought necessary, nor would it be profitable, to enter into a detailed description of prior invention claimed to show anticipation. Those who have sat or slept upon some of them, or attempted to, and have endured the discomforts of their imperfections, the more readily appreciate the worth of the Hale patent when actually used, and a comparison is made.

The Cobb patent for car or other seats, issued May 8, 1883, No. 277,115, used a flexible and elastic preparation or composition, the base of which is paper, and known to the trade as "vulcanized fiber" and "leatheroid," where the Hale patent uses the steel plate, and the mode of attachment to the frame was different. This was a failure. The Cobb patent does not show or establish anticipation.

Clearly, the Casseday patent, No. 100,116, dated February 22, 1870, being a seat composed in the main of a number of curved or elliptical springs secured to a frame and arranged side by side, but a short distance apart from each other, in combination with a covering of plush or other suitable fabric, falls very far short of showing anticipation. Many other prior patents for spring beds and spring seats have been carefully examined; and, while some of them probably suggested ideas to the patentee, Hale, none of them show all the elements or the combination of elements found in the Hale patent. These prior inventors struggled with a problem, strove to attain a desired end—to produce an article millions felt the need of—but they all failed, and Hale came in, and by a new combination produced the desired result.

The defendant has failed to establish either of his defenses, and the complainant is entitled to the injunction prayed for and to an accounting. A decree will be prepared accordingly.

## JULIUS KING OPTICAL CO. v. BILHOEFER et al.

(Circuit Court, S. D. New York. July 22, 1903.)

## 1. PATENTS—INFRINGEMENT—EYEGLASS GUARDS.

The Wells patent, No. 412,442, for eyeglasses, relating to that part of the frame designed to hold the glasses on the nose of the wearer, which, as shown, consists of two or more pads on each side, one at least being above and to the rear of the others, such pads being attached to posts or standards secured to the lenses, the object being to hold the glasses steady in position, and prevent rocking or tipping, was not anticipated, and is valid. Claims 4 and 5 of such patent are also infringed by the lasso nose pieces or guards constructed in accordance with the Fox patent, No. 695,681, which, although varying in form, embody the same principle, and accomplish the same result in the same way, and by devices substantially the same.

In Equity. Suit for infringement of letters patent No. 412,442 for eyeglasses, granted to Walter S. Wells October 8, 1889. On final hearing.

The bill of complaint in this case was filed for the purpose of perpetually restraining and enjoining the defendants from making, constructing, using, vending, etc., any eyeglasses or eyeglass guards made like the so-called "lasso guards," or any other made in accordance with such invention and patent, and from practicing or causing to be put in practice, operation, or use the mode of construction described in said patent. The complainant, under its patent, manufactures, vends, etc., what is called the "anchor guard," under letters patent bearing date the 8th day of October, 1889, and numbered 412,442, being a patent for eyeglasses. Infringement is claimed through the manufacture and sale of what is known as the "lasso guard," which it is alleged came upon the market July or August, 1901. These letters patent were issued to one Walter S. Wells, and it is claimed that by due assignment they are now owned by the complainant. The defendants deny the assignment, and deny that Wells was the original and first inventor of the alleged improvement of eyeglasses set forth in the said patent, and deny that same were not in use, etc. The defendants deny infringement. The defendants allege that the said letters patent consists of devices, arrangements, and constructions, which were at the date of their supposed invention by Wells old and well known and familiar in form and operation in the art to which said letters patent relate, and deny novelty, and allege that said letters patent are void and destitute of patentable novelty. The defendants also allege that the lasso nose piece or guard complained of as constituting an infringement upon the said letters patent is manufactured and sold under the sanction and protection of letters patent granted to the manufacturer of said nose piece or guard, Ivan Fox, upon the 9th day of July, 1901, and March 18, 1902, Nos. 34,752 and 695,681, respectively. The defendants set out a large number of patents, and allege that prior to the making of the alleged invention set forth in the bill of complaint the alleged invention therein shown was patented and described in all things. Subsequent to January 2, 1902, and after the answer herein was filed, the defendant Bilhoefer transferred his interest in the firm to one Richard E. Stilwell, and the business is conducted at the same place under the style of McCoy & Stilwell. Stilwell has been made a party defendant.

H. Albertus West, for complainant.

William C. Strawbridge, for defendants.

RAY, District Judge (after stating the facts). Letters patent No. 412,442, dated October 8, 1889, issued to Walter S. Wells, of New York, N. Y., being a patent for a new and useful improvement in eye-

glasses, have been duly assigned, and are now owned by the complainant, as clearly appears from the evidence. The complainant alleges infringement of claims 4 and 5 of said letters patent, which read as follows:

"(4) In an eyeglass, the combination, with lenses, of posts or standards secured thereto, nose pads secured to said posts or standards and adapted to grip the nose, and other nose pads rigidly secured to said standards above and to the rear of the nose pads first named, and also adapted to grip the nose, substantially as specified.

"(5) In an eyeglass, the combination, with lenses, of posts or standards secured thereto, pads for the nose rigidly secured to said posts or standards; certain of said pads being arranged in the same plane as the lenses, and other of said pads being arranged above the other pads, and to the rear thereof, substantially as specified."

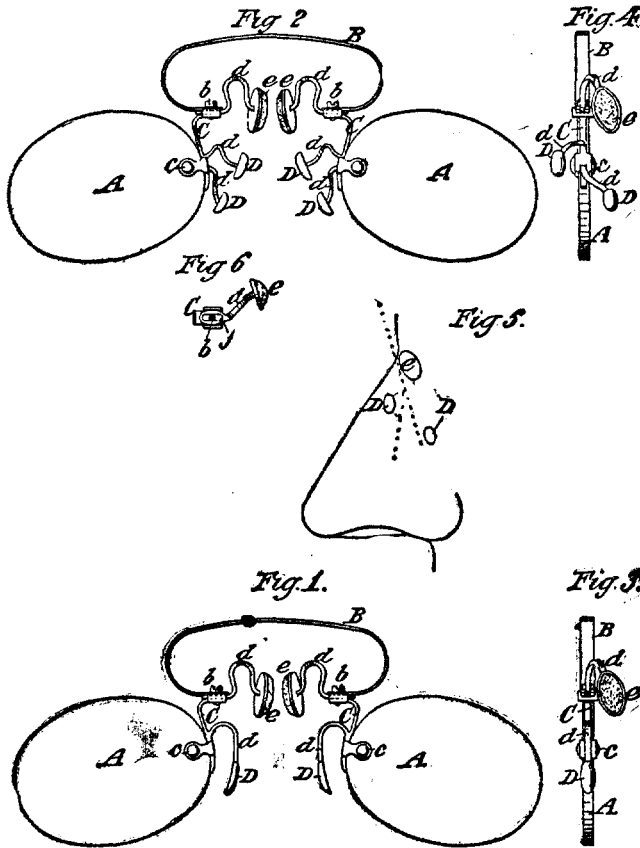
The specifications are as follows:

"To all Whom it May Concern:

"Be it known that I, Walter S. Wells, of New York, in the county and state of New York, have invented a certain new and useful improvement in eyeglasses, of which the following is a specification: I will describe in detail an eyeglass embodying my improvement and then point out the novel features in claims. In the accompanying drawings, Figure 1 is a face view of an eyeglass embodying my improvement. Fig. 2 is a similar view illustrating a modification thereof. Fig. 3 is a side view of the example of my improvement shown in Fig. 1. Fig. 4 is a side view of the example shown in Fig. 2. Fig. 5 is a diagrammatic view showing the position of the eyeglass upon the nose and the arrangement of the pads, as illustrated in Figs. 2 and 4. Fig. 6 is a detail view showing the mode of attachment of certain of the nose pads for the glasses. Similar letters of reference designate corresponding parts. A designates the lenses of the eyeglasses, which may or may not be mounted in rims. B designates the spring by which the glasses are held upon the nose. C designates posts or standards secured to the lenses, as here shown, by rivets, c. In the example of my improvement shown in Figs. 1 and 3, D designates pads secured upon downwardly extending arms, d, which arms form part of or are secured to the posts or standards, C. The pads, D, in this example of my improvement, are in the same plane as the lenses of the glasses, and when in use bear against the cartilaginous portions of the nose. The posts or standards, C, have upwardly extending portions, to which portions the spring, B, of the glasses is attached. In the example of my improvement shown such attachment is effected by means of screws, b, passing through suitable apertures in the inwardly turned ends of the spring and in the upwardly extending portions of the posts or standards, C. I prefer that the posts or standards, C, and the downwardly extending portions, d, which bear the pads, D, shall be made integral. Secured to the upwardly extending portions of the posts or standards, C, are arms, d, which arms bear at their extremities pads, e. As shown in Fig. 6, these arms are adjustable upon the upwardly extending portions of the posts or standards, C, so that the pads may be brought nearer to or farther from each other, as desired. Such adjustment is secured by providing the portions of the arms, d, which are secured to the upwardly extending portions of the posts or standards, C, with longitudinally extending slots, f, as more clearly shown in Fig. 6. It will be observed that the pads, e, are considerably above the axes of the lenses, and that they have a backward and downward extension. This is more clearly illustrated in Figs. 3 and 4. In the example of my improvement shown in Figs. 2 and 4, and in the diagrammatic Fig. 5, I employ a modification of the nose pad or pads, D. This modification consists of two pads, D, which pads are mounted upon two arms, d, extending from the posts or standards, C. By reference to the diagrammatic view Fig. 5 and Fig. 4, it will be clearly seen that one of the pads, D, in this example of my improvement, is arranged in approximately the same plane as the lenses of the glasses, while the other is above and at the back of the said plane. It

will also be observed that the pads, D, in this example, together with the pads, e, are arranged approximately at the points of a triangle; or, in other words, the pads, D and e, have a triangular bearing upon the nose. In all the examples of my improvement shown, the pads, e, when secured by the screws, b, have a rigid connection with the upwardly extending portions of the posts or standards, C. By my improvement I provide an eyeglass which is adapted to grasp the fleshy portion of the nose by pads which are rigidly secured, and prevent any swiveling or rocking movement, and also other pads adapted to grasp the cartilaginous portion of the nose, and to act as steadiments."

The drawings are as follows:



It will be noted that these claims speak specifically of the combination with lenses of posts or standards secured thereto, "nose pads secured to said posts or standards and adapted to grip the nose, and other nose pads rigidly secured to said standards above and to the rear of the nose pads first named, and also adapted to grip the nose, substantially as specified." Claim 5 speaks of the combination with lenses of posts or standards secured thereto, pads for the nose rigidly secured to said posts or standards, certain of said pads being arranged in the same plane as the lenses, and others of said pads being arranged above the other pads and to the rear thereof,

substantially as specified. These claims, read with the specifications and drawings, clearly contemplate at least two pads attached to each post or standard secured to each lens, and adapted to grip the nose, and as clearly contemplates that one of such pads is to be above and to the rear of the first-mentioned nose pad, or, as mentioned in claim 5, one of said pads, at least, is in the same plane as the lens, and the other is above and to the rear thereof. In Figure 2 of the drawings we have two pads attached to each lens, with another pad for each lens above and to the rear thereof, adapted to grip the nose; while in Figure 1 of the drawings there would seem to be but one pad directly attached to and in the same plane with the lens, with another pad above and to the rear thereof.

Within the language of the claims, it would seem clear that any number of pads for each lens in the same plane as the lens, with other pads, one or more, above and to the rear thereof, would be allowable. There may be one or there may be more pads at each of the points specified. The claims call for such a combination and construction as has posts or standards attached to the eyeglass and secured thereto, with pads secured to these posts or standards, and which pads are adapted to grip the nose, with other pads secured to the same standards or posts above and to the rear of those first named. This court is unable to distinguish any particular difference between claims 4 and 5, except that in claim 5 the first set of pads is more definitely located as being in the same plane with the lenses. The pads in the drawings are secured upon downwardly extending arms, which may either form a part of or be secured to the posts or standards, which posts or standards extend upwardly from the point where they are attached or secured to the lenses by rivets, although this mode of attachment might be changed. These arms are adjustable upon the upwardly extending portion of the posts or standards, so that the pads may be brought nearer to or farther from each other, as may be desired by the wearer. This adjustment is secured by providing the arms with longitudinally extending slots. The pads above and to the rear of those in the same plane with the lenses are above the axes of the lenses, and have a backward and a downward extension.

It is evident that these pads are intended to grasp the nose at least at two different points, one of which points is in the rear of the other and higher up; the purpose being to prevent any swiveling or rocking movement of the glasses. The pads above and to the rear of those in the same plane with the lenses are the main ones, while those in the same plane with the lenses serve a useful purpose in steadying the glasses and preventing a rocking movement.

As shown in actual construction and use, this form is not bulky or cumbersome, but neat and tasteful in appearance, and the glasses, when adjusted upon the nose, are held steadily in position, and neither rock sidewise nor tip forward or backward. The utility of this construction cannot well be questioned.

It was shown on the trial that claims 4 and 5 of the Wells patent, from some points of view, are generic, and from other points specific. The defendants' expert says:



"Q. Do you regard the claims 4 and 5 of the Wells patent as generic or specific? A. The terms 'generic' and 'specific,' as I understand them, are both relative, so that from some points of view the claims might be regarded as generic, and from other points as specific. I regard them as generic to the extent that, as I understand, they may include various specific forms or arrangements so long as they are characterized by having two or more pads, with certain of said pads above and to the rear of the other."

The defendants, in their defense of anticipation, rely largely on a patent to Ivan Fox, issued January 29, 1884, No. 292,479. The specifications and claim in that patent are as follows:

"To all Whom it May Concern:

"Be it known that I, Ivan Fox, a citizen of the United States, residing in the city and county of Philadelphia, and state of Pennsylvania, have invented a new and useful improvement in eyeglasses, of which the following is a specification: My improvement relates to that class of eyeglasses having adjustable nose pieces that are arranged out of the plane of the lens frames; and it consists in such an arrangement and construction of the parts as will admit of the angle of the nose pieces and the distance apart of the centers of the lenses being permanently adjusted, as desired, in the manner herein-after more fully described and claimed. In the accompanying drawings, Figure 1 represents a front view, Fig. 2 a side view, and Fig. 3 a detail of one of the nose pieces. The bow, s, eye frames, and lenses, FF', may be made of any approved form, as my invention relates solely to the nose pieces, NN', the form of which is shown clearly in Fig. 3, where it will be seen that each nose piece consists of an inclined bar, a, having arm, b (preferably curved, as shown), by which the nose piece is attached with a screw, c, as shown in Fig. 1, to any convenient part of the frame, but preferably as shown in the drawing, in which it is screwed fast upon the top of the spring bow, and is held from moving by means of the sides of the recess in which the arm of the nose piece and bow are secured. The arm is made integral with the bar, a, and projecting from a point near the middle, relieves the torsional strain therefrom. Said arm also being curved, practically lengthens the bar, so that it can be more readily twisted or bent. The arm, b, being of considerable length, and of soft metal—that is to say, metal that will readily bend, as desired, and when so bent will retain its form—can be readily twisted, to slightly change the position or angle of the bar to suit the shape of the nose; or, by bending the said arms, b, the bars, aa, forming the nose pieces proper, can be readily brought closer together or farther apart, as desired, and thus the distance of the optical centers of the lenses can be varied as desired. I am aware that eyeglasses have been made with a curved arm projecting from the frame, and having attached thereto a nose piece; but I do not claim such as my invention. What I claim as new is: (1) The combination, with a pair of eyeglasses, of the nose pieces, NN', each consisting of the inclined bar, a, having the arm, b, integral therewith, and projecting from a point near its middle, substantially as and for the purpose specified. (2) The combination, with a pair of eyeglasses, of the nose pieces, NN', formed of comparatively soft metal, each having the inclined bar, a, and curved arm, b, integral therewith, and projecting from a point near its middle, substantially as and for the purpose specified."

In this Fox patent, 292,479, there is no lettering upon the drawings attached to correspond with either the specifications or the claims, and the court is left to guess at the construction, except that the bow is lettered, the lenses are lettered, and the nose pieces as a whole are lettered. It would seem, however, that the nose piece formed of soft metal consists of an inclined bar, which strikes the nose with the curved arm, b, projecting, and which attaches to the bow, s, where the bow is attached to the frame of the lens. The nose piece would seem to consist of a single piece of soft metal, curved, the arm projecting from near the middle thereof serving to attach

this to the bow holding the lens. This nose piece would strike the nose, it might be, at one point, and it might be at two or more points, depending on the shape of the nose; but the court discovers nothing in this corresponding to the construction of the complainant's patent except that we have lenses, a bow, and a nose piece attached to each lens, and by means of the bow these are pressed against the nose, and are supposed to hold the glasses in position. There is no anticipation here. We have nothing specially designed to prevent swiveling or a rocking movement of the glasses, or to prevent their tipping forward and downward, as in the complainant's patent. True, if the grip of the nose pieces are strong enough, the glasses might not rock or swing or tip. The construction of this Fox patent is much more simple, as shown in the drawings, but with this simplicity utility is sacrificed.

The lasso guards, which are alleged to infringe claims 4 and 5 of the Wells patent in suit, are manufactured and sold under patents to Ivan Fox, No. 695,681, dated March 18, 1902, and No. 34,752, dated July 9, 1901. The specifications and claims of this patent read as follows:

"Be it known that I, Ivan Fox, a citizen of the United States, residing at Lansdowne, in the county of Delaware and state of Pennsylvania, have invented certain new and useful improvements in nose pieces for spectacles or eyeglasses, of which the following is a specification: It is the object of my invention to provide, for employment upon eyeglasses and spectacles, nose pieces, capable of being fitted to noses of any configuration, of such construction and arrangement as to be secure and comfortable to the wearer. In the accompanying drawings I show, and herein I describe, a good form of a convenient embodiment of my invention, the particular subject-matter claimed as novel being hereinafter definitely specified. In the accompany drawings, Figure 1 is a view in rear elevation of a pair of eyeglasses equipped with nose pieces embodying my invention. Figure 2 is a view in end elevation of one of the lenses and nose pieces shown in Figure 1, sight being taken toward the inner end of the lens. Figure 3 is a plan view of a blank from which a complete nose piece may be formed. Similar letters of reference indicate corresponding parts. In the accompanying drawings, a are the lenses, b the clasps and lens posts, and c the bow spring, of a pair of eyeglasses. My improved nose pieces consist each of an approximately U-shaped loop of suitable metal, and are conveniently formed by bending up a flat strip of metal previously cut by a die or otherwise to the desired shape. The free leg, e, of each nose piece merges at its end into an enlargement, f, which extends edgewise rearwardly more or less according to adjustment, out of the plane of the lenses, is preferably of approximately oval form, and conveniently of breadth about twice that of the strip. Said enlargement and free leg, although in the fitting operation to be given such curvature as may be necessary to cause them to conform to the wearer's nose, are to be considered as existing in approximately a common plane; that is to say, as together constituting a plate or sheet of metal. The enlargement, which constitutes a bearing plate, is provided with a large central aperture, g, shown as corresponding in outline with its own. Said aperture is conveniently of a breadth about equal to that of the strip of which the body of the U-shaped loop is formed. The nose pieces may be attached by screws or pivots passing through the upper ends of their basal legs, d, and into the lens posts, or other portions of the spectacle or eyeglass frame or mounting. When in position, the bight of the U-shaped loop depends below the screw, pivot, or other device employed to secure the nose piece in position. By reason of the rearward adjustment or set of the enlargement, f, it is out of line with the upper end of the basal leg; that is to say, is, when the device is in use upon a spectacle or eyeglass, nearer the plane of the eyes of the wearer than is the upper

end of the basal leg. When the nose pieces are mounted as stated, the free legs, e, may be lengthened or shortened to the better fit a wearer by such manipulation of the metal as will shift the position of the bight, h, relatively to the length of the strip. Said free leg as well as the basal leg may be set at any desired angle with relation to the plane of the lenses to fix and determine the position of the bearing plate, and said plate itself may be adjusted toward and from the plane of the lenses by manipulation of the neck, i, by which it is connected to the free leg. Apart from the movement or adjustment of said leg, and said plate as a whole, said plate may, as to its different parts, be adjusted or bent to a set other than that illustrated. In addition to adjustment toward and from the plane of the lenses, the different parts of the nose pieces may be adjusted toward and from the nose of the wearer, and the plates may be given, as shown in Fig. 1, a curvature in which their respective upper inner portions are, to the better conform to the wearer, further apart than their lower portions, while the lower portions of the loops may also be, as shown, bent bodily away from each other, or otherwise, to present the acting faces of the bearing plates in contact with such part of the nose of the wearer as may best secure the desired result. The openings in the bearing plates are of such area that in use the skin or fleshy parts of the nose of the wearer will project bodily slightly therewith, whereby the hold of the nose pieces will be re-enforced, a result not possible where minute openings are resorted to. While I do not herein illustrate my nose piece as provided, as to the bearing plate and the free leg which act against the nose of the wearer, with the celluloid or other facings largely employed in connection with nose pieces, and in fact, with my present knowledge, prefer not to employ them, it is to be understood that I do not exclude the application of facings to the structure herein claimed, provided only that they be not so applied as to close the skin-receiving opening. Two factors must be taken into account in the fitting of the lenses; that is to say, the necessity for supporting the lenses in proper position with respect to the eyes, and the desirability of setting the nose pieces at such position upon the nose of the wearer that they will take a secure hold. As these two positions both vary in different individuals, and possess no fixed relation, it has been difficult to accomplish both desiderata with nose pieces as heretofore constructed. My improved nose pieces, however, possess such a range of adjustment that they may be bent to present against that part of the nose of the wearer where they take the most secure hold, while at the same time the lenses may be set at any desired position with respect to the eyes. The precise diameter of the skin-receiving apertures in the enlargements is a matter within the province of the constructor. I employ apertures of about the size, proportionately, to the other parts, illustrated in the drawings. The character of the skin is such that a minute opening is not adapted to receive and take a grasp upon it. The opening must be of considerable magnitude, else a mass of the skin will not enter it. It is to be understood, therefore, that in claiming skin-receiving apertures, I intend to cover openings bearing approximately the same relation, as to size, to the nose piece, as do the openings shown in the drawings bear to the nose piece therein depicted, and intend the words 'skin-receiving openings' to exclude openings materially smaller, proportionately, than the openings depicted.

"Having thus described my invention, I claim: (1) A nose piece for a spectacle or eyeglass, the same consisting of a U-shaped loop, formed from a strip of plate metal, one leg of which is adapted to be attached to a lens, lens frame, or mounting, and the other provided with an enlarged bearing plate arranged at its upper end, and forming a direct continuation of it, but out of line with the upper end of the first mentioned or basal leg, said bearing plate and its leg existing in approximately the same plane, so that in use both are in acting contact with the nose of the wearer, and said bearing plate embodying a large skin-receiving opening, substantially as set forth. (2) A nose piece for a spectacle or eyeglass, the same consisting of a U-shaped loop, formed from a strip of plate metal, one leg of which is adapted to be attached to a lens, lens frame, or mounting, and the other provided with an enlargement constituting a bearing plate arranged at its upper end, and forming a direct continuation of it, but set out edgewise from it; said bearing

plate and leg existing in approximately the same plane, so that in use both are in acting contact with the nose of the wearer, and said bearing plate embodying a large skin-receiving aperture cut directly through it, substantially as set forth."

It will be noted, in connection with the complainant's patent, that one object of the two or more pads attached to each post or standard secured to each lens, and adapted to grip the nose, is to enable the wearer of the glasses to adjust and support the lenses in proper position with respect to the eyes, and to enable him to set the nose pieces at such position upon the nose that they will take a secure hold. These positions on the nose where the grasp of the nose pieces must be had vary in different individuals, and possess no fixed relation. The complainant's patent provided for these nose pieces in such a way that they might be adjusted easily either by bending, or by means of the slots, to any shaped nose in any individual. A careful reading of the specifications of the Fox patent, No. 695,681, demonstrates that Fox sought by means of his patent to accomplish the same purpose.

Should we take the complainant's patent, and connect the nose pieces by a soft metal or otherwise, leaving a small hole therein of any shape through which the skin might protrude, we would have substantially the same construction, ideas, and purposes accomplished and sought to be accomplished by means of the Fox patent, No. 695,681. In this Fox patent of March 18, 1902, the specifications say: "a are the lenses, b the clasps and lens posts, and c the bow spring, of a pair of eyeglasses." Here we have posts, and it matters little whether the posts are perpendicular or horizontal. In this Fox patent he says:

"My improved nose pieces consist each of an approximately U-shaped loop of suitable metal, and are conveniently formed by bending up a flat strip of metal previously cut by a die or otherwise to the desired shape."

He then says:

"The free leg of each nose piece merges at its end into an enlargement, which extends edgewise rearwardly more or less according to adjustment, out of the plane of the lenses, is preferably of approximately oval form, and conveniently of breadth about twice that of the strip."

In place of the nose pads used in the complainant's patent, we have this nose piece so arranged and cut as to act as pads and press against the nose at the same points and in the same manner that the pads of complainant's patent press against the nose, and thus serving the same purpose in the same manner. In the Fox patent of March 18, 1902, the lower portion of the U-shaped loop serves the same purpose as the nose pads, D, D, in the complainant's patent, known as the Wells patent, while the upper portion of the U-shaped loop serves the same purpose as the nose pads in the Wells patent (complainant's patent) above and to the rear of the first-mentioned nose pads. In the Wells patent (complainant's patent) these lower nose pads are attached by mechanism at or very near the same point where attachment is made to the lenses, and it is at this point that the Fox patent attaches the U-shaped loop. In the

Wells patent we have an arm extending upward from this point, and connecting with the bow spring; and at this point, by means of a screw or otherwise, the other nose piece is attached—the one extending backward. In the Wells patent we have more machinery, so to speak, more mechanism, and which of the two, the Wells patent or the Fox patent, is most desirable and most useful, would depend largely upon the taste of the wearer. It must be conceded, however, that the Fox patent construction is much more readily kept in order, while it would seem plain that the nose pads in the Wells patent are much more easily and quickly adjusted to the nose of the wearer.

All the patents and devices in evidence and use prior to filing of the application for complainant's patent have been carefully examined. The complainant's patent is a new and a useful invention, and was not anticipated. No equivalent was in use prior to the filing of the application for this patent. It proved a business and a commercial success, and met with large sales. The defendants' device or lasso guards for eyeglasses, although, so far as the nose piece is concerned, formed of a single piece of metal, usually, is a substantial duplication of complainant's guards, and was intended to be, and embodies the same principle and ideas, and serves the same purposes. It has the complainant's posts, in a different form, true, but the pressure or holding upon the nose comes at the same points in the same manner substantially, and all of the U-shaped loop mentioned in defendants' patent, No. 695,681, dated March 18, 1902, is surplusage except the points of pressure upon the nose, which points may appropriately be called pads. It is immaterial on the question of infringement that the points of pressure serving as pads are connected by means of this superabundant material. In like manner the defendants' construction serves the same purpose in the same manner for preventing tipping, etc. The defendants have appropriated the complainant's invention by varying the form of construction and in minor details by varying the form and manner of attachment to the frames or lenses. These variations are immaterial so far as the principle of complainant's invention is concerned, and cannot relieve the defendants from the charge of infringement. The infringement is deftly hidden from the eye of a casual observer, but cannot be concealed from the user. The lasso guards are so constructed as to be adjusted by bending and producing the pad pressure at any desired point.

The defendants' device, the Fox patent, No. 695,681, dated March, 1892, displays great ingenuity in attempting to evade the charge of copying and infringing complainant's patent, No. 412,442, dated October 8, 1889, but this cannot avail. *Hoyt v. Horne*, 145 U. S. 302, 309, 12 Sup. Ct. 922, 36 L. Ed. 713. So in the specifications the Fox patent carefully avoids the use of the word "pad," and substitutes the "U-shaped loop of suitable metal"; but how can this be material when we find the "U-shaped loop" performing the same functions in the same manner, and embodying precisely the same ideas of accomplishing the desired end, as the complainant's "pads"?

In *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713,

at page 309, 145 U. S., page 925, 12 Sup. Ct., 36 L. Ed. 713, the court said:

"Indeed, the ingenuity displayed in this evasion is only equaled by the ingenuity with which it is concealed in the specification of defendant's patent and the function of a more thorough mixture of the pulp put forward as the salient feature of the invention."

The salient features of the Fox patent referred to are the same as those of the Wells patent, and, indeed, in seeking to hold the market with a Fox patent we find him abandoning his old form and invention, No. 292,479, of January 29, 1884, and appropriating all the substantial features and ideas of the Wells patent.

In *Machine Company v. Murphy*, 97 U. S. 120, 24 L. Ed. 935, the court said:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue; the correct rule being that in determining the question of infringement the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions, or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation, or the way the device works, and at the result, as well as at the means by which the result is attained. Inquiries of this kind are often attended with difficulty; but, if special attention is given to such portions of a given device as really does the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome. *Cahoon v. Ring*, 1 Cliff. 620 [Fed. Cas. No. 2,292]. Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that, if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape. *Curtis, Patents* (4th Ed.) § 310." Again: "One may not escape infringement by joinder of two elements into one integral part, if the united parts effect the same results in substantially the same way as the separate parts before the union."

*Bundy Mfg. Co. v. Detroit Time Reg. Co.*, 94 Fed. 527, 36 C. C. A. 375.

This is what was done in the case at bar by the use of superabundant material to form a U-shaped loop in place of pads. These lasso guards were made by defendants and put upon the market prior to the commencement of this action. The conclusion is irresistible that complainant's patent is valid, and that defendants have infringed claims 4 and 5, and are infringing the same.

The complainant is entitled to an injunction and to an accounting. A decree will be prepared accordingly.

## GOLDEN GATE MFG. CO. v. NEWARK FAUCET CO.

(Circuit Court, D. New Jersey. July 20, 1903.)

## 1. PATENTS—VALIDITY AND INFRINGEMENT—METHOD AND DEVICES FOR RACKING BEER.

The Mussell patent, No. 331,252, for a method of filling casks or kegs with beer or other carbonated liquid, was anticipated by the English patent to Russell, No. 4,083 of 1816, and the Matthews patent, No. 260,766, relating to a method of charging soda fountains; and the Mussell patents, Nos. 331,251 and 333,081, and the Savage patent, No. 537,939, all for mechanical devices for practicing such method, are identical with the device of the Russell patent in principle of construction, and must be strictly limited to the particular construction of parts shown and described. As so limited by the prior art, such patents *held* not infringed.

In Equity. Suit for infringement of letters patent Nos. 331,251, 331,252, and 333,081, granted to Christoph Mussell November 24, 1885, and December 22, 1885, respectively, and No. 537,939, granted to W. C. and Granville L. Savage April 23, 1895, all relating to a method and devices for filling kegs with beer. On final hearing.

Wm. B. Greeley and Wm. A. Redding, for complainant.

Edwin H. Brown, for defendant.

KIRKPATRICK, District Judge. The complainant in this suit charges the defendant with infringement of United States patents Nos. 331,251 and 331,252, granted to Christoph Mussell November 24, 1885, and No. 333,081, granted December 22, 1885, and also patent No. 537,939, granted April 23, 1895, to W. C. Savage and Granville L. Savage. All of these patents relate to racking, or the filling of kegs and other vessels with beer or other carbonated liquids. Patents Nos. 331,251 and 333,081, to Mussell, and No. 537,939, to Savage, are what are known as "device patents," while patent No. 331,252 is a patent for a mechanical method. Proofs of infringement are restricted to claim No. 5 of patent No. 331,251, to claim 1 of patent No. 333,081, to claim 1 of patent No. 331,252, and the four claims of patent No. 537,939.

It seems apparent, from an examination of the evidence, and study of the art of racking beer, that for a long time it had been considered to be a most desirable thing that a cask or the keg, when prepared for shipment, should be completely filled with the beer, so that in its handling for delivery to the market customer there should be the minimum amount of agitation of the beer in the cask or keg. It was found that if the cask were not completely filled, but contained a portion of froth or foam upon the surface of the liquid, the gas contained in the body of the beer would, by agitation, escape to that space, filled by foam, and thus destroy the quality of the beer, and as a result the beer would become what is known to the trade as "stale" or "dead," and therefore unsalable. Brewers and manufacturers had sought and tried various means to avoid this loss; and to permit beer to be shipped, handled, and kept without becoming stale, various processes and devices for filling the casks or kegs had been patented and adopted. Among those patents resulting from these attempts

were those granted to Mussell, upon which, in connection with that granted to Savage, the complainant in this case relies.

The Mussell patent, No. 331,251, claim 5, alleged to be infringed, reads as follows:

"A filling and supply head for beer, and a filling and supply head for air, both located to communicate at different points with the vessel to be filled, and both acting simultaneously to supply beer and air to a keg or other receptacle, substantially as and for the purpose specified."

This seems, from the record, to be the first patent showing what Mussell conceived to be the device which would remedy the defects in the then known processes of racking beer. In view of the state of the art at the time of granting the patent 331,251 to Mussell, I am of the opinion that it cannot be considered a pioneer in the art to which it applies, and that its claims, and those of the subsequent patents in suit granted to Mussell, must be construed narrowly, and limited in their scope to such an extent as the prior art required. The English patent No. 4,083, granted to William Russell, and bearing date November 19, 1816, is in the same art and class, and for the same purposes and uses, as the Mussell and Savage patents. It covers and contemplates substantially everything involved in the complainant's device patents in suit. Without describing in detail the device set out in the Russell patent, but by construing it in comparison with claim 1 of the earliest Mussell patent in suit, we find there embodied all the elements set forth in the claim of the early Mussell patent, and find them adapted to and specified for the same uses as the like elements in the Mussell patent. To be sure, the mechanical structure in each, as shown in the drawings, respectively, is not identical; but, in view of the fact that the same elements are for the same uses in each patent, it follows that, whatever invention or novelty may be claimed for the Mussell patent, it must be limited strictly and narrowly to the difference that may be found in the detailed construction of the various parts that go to make up the Mussell and Savage devices. This is plain, for in the Russell patent conception is clearly shown of two filling and supply heads, both so located as to communicate at different points with the vessel to be filled, and both capable of normally "acting simultaneously to supply beer and air to a keg or other receptacle." Further, we find set out in the Russell patent a conception of what seems to be the alleged novel idea set out in the Mussell patents, for Russell has provided for opposite openings in the receptacle to be filled, suitable connections therefor that may admit to or lead from said receptacle both beer and air. He has provided for and gives evidence in the patent of having conceived the uses which may be made of back pressure in the receptacle to be filled. He has further provided for a separate pipe leading to or from the similarly located openings in the receptacle. For these reasons, I consider the Russell patent a substantial anticipation of claim 1 of the Mussell patent No. 331,251.

The broadest permissible construction that can be put upon the claims of the Mussell patents in suit can relate only to the particular and specific construction of the various parts of the apparatus he has shown and described as being necessary to make use of the novel



ideas in this art of which, from the evidence, Russell must be considered the pioneer inventor. Referring to the cask or keg to be filled, Russell says in his patent: "This vat may be filled through the liquor aperture or the cock, C, an application which is recommended to brewers in particular, who find great advantage from starting in near the bottom of these vats, or it may be filled at the top by an open aperture or by a hose and screw cap." He also says that:

"The peculiar construction of my newly invented cock and its apparatus effectually shuts off all communication with the atmospheric air, except when the fluid is actually running into or out of the vessel; and in some cases the atmosphere may be entirely excluded, and only gas of the peculiar fluid or any other gas which may be desirable admitted."

From these quotations, and from the other provisions set forth in the specifications and claims of his patent, it is apparent that he had conceived the use to which back pressure could be put in filling casks with liquors, as well as means for producing and conveying to and from the cask the gas which should be used to create such back pressure, and means for conveying liquors to and from the cask. That these means used by Russell for the handling of the gas and liquors were not identical in their mechanical construction with those devised by Mussell and Savage is immaterial, as far as it may be considered in determining whether Mussell is entitled to have his patents construed broadly as pioneers in this art. The evolution of the principles involved in the Russell, Mussell, and Savage patents must be credited, from the evidence in the suit, to Russell. All that Mussell did was to make use of the principles and ideas shown in the Russell patent, and construct a device somewhat different in its detail from that used by Russell. The principle of operation of all these devices, therefore, was the same, Russell being the pioneer patentee in making use of these principles in this art, the Mussell and Savage patents must be construed narrowly in contemplation of the prior art.

Before we enter upon a consideration of the scope which shall be given to these device patents in suit, let us look for a moment to Matthews' method patent, No. 260,766, of July, 1882, to ascertain its effect upon the Mussell method patent, No. 331,252, upon which the complainant also relies. An inspection of this Matthews patent shows that it describes "a method of bottling liquid, or the like, under pressure, by which constant and uniform pressure is maintained upon the liquid as well when passing into the vessel to be filled as when in the reservoir from which it is taken." There is but one claim to this patent. It reads as follows:

"The method herein described of charging the fountain with aerated beverages by connecting it first with the reservoir that contains only gas under pressure, and then with another reservoir containing water and gas under greater pressure, meanwhile having the connection with the first reservoir uninterrupted, so that the fountain will first be charged with gas, and then with water under greater pressure than the gas, the water expelling surplus gas into the first reservoir, whereupon communication with both reservoirs is closed, substantially as specified."

This process relates primarily to, and was used chiefly in, charging soda water fountains. The complainants contend that such method

could not be considered as an anticipation of the Mussell method patent, because of the alleged difference between the art of filling casks with beer and the charging of fountains with soda water. They claim that there is not a sufficient analogy between these two arts or processes to permit of the view that the Matthews process is an anticipation of the Mussell process. They claim that the conditions under which beer and soda water are handled and treated, and the characteristics of the two liquids are so different, that the principles, methods, and devices that would apply to the handling of beer would not be applicable to the handling of soda water, and vice versa. They undertake to say that there are such differences between these two liquids and the methods that must be used in the handling that the principles and methods set forth in the Matthews patent of 1882 are not an anticipation of the Mussell method patent of 1885. My opinion is that such contention is not well founded, and that by the Matthews patent of 1882 the method shown and described in the Mussell patent 331,252 was clearly anticipated. The United States Patent Office classifies these two arts under the same division, and considers them not only as analogous, but as practically the same art. This is the view taken by the court. The difference between beer and soda water does not relate to, and is not found in, the different effects which back pressure will have upon them in the filling of casks with beer or fountains with soda water. Difference is found in the consistency of the liquid body of the beer and soda water, respectively; but inasmuch as we are not called upon in this suit to consider any chemical process, or to determine the difference between the chemical constituency of beer and water, it is evident that, whatever this difference may be, it has no bearing upon the questions involved in this litigation. Therefore, in considering the Matthews method patent with the Mussell method patent, no distinction can be permitted in point of the uses to which these methods are put, whether it be in the handling of soda water or the handling of beer. The point in each conception is the production of back pressure by gas within the cask or receptacle to be filled against the inflowing liquid. The Mussell method patent describes nothing more than that which is done in the Matthews method patent. Mussell does not specify that the inflowing liquid shall be received at the bottom or lower end of the receptacle to be filled, which is not specified in the Matthews patent; but means for this are shown and specified in the Matthews device patent, No. 260,037, June 27, 1882, which is prior to both the Mussell device and the method patent of 1885. Therefore there is no novelty in the Mussell method patent of 1885, the same being anticipated both in the method patent of Matthews, and means for such introduction of liquids being shown in the Matthews device patent, No. 260,037, of 1882. In reference to the Mussell device patent, No. 333,081, December 22, 1885, and the Savage device patent, No. 527,939, April 23, 1895, relied upon by the complainant, my opinion is that these patents, being based upon the principles embodied and shown in the first Mussell patent, are, of course, not pioneers in the art, and that they, as well as the first Mussell patent, in principle of construction, are anticipated by the English patent to

Russell, and that whatever consideration shall be given to them must be limited to the construction of the parts as they are shown and described, putting such limitation thereon as the state of the art, as shown in the Russell and Matthews patents, above referred to, requires. Claim 1 of the Mussell patent, No. 333,081, is the only one in this patent alleged to be infringed. It reads as follows:

"In an apparatus for filling kegs with a liquid containing carbonic acid or other gas in solution, the combination of the cask holding the liquid, situated above the keg to be filled, and joined thereto by a suitable tube and corking device, secured over an opening near the lower end of said keg, the relief vessel, situated above the keg to be filled, and connected thereto by a suitable tube and corking device, secured over an opening in the upper head of said keg, and the condensed air reservoir, connected both to the cask and relief vessel by proper tubing, all substantially as specified."

If there is any novelty in the device set forth in this claim, it is the corking device. Without going into details, we are convinced that the corking device described in this patent is not entitled to be called an invention, but is, rather, a mechanical equivalent for other different corking devices, well known in this art, and used publicly prior to the date of this patent. We therefore give a narrow construction to this claim, and hold that it is not proper ground on which to base a suit against the defendant herein.

In the Savage patent, No. 537,939, all claims are alleged to be infringed. They are as follows:

"(1) The combination with a supply-vessel for liquid, and a barrel or other package having a tape-valve and a vent-valve located at opposite points, and each being a feature of the barrel or package, and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery-pipe from said supply-vessel, a coupling-piece to connect said pipe to said tape-valve, a cut-off for said coupling-piece, a pipe to receive and conduct gas or air from the barrel, a coupling-piece to connect the gas-pipe to said vent-valve, and a cut-off valve for said last-named coupling-piece, substantially as shown and described.

"(2) The combination with a supply-vessel for liquid, and a barrel or other package having a tape-valve and a vent-valve located at opposite points, and each being a feature of the barrel or package, and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery-pipe from said supply-vessel, a coupling-piece to connect said pipe to said tape-valve, a cut-off for said coupling-piece, a pipe to return gas or air from the barrel to its source of supply, a coupling-piece to connect the return pipe to said vent-valve, and a cut-off valve for said last-named coupling-piece, substantially as shown and described.

"(3) The combination with a supply-vessel for liquid, and a barrel or other package having a tape-valve and a vent-valve located at opposite points, and each being a feature of the barrel or package, and each having a gate to be opened or closed by connection therewith or a coupling-piece or other key, of a delivery-pipe from said supply-vessel, a coupling-piece to connect said pipe to said tape-valve, a cut-off valve for said coupling-piece, a pipe to return gas or air from the barrel to its source of supply, a coupling-piece to connect the return-pipe to the vent-valve, a cut-off valve for said coupling-piece, and a trap-tank interposed in said return-pipe, substantially as shown and described.

"(4) The combination with a supply-vessel for liquid, and a barrel or other package having a tape-valve and a vent-valve located at opposite points, and each being a feature of the barrel or package, and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery-pipe from said supply-vessel, a coupling-piece to connect said

pipe to said tape-valve, a cut-off valve for said coupling-piece, a pipe to return gas or air from the barrel to its source of supply, a coupling-piece to connect the return-pipe to the vent-valve, a cut-off valve for said coupling-piece, a trap-tank interposed in said return-pipe, a delivery-pipe from said trap-tank, a coupling-piece adapted from connection to the tape-valve of a barrel, and a cut-off in said last-named delivery-pipe, substantially as shown and described."

Claim 2 differs from claim 1 in specifying the return of the gas or air to its source of supply. Claim 3 has an added element—the brass tank interposed in the air return pipe; and claim 4 specifies, in addition, a delivery-pipe and cut-off, the function of which is to draw the trap-tank into a barrel or package. From the file wrapper of the Savage patent, it appears that Savage originally claimed to have invented a method as well as an apparatus. It also appears that Savage later admitted that he was in error in claiming to have invented a method.

There was great difficulty experienced by Savage in obtaining a grant of this patent. Extracts from the correspondence between the Patent Office examiner and Savage show that the patent was allowed not for any broad invention, but only for details distinguished by valves and couplings, which Savage made no pretense of having invented. It is clear that Savage did not pretend to have invented any method of filling, or any new function of any different operation of any apparatus, or any of the elements enumerated in his claims. He only contended for a patent upon the ground that he was the first to provide couplings and cut-offs for the liquid and gas-pipes, by which he could detach a vessel after filling. He admitted that there was no other novelty. The study of the prior art shows clearly that these were the grounds on which his patent must have been allowed, and that as such it must be narrow and limited in its scope to these details of construction. This limitation applies to all four claims. The complainant's expert finds an embodiment of the claims of the Savage patent in the defendant's racker only when a broad interpretation is given to the claims of the Savage patent, and when capabilities which are not suggested in the specifications of the patent are read into the same. After a careful examination of the defendant's device and the Savage patent in suit, the court concurs in this view. To infringe the Savage patent, the defendant must have employed the specific mechanism and arrangement of elements described in the Savage specifications. This he does not do, and therefore it cannot be said that he is an infringer. The complainant's contentions in this case cannot be sustained. The device patents of Mussell and the device patent of Savage must all be construed narrowly, for the reasons stated. The method patent to Mussell is anticipated, as shown, because Russell gives evidence of having been the pioneer in the conception of the principles underlying both the Mussell and Savage device patents and the Mussell method patent; also because, when a narrow construction is put upon the Mussell and Savage patents, and a comparison is made of the claims of these patents with the defendant's device and process, it is not shown that the elements set forth in the complainant's patents are embodied in the defendant's device; nor is it shown that the process set forth in the complainant's patents is that under which the defendant's device operates.

Upon the whole case, we find that the defendant's device does not infringe any of the several claims of the patents enumerated and set out in the complainant's bill, and his bill must be dismissed.

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BRYANT ELECTRIC CO. v. BUCHANAN et al.

(Circuit Court, E. D. Pennsylvania. August 8, 1903.)

No. 30.

1. PATENTS—INFRINGEMENT—INCANDESCENT LAMP SOCKETS.

The Lange patent, No. 434,153, for an incandescent lamp socket, was not anticipated nor so limited by the prior art that it must be narrowly restricted in construction. Claims 1 and 2 construed, and held infringing.

In Equity. Suit for infringement of letters patent No. 434,153 for an incandescent lamp socket, granted to Philip Lange August 12, 1890. On final hearing.

Howson & Howson, for complainant.

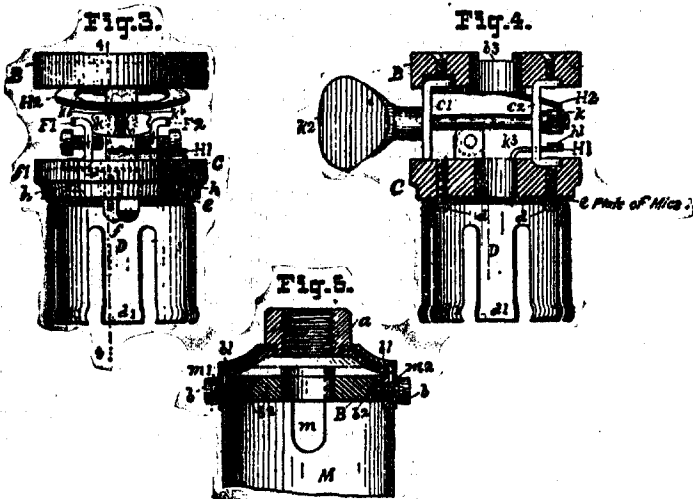
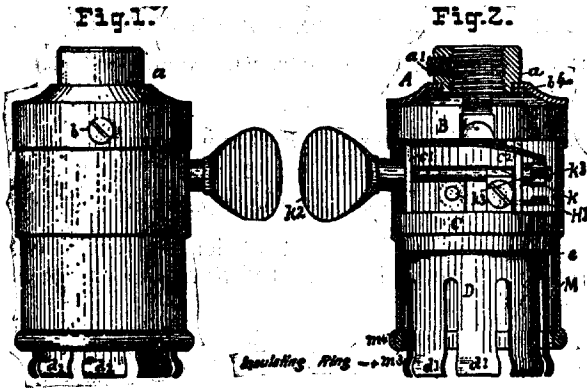
Horace Pettit and Edward Payson, for respondents.

J. B. McPHERSON, District Judge. This suit involves the validity of claims 1 and 2 in letters patent No. 434,153, applied for October 31, 1888, and granted August 12, 1890. The inventor was Philip Lange, but the patent was issued to the Westinghouse Electric Company, as assignee, and the title is now owned by the complainant. The subject-matter of the invention is a new and useful improvement in key-sockets for incandescent electric lamps. The scope of the improvement is thus described, by Mr. Waterman, the complainant's expert:

"The Lange patent, as its title, 'Incandescent Lamp Socket,' implies, relates to sockets or holders for incandescent electric lamps, by which they are at the same time held mechanically in position, and connected, or adapted for connection, with an electric circuit, by which they are to be supplied with current. The invention which the patent disclosed, in so far as concerns the two claims referred to, relates in general to a mechanical construction by which particular parts are brought and held together. It will be sufficient, as a general introduction, to say that, while the completed socket is a simple and comparatively insignificant looking article, its construction, to meet practical requirements, has been a problem of great difficulty, and its satisfactory solution has been a matter of imperative importance; for while the socket must, from a commercial standpoint, be small, light, simple, easily wired, and, as the English say, 'eyeable,' and though cheapness is essential, it is an article necessarily situated in a dangerous location in connection with live terminals in an electric circuit, and upon its mechanical stability and perfect performance of its function depend safety from fire, and even in many cases the safety of life, as well as continuous and satisfactory lighting service. It is, therefore, of paramount importance that the socket should preserve continuously the correct mechanical relation of its parts, and, as it is necessarily constructed of light metal parts and frail insulating materials, and is subjected to much rough usage, as well as to the weight of heavy globes and shades, correct relation of parts and methods of securing them together become of prime importance. These methods, moreover, must permit of the socket being quickly taken apart and conveniently wired or connected to the electric circuit, whether hung from a cord as a pendant or attached to a chandelier or other fixture.

"The object of the patent is to attain this correct relation of parts, and at once improve the mechanical construction, lessen its parts, and increase its durability. This is stated by the patentee:

"The object of the invention is to simplify and improve the mechanical construction of the device, and thereby lessen its parts, and increase its durability.'" (Page 1, lines 13 to 16.)



The following extracts from the specifications will explain more clearly the construction referred to in the two claims now in suit:

"Referring to the figures, A represents a cup-shaped base adapted to be secured to a fixture of any suitable character. In this base there is set a base-plate, B, of nonconducting material. The plate, B, is secured in position by means of two screws, b, b, which enter corresponding lugs b<sup>1</sup>, b<sup>1</sup>, extending from the bottom of the base, A, parallel with its plates. These lugs may be

conveniently formed upon a ring, b, which surrounds the portion a, which screws into the fixture. The portion a may be soldered or screwed or otherwise fastened into the cup-shaped portion of the base. A screw, a<sup>1</sup>, serves to bind the base upon the fixture. The screws, b, are designed to project over the shoulders, b<sup>2</sup>, b<sup>2</sup>, in the plate B, and thus hold it in position. The bottom of the base-plate, B, is constructed with a recess or groove, b<sup>2</sup>, which fits over the portion of the lugs b', b', lying along the bottom of the cup. This prevents the plate from being turned in the cup. The screws, b, pass freely through the flange of the base, and screw into the lugs, and by means of them the outer shell, presently to be described, may be held firmly between the flange of the base and the lugs. \* \* \*

"The entire working parts of the socket and the inner shell, D, are inclosed in an outer shell, M, which fits over the shell D and the plates B and C, and extends into the bottom of the cup, A. The shell M is provided with a slot, m, for receiving the shaft, k', of the key, and two small slots, m', and m<sup>2</sup>, which pass over the screws, b, b, between the outer shell and the lugs, b', b'. When the screws are tightened, they pinch the shell between the flange of the base A and the lugs b', holding it securely in position.

"When the socket is being applied to the fixture, both the shell and the working parts are removed by loosening the screws, b. The bottom is then screwed upon the fixture, the plate B is inserted, and the screws tightened sufficiently to hold it in place. After the wire connections have been made, the outer shell is slipped into position and fastened by tightening the screws, b. It will be seen thus that the number of parts which the workman is obliged to handle in putting the socket into position is reduced to a minimum."

Claims 1 and 2 of the patent are as follows:

"(1) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a recess in the base-plate fitting over the lugs.

"(2) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a shell extending between the lugs and the base and held in position by pressure."

The construction thus claimed is described so lucidly by Mr. Waterman that I prefer to transcribe that portion of his testimony, rather than attempt to put into my own words what I am sure would be a less intelligible description:

"The socket described, as will be seen by reference to the drawings, consists of an outer shell or case and an inner insulating and connecting mechanism or structure (Figs. 3 and 4) separable therefrom as a unit. The exterior case consists of a base, A, and a cylindrical shell, M, separable from the base, the latter being provided with a screw-threaded neck, a, and set-screw, a<sup>1</sup>, for attaching it to a chandelier or fixture. The interior portion, consisting of the insulating parts and connections, is shown as having a base-plate, B, from which all the other parts depend, and by means of which they are fastened within the base, A, of the exterior case. This base-plate is constructed of insulating material, and forms, in conjunction with the plate, C, rigidly connected with it by arms, c<sup>1</sup>, c<sup>2</sup>, an insulating chamber for the reception of the necessary connections for the electric circuit. Below the plate C is a spring shell, E, for receiving a lamp and connecting one terminal of it with the electric circuit, while depending through a hole in the center are two spring arms for grasping the central contact of a lamp, and so connecting its other terminal.

"A suitable switch mechanism is shown for turning the lamp on or off at will. This interior portion constitutes a single, strong and durable structure, and the assembling of these three main parts or divisions of the structure—the base, the mechanism, and the exterior shell—into one unit mechanically

in a convenient, strong, and serviceable manner is the particular problem to which claims one and two relate, as I understand them.

"As shown in Fig. 5, the base is provided with two lugs,  $b_1$ ,  $b_1$ , which the patent says may be conveniently formed upon the common central ring securely fastened in place within the base, the two lugs extending outwardly and downwardly parallel with the sides of the base. These lugs are formed of material sufficiently strong to give the necessary mechanical strength, and sufficiently thick to be drilled and screw-threaded and receive screws  $b$ ,  $b$ , passing through holes in the outer cylindrical portion of the base, and screwed into the lugs as shown in Fig. 5. As shown in Figs. 2, 4, 5, and in dotted lines in Fig. 3, the base-plate,  $B$ , of insulating material, is grooved to fit over the lugs, and hollowed out at its sides at opposite ends of a diameter to receive the ends of the screws,  $b$ ,  $b$ . By this means the interior part or mechanism is held within the base without regard to the presence or absence of the exterior shell,  $M$ . This shell is provided with two small slots,  $m^1$ ,  $m^2$ , so that the shell may be slipped upwards toward the base and pass between the exterior of the base and the depending lugs. By tightening upon the screws,  $b$ ,  $b$ , the shell is firmly clamped between the exterior of the base and the lug, whereby a large clamping area is secured, and an exterior friction placed upon the shell, so that in spite of the light materials and of the great strain imposed by the weight of globes and shades, the socket is enabled to preserve rigidly the proper mechanical relation. \* \* \*

"Referring now to the claims, I find that they have particular reference to those features of the construction by which the several parts are adapted to one another and held together. Claim 1 reads as follows:

"(1) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a recess in the base-plate fitting over the lugs."

"This claim calls for very little comment. It is addressed to the union of the socket-base with the base-plate of the interior mechanism by means of the lugs which I have described, and into which the screws are threaded, and through which they pass into recesses in the base-plate, whereby the interior mechanism is held in position, whether the exterior shell is present or not, and permitting of the removal of the latter, while the base-plate, with its connections and the wires leading thereto, remain undisturbed. \* \* \*

"Claim 2 reads as follows:

"(2) In a key-socket, the combination, with the base, of the base-plate contained therein, screws passing through the sides of the base holding said base in position, lugs carried by the base through which said screws pass, and a shell extending between the lugs and the base, and held in position by pressure."

"This claim is evidently directed to the method of holding the exterior shell by clamping it in position between the lugs and the base, whereby a strong gripping pressure is exerted to hold the shell against displacement by rough handling, the weight of the shade, and the like, while permitting it to be quickly and readily removed by the simple loosening of the two screws."

The defendants appear to concede that the patent is valid, unless it was anticipated by a socket, called in the testimony "Mather No. 2;" and the complainant admits that the first claim of the patent would be anticipated by this socket, if its existence can be carried back to the latter part of 1887; this being the date referred to by the only witness that supports the defendants' attempt to prove the prior right of Mather No. 2. It is clear to my mind, however, that the witness was mistaken—honestly, no doubt—and that the date of Mather No. 2 cannot be fixed earlier than 1889 at the best. In my opinion, the testimony that establishes the priority of Lange is overwhelming, and I shall not take either time or space to transcribe it from the record.

Assuming, therefore, the patentability of the Lange device, it seems



clear to me that the socket sold by the defendants is an infringement. To use Mr. Waterman's language once more:

"The 'Complainant's Exhibit Defendants' Socket,' is in every way such a socket as is referred to in the Lange patent and illustrated by the Lange and Bryant exhibit sockets, and consists of a base-plate of porcelain substantially like those in the exhibit Bryant sockets, arranged for Westinghouse and Edison lamp bases, and from which, as in the Lange patent, all connections and working parts depend. It has a base and an exterior shell substantially exactly as shown in the Lange patent. The base is provided with lugs which are formed upon a ring, as described on page 1, lines 36 to 38; the ring being fastened into the base by surrounding the neck portion (a), as shown in the Lange patent. These lugs are drilled and screw-threaded, and through them pass screws entered through holes in the cylindrical portion of the base; also as shown in the Lange patent. These screws pass into recesses in the base-plate, thereby holding the latter and the entire interior mechanism in position in the base independently of the presence of the shell, there being recesses in the base-plate fitting over the lugs. The exterior shell is slotted, and extends between the lugs and the base-plate, and is clamped between them by the tightening of the screws, whereby the two screws serve to effect the entire union of the parts in such a strong and rigid manner as to meet the requirement of the lamp socket which I have referred to, and give the necessary facility of handling, convenience of wiring, and cheapness of manufacture. The substantial identity of the construction with the exhibit Lange socket and exhibit Bryant sockets, will be apparent at a glance.

"Comparing with the two claims of the Lange patent inquired about, the 'Complainant's Exhibit Defendants' Socket' is, in my opinion, such a socket as is referred to in those claims in all substantial respects. It has the combination with the base of a base-plate contained therein, screws passing through the sides of the base holding said base-plate in position, lugs carried by the base through which said screws pass, and a recess in the base-plate fitting over the lugs, all substantially as described in the Lange patent, whereby the base-plate and the interior mechanism are united to the socket base, and held together independently of the presence of the shell. It has also the peculiar features of the second claim, namely, a shell which extends between the lugs and the base, and is held in position by pressure, being clamped between the base and the lugs, as shown and described in the Lange patent, so that the said screws unite the shell and the base and also unite the base-plate and the base.

"For these reasons, 'Complainant's Exhibit Defendants' Socket' contains the construction which I understand is set forth in the Lange patent, and particularly referred to in claims one and two."

The principal defense appears to be that the prior art requires the patent to be so narrowly construed that the defendants' construction does not infringe. I have already said that the charge of infringement seems to me to be established, and the remark was not made without having had in mind the defense now referred to. I do not think it necessary to add more than a few words. To discuss the prior art fully would extend this opinion unduly, and would be little more than a substantial reproduction of Mr. Waterman's testimony in rebuttal—to which I refer with approval. Three principal types of sockets—the Thompson-Houston, the Bergman, and the Mather No. 1—were in use before the Lange patent, and it is these upon which the defendants rely. As it seems to me, however, the devices comprised in each of these classes have been fully and satisfactorily distinguished from the socket in suit. I do not believe that the Lange patent is to be so narrowly restricted that the recess in the defendants' device must be held to be a successful evasion, merely because it is somewhat different in shape and construction from the recess in the complain-

ant's socket, as long as it performs the same function, and does in like manner co-operate with the screws to hold the plate in position. Further, if I understand correctly the two devices in controversy, it is pressure in each case that holds the shell in position. This is practically admitted by the general manager of the real defendant—the New England Electric Manufacturing Company—who testified that the screws in the defendants' socket ought to be tightened as far as they would go, in order to hold all parts of the socket together as firmly as possible, thus holding the shell tightly between the lugs and the flange of the cap. Inspection of the two sockets will show at once, I think, that there is scarcely any room to dispute that in each the shell is held in place by the same means, and that the bayonet-joint of the defendants' socket would be ineffective without the screws.

On the whole case I think the complainant is entitled to the usual decree for an injunction and an accounting.

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#### VAN EPPS v. INTERNATIONAL PAPER CO.

(Circuit Court, N. D. New York. August 14, 1903.)

1. **PATENTS—INFRINGEMENT—PRIOR ADJUDICATION.**

A judgment for infringement against a manufacturer is not conclusive upon a subsequent purchaser and user of the manufactured articles either as to the validity of the patent or infringement.

2. **SAME—EFFECT OF JUDGMENT AGAINST MANUFACTURER—RIGHT TO USE.**

A judgment at law against an infringer for the manufacture of an infringing article does not give him the right to vend the articles so made, or the right to the purchaser to use the same.

3. **SAME—INFRINGEMENT—VARIATION FROM DRAWINGS.**

In constructing a machine under a patent, slight and immaterial departures from the drawings are permissible, and infringement is not avoided because of such differences.

4. **SAME—PULP-SCREENING MACHINES.**

The Victory & Remington patent, No. 417,451, for pulp-screening machines, was not anticipated, shows patentable invention, and is valid. Claims 1 and 2 also held infringed by machines made under the Gotham patents, Nos. 511,770 and 530,586.

This is an action at law for the recovery of damages alleged to have been sustained by the plaintiff by the use by defendant of a number of wood pulp screens manufactured and sold to defendant by one Darwin B. Gotham under his patents (as he claims) Nos. 511,770 and 530,586, and which are alleged to infringe claims 1 and 2 of letters patent to Edmund Victory, plaintiff's intestate, No. 417,451, dated December 17, 1889, application filed April 19, 1889.

Edwin H. Risley, for plaintiff.

Alfred Wilkinson (Stetson, Jennings & Russell, of counsel), for defendant.

RAY, District Judge. The action was commenced by Edmund Victory, and, he having died, the suit was continued in the name of his administratrix. The defendant admits the purchase and use

of 85 pulp-screening machines alleged to infringe claims 1 and 2 of a patent granted to Edmund Victory, No. 417,451, dated December 17, 1889. The defendant is not a wood pulp screen manufacturer, but merely owns and uses these machines to carry on its pulp business. On the final hearing the only defenses relied on were non-infringement and that plaintiff's patent is invalid by reason of the alleged fact that it is old, was anticipated by the Kron patent, No. 315,420, of 1885, and two British patents—Miller, No. 3,620, of 1880, and Rogers, No. 4,073, of 1887. Other patents were in evidence, but no serious claim was made that they show anticipation, etc. The defendant says that, to show anticipation, he relies particularly on the Kron patent, and that, comparing Victory's to Kron's, there is practically no difference, the whole arrangement and mode of operation being the same; that Kron has a series of two chambers arranged longitudinally in a box, whereas Victory has increased the number, and arranged them laterally in a box; that the operating means and connection to the bellows is the same in mode of operation; but admits that Victory differs from Kron in the form of his connecting frame, his flexible bellows joints, which are turned at right angles, and connected to the edges of his plates, and in the form of his flexible packing strips; but it is alleged that Gotham has not copied these details. On a careful examination of the evidence and of the exhibits this court is satisfied that the Victory patent was not anticipated, and shows patentable invention, and is valid. The presumption is in favor of its validity, and this presumption has not been overcome by the evidence.

Attached to the declaration in this case is the copy of a judgment in an action in this court wherein said Edmund Victory was plaintiff and said Darwin B. Gotham was defendant, and which is as follows:

"United States Circuit Court, Northern District of New York.

"Edmund Victory vs. Darwin B. Gotham. Judgment.

"This action was brought to recover damages for the infringement of United States letters patent No. 417,451, issued December 17, 1889. The defendant appeared in said action, and filed his answer, and this court made an order on consent of the parties waiving a trial by jury, and directing that the case be tried before the court. The parties having submitted all of their proofs, and the case having been duly argued in this court by the attorneys and counsel for the respective parties, and the court having filed its decision in favor of the plaintiff and against the defendant for \$5,000 damages:

"Now, therefore, on motion of Messrs. Risley & Love, attorneys for the plaintiff, it is ordered and adjudged as follows:

"First. That the plaintiff, Edmund Victory, is the exclusive owner of U. S. letters patent No. 417,451, issued December 17, 1889, to Edmund Victory and Charles R. Remington, and of all rights of action for damages for the infringement thereof.

"Second. That the said letters patent No. 417,451 is a good and valid patent in law.

"Third. That the defendant, Darwin B. Gotham, has infringed claims one and two of said letters patent by the manufacture and sale of pulp screens known as the 'Gotham Pulp Screen.'

"Fourth. It is further ordered, adjudged, and decreed that the plaintiff, Edmund Victory, do now recover judgment against the defendant, Darwin B. Gotham, for the sum of five thousand dollars (\$5,000) damages for the wrongful manufacture and sale by the said Darwin B. Gotham of one hun-

fred Gotham pulp screens, and that the plaintiff have execution against the defendant therefor.

"Judgment entered, filed, and docketed this 21st day of November, 1900, at 2 o'clock and 35 minutes p. m. W. S. Doolittle, Clerk."

The original judgment and roll and the evidence in that case is in evidence in this case. This court declines to hold that such judgment is *res adjudicata* as between the parties to this action on any question in issue, but decides the case on the evidence produced regardless of that judgment. Defendant says such judgment and the proof of its payment establishes a right in Gotham to sell these machines, and a right in his vendee to use them. That this court declines to hold, as such judgment was for past infringements of plaintiff's patent by the defendant in that suit. That judgment established no license or right to continue the infringement.

It appears from the evidence in this case that Victory was the first to invent and the first to reduce to practice and use a practical screen with a series of separate compartments running crosswise of the screen body, each having an outlet sealed with "stuff" to prevent the escape of air, and a series of independently operated bellows plates operating in the compartment below the horizontal screens. The utility of the invention has been demonstrated by large sales, and there is evidence that it displaced all prior types of screens in the manufacture of wood-pulp paper, thereby increasing production and decreasing expense, and making the only practical screen now in use. Letters patent secure to an inventor the right to manufacture, for which right Gotham has settled and paid; also the right to vend to others to use and the right to use the machines; and any one who infringes any of these rights is liable to the owner of the patent for damages. *Birdsall v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768. This court is of the opinion that claims 1 and 2 of the patent in question have been infringed by the defendant in using the screens purchased by it of Gotham. This court is of the opinion that each and every element in both these claims are present and used in the construction of the alleged infringing machines, and the function of each and every element is performed in the same manner by the infringing machines as in the plaintiff's machines. Infringement is not disproved by the fact that there is a difference in the drawings in the patent in suit and the mode of attaching the bellows joint to the bellows plate. Drawings accompanying applications for letters patent are hardly ever drawn to the same condition, nor is the machine manufactured in the same way precisely as illustrated in the drawings of the patent. Slight and immaterial differences in the making and in the connection between parts for accomplishing the end described in the patent are permissible. This court finds and holds that the infringing machines used by the defendant contain the same element, perform the same function, and secure the same operation and result as do the Victory patent. Having arrived at this conclusion after an examination of the evidence, the exhibits, etc., it is unnecessary for this court in this action to enter into a detailed statement of the reasons why it arrives at this conclusion. This court is satisfied that as to claims

1 and 2, alleged to be infringed, the machines used by the defendant substantially copy and appropriate the patent in suit. The slight structural changes in the defendant's machines do not involve a change of principle, or of construction, or of operation. The structural difference in the defendant's machines, as compared with the Victory patent, consisting of a change in the construction of the flow box and slight modifications in the rod or connecting frame, and the use of a cam instead of an eccentric, are those of structural changes without departing in any substantial degree from the principles of construction and operation of the plaintiff's machine. The plaintiff's contention is the separate compartments crosswise of the length of the screen body; screen plates over the separate compartments; independent rigid bellows plates of substantially the same size as the separate compartments, the bellows joints connecting the bellows plate and the adjacent walls of the separate compartments, either alternately or simultaneously arranged eccentrics or cams; and independent connecting rod or rods connecting cam or eccentric with the independent bellows plate. All the elements form a new and useful combination to produce a new result, where each compartment is sealed so as to obtain alternately an upward pressure of air and a partial vacuum in each compartment. These are neither met nor anticipated in any or all of the prior patents, and the core or heart of the invention of the Victory patent consists in the combination and arrangement of the elements set forth in claims 1 and 2 of the patent. The defendant's machines clearly infringe.

The remaining question is one of damages. The plaintiff has established a license fee for his machines, and this forms a proper measure of damages. The purchase and use of 85 of these machines is conceded, and the damages are assessed at \$4,250, for which sum plaintiff is entitled to judgment, with interest from the time of the commencement of this action.

Judgment is directed accordingly.

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TOMPKINS et al. v. TERWILLIGER et al.

(Circuit Court, N. D. New York. July 21, 1903.)

1. PATENTS—VALIDITY AND INFRINGEMENT—KNITTING MACHINES.

The Tompkins patent, No. 307,152, for devices for use in knitting machines, covers a pioneer invention, the devices shown being novel and useful; also *held* infringed.

2. SAME—PRIOR USE.

The Tompkins patent, No. 360,931, for improvements in knitting machines, *held*, on the evidence, not void for prior public use of the invention; also *held* infringed by a machine which, while in some respects changing the form of the device, retained the principle and mode of operation.

In Equity. Suit for infringement of letters patent Nos. 307,152 and 360,931, both for improvements in knitting machines, granted to Albert Tompkins and Ira Tompkins on October 28, 1884, and April 12, 1887, respectively. On final hearing.

The bill in equity in this cause was filed to obtain an injunction restraining alleged infringement of two patents, both relating to devices for use on knitting machines, and so adapted as to be used separately, or at the same time and upon the same machine, being letters patent Nos. 307,152 and 360,931, respectively, and for damages and an accounting because of alleged infringement. Letters patent No. 307,152 were issued or dated October 28, 1884, and letters patent No. 360,931 were issued or dated April 12, 1887. Defendants say patent No. 307,152 was void for want of novelty, and its single claim contained one or more elements not found in defendants' construction, and was not infringed. Defendants say patent No. 360,931 has in each of its claims one or more elements not found in the defendants' construction and is not infringed, and that same is void, having been in public use and on sale more than two years prior to the date of the application for a patent. During the pendency of this action and before the trial the first-mentioned patent expired, and only damages can be recovered.

Wm. W. Morrill, for complainants.  
Geo. A. Mosher, for defendants.

RAY, District Judge. In machines constructed for the manufacture of knitted fabrics a series of needles are arranged vertically around the circumference of a horizontal circular casting known as the "cylinder." The needles are placed in molds, and a preparation poured about them, which hardens and holds them in position in so-called leads. Knitting is done by the manipulation of thread or yarn upon and off these needles by means of burrs and wheels, the construction of the burrs not being susceptible of a brief and plain description. A take-up suspended above the machine receives the completed fabric. Some of the burrs and wheels are placed inside and others outside the web. The burrs and wheels are each mounted on a separate standard, which are arranged in feeds, and the number of burrs in a feed depends on the character of the work. Some work requires two stands to a feed in the outer circle, some four, and some six. The stands composing a feed are grouped together. The number of feeds used is limited by the space around the circle. In knitting varieties of fabric and grouping burr supports a large number of changes of position is necessary. The invention covered by the complainants' first patent, No. 307,152, relates to facilitating the adjustment of the stands which support the inner burrs and wheels. Before the application for this patent the complainants began the use of a device in evidence, "old inner circle." In this we find no provision for moving the stands around the circle. It could support but four stands, and their positions were fixed. The patent is a device for the circumferential adjustment of the inner burr stands, the claim being for the combination of the ring plate with a recessed bracket, a set screw to hold the bracket upon the ring, and other parts similar to those employed in the old inner circle.

This invention was useful and novel and successful. It was a pioneer invention. It is not shown that there was any prior device that would perform the function of the one described. It has been acquiesced in and is used on about two-thirds of the rotary knitting machines in use. There has been a large use and large sales. It is clear that this patent is not void for want of novelty. It was new and useful, and displayed great inventive skill. This court fails to dis-

cover that it contains any element not found in defendants' construction. It is clear that complainants are entitled to an accounting.

As to the second patent, No. 360,931, this court does not see that it would serve any useful purpose to describe it in detail, or to describe the defendants' construction in detail. The claim is as follows:

"(1) The combination of the ring, R, formed with the annular T-shaped groove, a, and opening, O, with the plate, P, formed with the slot, S<sup>2</sup>, and the bolt, B, provided with the nut, N', all constructed and arranged substantially as and for the purposes specified.

"(2) The combination, with the cylinder of a knitting machine and supports arranged concentric thereto, of the ring, R, arranged on said supports, and formed with an annular, T-shaped groove, a, in its upper face, and opening, O, the plate, P, formed with slot, S<sup>2</sup>, the bolt, B, and nut, N', the standard, A, made with the base ring, r, and threaded stem, t, and the fastening nut, n', all substantially as described."

The specifications state in part.

"Be it known that we, Albert Tompkins and Ira Tompkins, of the city of Troy, county of Rensselaer, state of New York, have jointly invented a new and useful improvement in circular-knitting machines, of which the following is a specification:

"Our invention relates to that part of a circular or rotary knitting machine that is used to attach thereto the burr-holder and presser-wheel standards. As circular or rotary knitting machines have heretofore been generally constructed, a table plate was arranged around the vertical shaft of the machine below the cylinder to receive the burr-holder and presser-wheel standards. This table plate was radially slotted to receive the standards, the lower ends of the latter being passed through the slots to rest on a rim formed on the standard, with the lower end of the latter, where passed through the slot and below the table, being adapted to receive a nut, by which said standard was kept in position. As thus made the relative position of the burr-holder and presser-wheel standards was arbitrarily limited to that of the slots, and where the machines were required to knit differing kinds of work that called for a change in the relative position of the burr-holders and presser-wheels, that could not be had by a slotted plate adapted for ordinary work, then the table plate had to be changed, there being required several kinds of plates having different arrangement of radial slots to condition a knitting machine for different kinds of work. To adapt a knitting machine for any radial arrangement and location of burr-holders and presser-wheels, and without the use of a series of the table plates, is the object of our invention. \* \* \*

"As thus made, any number of slotted plates like that indicated at P may be applied by means of nuts or bolts to the ring, R, that the circumference of the annular groove, a, will contain, and they may be secured at any point in the circumference of the said ring relatively to the machine cylinder that may be desired, said ring being arranged on the machine table concentrically to the said cylinder. As thus made and applied, the burr-holder or presser-wheel standards may be adjustably attached to the said slotted plates, and the latter adjustably attached to the ring, R, and all the advantages which could be had by a series of table plates are obtained without the inconveniences of the latter."

This court cannot, on careful study and examination, discover that each of its claims has one or more elements not found in the defendants' construction, or that any one has. This court finds in defendants' construction substantially each and every element of the complainants' patent. This court finds that the defendants have infringed both patents.

The defendants urge that the second patent is void, the invention having been in public use and on sale more than two years prior to the date of the application for a patent. This contention is based on a

sale alleged to have been made by the complainants prior to the time mentioned. There is a sharp conflict of evidence on this question. The printed records and the exhibits have been carefully studied, and the court is satisfied that the defendants have not established any sale or public use of this invention prior to the application for the patent. The complainants invented and patented new and useful things—those described in the patents in suit—and are entitled to the benefits thereof. The defendants have infringed.

True, the defendants somewhat, in some respects, have changed the form of the device, or some of the mechanical elements of the combination making up complainants' invention and covered by their patents, but they are not improved or substantially changed. The complainants' principle and mode of operation has been adopted. The form of the machine or of the elements changed is not a distinguishing characteristic. This change does not avoid the charge of infringement. *National H. B. Co. v. I. B. Co.*, 106 Fed. 693, 45 C. C. A. 544.

As to the second patent, No. 360,931, dated April 12, 1887, the complainants are entitled to the injunction asked and to an accounting.

A decree will be granted accordingly.

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#### LORAIN STEEL CO. v. NEW YORK SWITCH & CROSSING CO.

(Circuit Court, D. New Jersey. July 27, 1903.)

##### 1. PATENTS—INFRINGEMENT—STREET RAILWAY SWITCHES.

The Moxham patent, No. 539,878, for railway switch work, when limited to the specific combination shown, the principal feature of novelty being a center piece provided with hardened track surfaces, was not anticipated, and shows invention. Claims 1 and 2 also held infringed.

In Equity. Suit for infringement of letters patent No. 539,878, for railway switch work, granted to Arthur J. Moxham May 28, 1895. On final hearing.

Richard Eyre and Geo. J. Harding, for complainant.

Charles G. Coe and Richard P. Elliot, for defendant.

KIRKPATRICK, District Judge. This suit is brought by the Lorain Steel Company, complainant, against the New York Switch & Crossing Company, defendant, for an alleged infringement of claims 1 and 2 of United States letters patent No. 539,878, issued to Arthur J. Moxham May 28, 1895. The patent is for an improved railway switch and crossing structure. The art to which it applies is that which relates to street railways. The defenses set up are noninfringement, prior use, and anticipation. The claims relied on read as follows:

"(1) A railway switch structure, which consists of a center piece provided with track surfaces, rails forming extensions of said center piece, the whole being secured together by a separate body of cast metal."

"(2) A railway switch structure, which consists of a center piece provided with hardened track surfaces, rails forming extensions of said center piece, and a separate body of cast metal, whereby the whole is secured together."



The defenses of anticipation and noninvention are the only ones that seem to call for serious consideration in the adjudication of the questions involved herein. It is my opinion that prior use of such a device as is shown by the drawings of the patent in suit, and covered by the first and second claims thereof, has not been conclusively shown, and that such defense need not be further considered. The defendant cites several patents granted prior to the date of the patent in suit for the purpose of showing noninvention, and an attempt was made to show that the advance in the art covered by complainant's patent was no new thing, but that it was, rather, the common practice of skilled mechanics and engineers to make use of devices sufficiently similar to that described in the Moxham patent to be a substantial anticipation thereof, and amount to prior use. It will not be necessary to make a comparison of each of the patents cited by defendant with that of the complainant. It will be sufficient to refer to the Vickers patent, upon which the defendant chiefly relies, and the Samuel & Angerer patent, No. 497,554. The former (No. 180,395) is dated July 25, 1876, and is for an improvement in railroad frogs. Vickers suggests, but does not illustrate, the attachment of rails in his device by a casting process. His description of this modification is as follows:

"Another method of attaching the wings (that is, the rails, C and D) to the frog is to form holes through them, as already mentioned, for the center or point, and then to heat them at the same time that the center is heated, and insert them in a properly shaped mold, and cast the metal between them and the center or point at the same time, and thereby unite the three parts firmly together without the aid of clamps or bolts, and in the proper relative position to each other, ready to be laid in the track."

The most that can be said for this patent and for the other patents cited by defendant is that they disclose only the idea of providing a wearing surface at some point in the switch, and securing the two parts of the switch together with cast metal. But it is not contended on the part of the complainant that the patent in suit covers that broad general idea of providing a wearing surface and binding such surface and the track together by cast metal. Its claim is only for the specific device shown in the patent.

From the state of the art at the time the patent was granted it is clear that it is not entitled to a broad construction. It must be limited by the state of the prior art and by the terms of its claims and specifications. It is a device patent for a specific combination of elements. The prior art does not anticipate it, and it is not such a structure as would result from the exercise, under ordinary conditions, of such usual skill as a mechanic versed in the art would use. It seems to have been the first really successful device constructed for the purposes specified; and this notwithstanding the fact that many had attempted to produce such a structure as would meet the requirements of modern street railway traffic. This being a patent for a specific device, limited as heretofore stated, let us see what the device must be. The first claim provides for three elements in a clearly defined combination. The elements and combinations are these: (1) "A center piece provided with track surfaces"; (2) "rails

forming an extension of said center piece"; (3) "the whole being secured by a separate body of cast metal." The second claim is also made up of three elements, and differs from the first claim in that it provides that its first element, viz., the center piece, shall have hardened track surfaces. To anticipate these claims, any prior patent would, of necessity, be obliged to embody this combination of elements. None have been cited to show that this was done. The Vickers patent, above referred to, did not embody these three elements as a combination. It neither showed nor claimed them. Vickers conceived but one thing as an advance in the art at his time, and that was the joining of the rails and the intermediate parts in their proper relation by cast iron, instead of bolts and clamps. In differentiation from this advance of Vickers, what Moxham did was, not broadly to claim as new the binding of the parts of his device by cast iron, but especially to claim a construction containing a new element, namely, a new form for the center portion of the frog, the same being a separate portion, and distinctly new in its shape and structure, and in combination with the other parts of the device. In my opinion, the device closest approaching this that the defendant has shown is not the Vickers patent, but the Samuel & Angerer patent of 1893, No. 497,554. This is the only patent cited which relates to the art as it was found at about the time of the complainant's inventions, but this patent is not an anticipation of the patent in suit. There is no mention made in it of the hardened center piece with track surfaces, as found in complainant's patent. It was not conceived by the inventors of the Samuel & Angerer device. This is the new element that Moxham introduced in making his improvement in the switch structure. The Samuel & Angerer device is a mass of cast iron containing track surfaces with rails embedded therein which form extensions of the track surfaces. Therefore, since there are but two elements in this device, it cannot be anticipation of complainant's patent. It lacks the third and new element of the Moxham patent, viz., the hardened separate center piece with track surfaces.

In view of the above conclusions as to the value of the patents cited by the defendant, my opinion is that the complainant's patent was not anticipated. In my opinion, the introduction of the separate hardened center piece in the switch, as the art then found it, was an improvement having both novelty and utility, and was the result of the exercise of such inventive skill as entitled Moxham to a patent for his device. The patent granted him, therefore, is valid.

The question of infringement is fully demonstrated in the record. It seems to me that it is conclusively shown, both by the drawings representing the structure made by the defendant and the testimony of witnesses who actually examined the structure, that it is made up of the specific combination of elements found in the claims of the patent upon which complainant sues. It is composed of a hardened center piece having track surfaces, rails forming extensions of the same, and these elements are bound together by a separate body of cast metal. These are the elements of the complainant's device and patent. These respective elements in the defendant's device perform

the same functions and are constructed and combined in like manner with those in the complainant's device. The two devices are practically identical. The complainant's patent being valid, and the defendant's device being an embodiment of the combination of the elements of both claims 1 and 2 of the patent in suit, and an infringement thereof, there must be a decree for the complainant.

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BROOKFIELD et al. v. NOVELTY GLASS MFG. CO.

(Circuit Court, D. New Jersey. August 15, 1903.)

1. **PATENTS—MANUFACTURE OF SCREW INSULATORS—VALIDITY—INFRINGEMENT.**  
 Claims 1, 2, 3, 6, 7 and 8 of patent No. 542,565, dated July 9, 1895, granted to Seraphin Kribs, assignor to William Brookfield, for "Improvements in Presses for Making Screw-Insulators," are valid and were infringed by the defendant.

2. **SAME—CONSTRUCTION.**

Claim 1 of patent No. 532,973, dated January 22, 1895, granted to Seraphin Kribs, assignor to William Brookfield, for "Improvements in Screw Presses for Forming Insulators," is of a subsidiary nature and of narrow scope; and, in view of the prior art, if it can be sustained at all, must receive such a narrow construction as to negative the charge of infringement by the defendant.

(Syllabus by the Court.)

In Equity.

Kenyon & Kenyon, for complainants.

Walter H. Bacon and Charles M. Catlin, for defendants.

BRADFORD, District Judge. The bill in this case was filed by William Brookfield, a citizen of New York, against the Novelty Glass Manufacturing Company, a corporation of New Jersey, charging infringement of letters patent of the United States Nos. 542,565 and 532,973, and containing the usual prayers. Brookfield recently having died, the suit is prosecuted by his executrix and executors. Both patents were issued to Seraphin Kribs as assignor to Brookfield. Patent No. 542,565 was applied for July 5, 1894, bears date July 9, 1895, and is for "Improvements in Presses for Making Screw-Insulators". Patent No. 532,973 was applied for September 6, 1894, bears date January 22, 1895, and is for "Improvements in Screw-Presses for Forming Insulators". Patent No. 542,565 contains ten claims. The charge of infringement has been restricted to claims 1, 2, 3, 6, 7 and 8. They are as follows:

"1. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, and a movable mold adapted to travel from the actuating rod to the spindle substantially as described.

2. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a mold, and a movable support for the mold substantially as described.

3. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a mold, a movable support for the mold, and a lock for holding the support with the mold in operative position relatively to the actuating rod and spindle substantially as described.

6. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle, adapted to engage the screw plunger, and a movable mold adapted to travel from the actuating rod to the spindle, said actuating rod and spindle being independent of one another substantially as described.

7. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a movable mold adapted to travel from the actuating rod to the spindle, and independent actuating levers for the rod and the spindle respectively substantially as described.

8. An actuating rod provided with a detachable screw plunger, combined with a rotary spindle adapted to engage the screw plunger, a mold, a movable support for the mold, and a standard for supporting the actuating rod and spindle and about which the support is movable substantially as described."

Infringement by the defendant of all the above quoted claims is admitted by its counsel either by stipulation or brief of argument. The question of liability for such infringement wholly turns on the validity or invalidity of those claims or one or more of them. This is the only issue as to patent No. 542,565. The defendant contends that the several claims of that patent in suit are void for the reason, as alleged, that one Charles J. Jordan, and not Kribs, was the true, original, sole and first inventor of the mechanism described and claimed, or, if Jordan was not the sole inventor, such mechanism was the joint invention of Kribs and Jordan or Kribs and one or more other persons in the employ of Brookfield at his glass factory in Brooklyn, New York; and for the further reason, as alleged, that the subject-matter of those claims had been anticipated or otherwise lacked patentable novelty; anticipation being urged as to some of the claims and the prior art as to the residue. The evidence hardly presents a question of priority of invention as between Kribs and Jordan or others employed by Brookfield at his glass factory. The seriously disputed point in this connection is to whom among Brookfield's employees the invention embodied in the claims in suit should be ascribed. On this point the evidence is conflicting and unsatisfactory. I shall not attempt to discuss it in detail. To do so would answer no useful end. On the evidence, oral and documentary, the point is by no means free from doubt. Kribs, however, received the patent; and the grant to him furnishes prima facie evidence that he was the first and sole inventor of the patented mechanism. Such a presumption is entitled to much weight in a doubtful case and, under the circumstances here disclosed, must prevail in favor of Kribs. The evidence contains many prior patents and other alleged anticipatory matter, but is, I think, insufficient to establish anticipation of any of the above quoted claims of patent No. 542,565. I have had some doubt as to the validity of these claims in view of the prior art. All of the elements entering into the mechanism covered by the several claims in suit were old and well known, and it has been a serious question whether the claims covered only mere aggregations of old elements, each performing, after assemblage, its old function, or, on the contrary, true combinations, though of old elements, producing new and useful results. But whatever doubt may inhere in this question must be resolved in favor of the complainants. The grant of the patent is prima facie evidence of the validity of its claims.

Aside, too, from that presumption, there are considerations which strongly tend to establish patentability in the subject-matter of the claims. The insulator press of the patent largely increased the production and improved the character and quality of glass insulators, at once met with great success and practically superseded the older methods of manufacturing those articles. The disputed claims of patent No. 542,565 must be sustained as valid.

The only claim of patent No. 532,973 in controversy is the first, which is as follows:

"1. A mold and a standard about which the mold is made movable, combined with supporting arms carried by the standard, a frame carried by the arms, a rotary spindle mounted in the frame, actuating gear wheels to one of which the spindle is feathered, an actuating wheel or handle for the gear wheels, a weighted lifting lever for the spindle, and a screw adapted to be inserted into the mold, said spindle and screw being respectively provided with engaging parts of a joint for enabling the spindle to detachably engage the screw substantially as described."

The defendant denies the validity of this claim and also its infringement. It is, admittedly, of a subsidiary nature and of narrow scope. The counsel for the complainants in referring in their brief to the character and object of patent No. 532,973, say:

"This patent is a narrow one and is addressed to a mere addition to or improvement upon the screwing device of the press of Patent No. 542,565. Its object is to make the work of withdrawing the screw from the insulator easier and more automatic to increase the production of the press."

In view of the prior art, if this claim can be sustained at all, it must receive such a narrow construction as to negative the charge of infringement.

Let a decree for the complainants be prepared in accordance with this opinion.

### ELDRED v. KIRKLAND.

(Circuit Court, N. D. New York. July 18, 1903.)

#### 1. PATENTS—INVENTION—CIGAR LIGHTERS.

The Chambers patent, No. 492,913, for an electric lamp lighter, used for cigar lighters, shows a combination of old elements, which, in view of the prior art, is not such as to involve patentable invention. Also *held not infringed* even if valid.

In Equity. The bill of complaint in this cause was filed against the defendant to restrain him from further infringing letters patent No. 492,913, dated March 7, 1893, and issued to J. C. Chambers, being a patent for an electric lighter or cigar lighter, and for an accounting.

C. C. Linthicum, and Louis K. Gillson (Milton E. Robinson, of counsel), for complainant.

Stem, Heidman & Mehlhope, for defendant.

RAY, District Judge. The complainant rests his case upon claims 1, 5, and 10, as set forth in his patent, and which claims read as follows:

"(1) In an electrical lamp lighter, the combination, with a lamp, the burner of which is formed into or provided with an electrode, an extinguisher formed

into or provided with the opposite electrode, and means for establishing and breaking the electrical connection between said electrodes, substantially as set forth."

"(5) In an electrical lamp lighter, the combination, with a lamp, the burner of which is formed into or provided with an electrode, an arm pivotally secured adjacent to the lamp, one end of which is provided with an extinguisher and an electrode, and means for automatically returning the arm to extinguish the light, substantially as set forth."

"(10) In an electric lamp lighter, a lamp, a support therefor, an arm led into proximity to the lamp, provided with an extinguisher, an electric circuit having its electrodes at the adjacent portions of the arm and lamp, said arm and lamp, the one movable in relation to the other, to close said circuit to ignite the lamp, and self-retracting, to extinguish the lamp, said circuit being normally open, substantially as described."

This patent in question has been in litigation and was passed upon in the case of *Eldred v. Kessler* (Seventh Circuit, Feb. 7, 1900) 106 Fed. 509, 45 C. C. A. 454, that case was well considered both at the circuit and in the Circuit Court of Appeals, and this court does not deem it necessary to go further than to say it agrees with the holdings of the court in that case.

It is conceded by the complainant that his patent must stand upon an alleged new combination of old elements. This new combination, in the opinion of this court, and in view of the prior art, is not such as show patentable invention. There is no infringement. The defendant has combined old elements, we will say, in a new form, but he has not copied or followed the combination of the complainant. These elements, used by the complainant had been combined in various forms by others, to produce a given result, which had been substantially attained.

This court is familiar with the doctrine of the cases cited by the complainant to the effect that a new combination of known devices, whereby the effectiveness of the machine is increased, may be the subject of a patent. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. In *Le Roy v. Tatham*, 22 How. 132, 16 L. Ed. 366, it was said: "One new and operative agency in the production of the desired result would give novelty to the entire combination." All this is true, but in the case at bar the court finds no new combination of known devices, whereby the effectiveness of the machine is increased, nor does it find one new and operative agency in the production of the desired result.

The bill of complaint must be dismissed, with costs.

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#### BRUNSWICK-BALKE-COLLENDER CO. v. KLUMPP et al.

(Circuit Court, S. D. New York. July 24, 1903.)

##### 1. PATENTS—INVENTION—BOWLING ALLEY.

The Wiggins patent, No. 623,933, for a bowling alley, held not to show patentable invention, on a motion for preliminary injunction.

In Equity. Suit for infringement of letters patent No. 623,933, for a bowling alley, granted to William H. Wiggins April 25, 1899. On motion for preliminary injunction.

J. C. Clayton, for the motion.  
S. L. Moody, opposed.

LACOMBE, Circuit Judge. The evidence relied on to support invention is not at all of the same character as that presented in Brunswick-Balke Co. v. Thum, 111 Fed. 904, 50 C. C. A. 61. There it appeared that the defects of the old structure were well known, and a long series of devices, intended to correct them, were shown to have been tried and to have failed. Here the patentee asserts that he was the first one to perceive the defects, or to appreciate their seriousness, and there is a sharp conflict of testimony as to whether the old style of rectangular gutter, which failed to center the balls, produced the evils he alleges that he cured. The patent to Chambers (235,209) seems a sufficient paper anticipation. The old style gutters, with cove-pieces and an enlarged strip at the pit end, to keep the ball away from the alley bed, may fairly be considered a practical anticipation. Certainly with these devices and the V-shaped gutter of Roberts (425,551) in the prior art there could be no invention in centering the misplayed balls of a bowling alley by the use of a U-shaped side gutter.

The motion is denied.

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#### BARKER v. PULLMAN'S PALACE CAR CO.

(Circuit Court, S. D. New York. July 31, 1903.)

#### 1. CONTRACTS—PERSONS ENTITLED TO ENFORCE—CONTRACT FOR BENEFIT OF ANOTHER.

By a contract between two corporations, one agreed to sell and transfer to the other all of its property and existing contracts; the transfer to be made on a specified date, when the selling company was to be dissolved. By a provision of the contract, the purchasing company agreed that, to enable the selling company "to make an immediate settlement of its affairs and distribution of its assets," the purchasing company, as a part of the transaction, would satisfy and discharge the indebtedness and liabilities of the other company, of any and every kind, which might be unsatisfied at the time of the transfer. *Held* that, while the primary purpose of such provision may have been the benefit of the selling company, it was also incidentally intended for the benefit of its creditors, since it was about to dissolve, and that a creditor could enforce such provision against the promisor, as one made for his benefit.

#### 2. REFORMATION OF CONTRACT—RIGHT TO MAINTAIN SUIT—ASSUMPTION OF CONTRACT BY ANOTHER.

Where one corporation purchased all the property, assets, and good will of another, paying therefor with an issue of its own stock, the same being distributed among the stockholders of the second company, which thereupon dissolved, and, as a part of the transaction, assumed and agreed to perform all of the contracts of the selling company, and satisfy and discharge all of its indebtedness and liabilities, of any and every kind, a party to an existing contract with the selling company may maintain a suit against the purchasing company for its reformation on the ground of mutual mistake, whether or not the defendant had knowledge of the mistake.

#### 3. SAME—GROUNDS—MUTUAL MISTAKE.

Where negotiations for a contract were between agents or representatives of the respective parties, and the contract, when reduced to writing,

was presented to one of the principals and signed by him, and was then signed by the agent for the other party on its behalf, afterward being submitted to his principal, and not objected to, evidence that the agents understood the terms of the contract agreed upon to be different from those embodied in the writing is not sufficient to establish a mutual mistake on the part of the principals, which would warrant the reformation of the contract as written

### In Equity.

This action was originally commenced in the Supreme Court of the state of New York, and on being removed into this court the complainant filed herein his bill of complaint, praying the reformation of a certain contract or agreement entered into on the 10th day of March, 1898, between the Wagner Palace Car Company and the Agricultural Insurance Company, and for the recovery of \$4,088.06 damages against said Pullman Company, with interest from August 13, 1900, by reason of an alleged violation of said agreement by the Pullman Company; it having assumed, it is claimed, to satisfy and discharge the liabilities of the Wagner Company, of any and every kind, etc., by an agreement in writing made November 8, 1899, between the Wagner Palace Car Company and Pullman's Palace Car Company; the Agricultural Insurance Company having duly assigned to the complainant (it is alleged) its cause of action under the first-mentioned agreement against the said palace car companies, and all the interest of said insurance company of, in, and under said agreement of March 18, 1898.

Cardozo & Nathan, for complainant.

Alexander & Green, for defendant.

RAY, District Judge (after stating the facts as above). The Pullman Company, or Pullman's Palace Car Company, is a corporation created and existing under and by virtue of the laws of the state of Illinois, and is a citizen of said state. The Agricultural Insurance Company is a corporation created and existing under and by virtue of the laws of the state of New York, and as such duly authorized and empowered to do and transact a fire insurance business in said state. At the times mentioned the Wagner Palace Car Company was a joint-stock association, consisting of more than seven members, organized and existing under the laws of the state of New York, and having its principal place of business in the county of New York. Both the Pullman Company and the Wagner Company for many years were respectively engaged in the business of carrying passengers for hire in their cars over the lines of public railroads in the state of New York and elsewhere, and, for the purposes of their said business, owned, respectively, many cars, stations, buildings, and other property, which were subject to loss or damage by fire, and said Pullman Company was accustomed to, and did, obtain insurance. In and about the month of March, 1898, the established rate of premium for fire insurance on such risks was the sum of \$35 for every \$1,000 of insurance. On the 10th day of March, 1898, a memorandum of agreement was made and entered into between the said the Wagner Palace Car Company, by W. S. Webb, its president, duly authorized, and the said the Agricultural Insurance Company, in the words and figures following, viz.:

"Memorandum of Agreement, made this tenth day of March, 1898, between the Wagner Palace Car Company and the Agricultural Insurance Company: Witnesseth:



"That in consideration of one dollar and other valuable considerations, the Agricultural Insurance Company agrees, on the expiration of the present insurance policy of the Wagner Palace Car Company, to renew the same for three years for the rate of  $29\frac{17}{100}$  annual premium, payable in nine equal installments, one each in September, October and November, respectively of each year.

"The Agricultural Insurance Company agrees to give substantially the same Companies comprising the syndicate now on the risk.

"In witness whereof the parties hereto have hereunto appended their signatures and seals the day and year first above written.

"The Wagner Palace Car Company,  
By W. S. Webb, President.  
"The Agricultural Insurance Co.,  
By \_\_\_\_\_."

"Witness, F. G. Smith.

It will be noted that this agreement, as executed, contains no covenant or agreement on the part of the Wagner Company to accept a renewal of insurance or to pay the premiums, and the complaint seeks to reform same by inserting the words "and the said Wagner Palace Car Company agrees to accept such insurance for the term of three years as aforesaid," before the attestation clause of said agreement, it being alleged that such words were left out by the mutual mistake of the parties to such agreement. The fair construction of the contract or agreement of March 10, 1898, is that in consideration of one dollar and other valuable considerations the insurance company agrees to renew certain insurance of the Wagner Company at the rate and on the terms mentioned. The Wagner Company does not agree (unless such an agreement on its part will be implied) to accept the insurance or pay the premiums mentioned. If no such agreement is implied, and the evidence does not justify the reformation asked, that is an end of the case, for no one will contend that damages may be recovered for refusing to accept insurance (which is the ground for damages alleged in the bill of complaint) unless there was an agreement to accept such insurance.

After the execution of the agreement of March 10, 1898, and on the 8th day of November, 1899, the Wagner Palace Car Company, by W. Seward Webb, its president, and Pullman's Palace Car Company, by Robert T. Lincoln, its president, entered into a written agreement as follows:

"Whereas, the Wagner Palace Car Company, a joint-stock association formed under the laws of the State of New York, hereinafter called the 'Wagner Company,' party of the first part, and Pullman's Palace Car Company, a corporation organized under the laws of the State of Illinois, hereinafter called the 'Pullman Company,' party of the second part, have entered into an agreement subject to ratification by the stockholders of both companies, for the sale of the property and assets of said Wagner Company to said Pullman Company, and said agreement contemplated the preparation and execution of a more formal contract between said companies; and

"Whereas, the Directors of said Wagner Company have taken appropriate action to secure the dissolution thereof on the thirtieth day of December next.

"Now therefore, in consideration of the premises and of one dollar paid by each of the said parties hereto to the other, receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, to be kept and performed by the respective parties hereto, it is covenanted and agreed by and between said parties as follows:

"First. Said Wagner Company shall sell, assign, convey and transfer unto said Pullman Company all of its cars, equipment, real estate, plant, good will

and other assets and property, including its contracts with railroad companies for the running of sleeping and other cars on their respective railroads, and shall procure the assent of said companies to such assignment.

"Second. In consideration of such sale, conveyance and assignment, said Pullman Company shall cause its capital stock to be increased from the amount of five hundred and forty thousand shares of the par value of one hundred dollars each, now authorized, to seven hundred and forty thousand shares of the same par value, and shall cause the two hundred thousand (200,000) shares, thus added to its capital stock, to be issued and delivered to said Wagner Company, or to its directors as liquidating trustees, in full payment for said property, assets and good will, and to be distributed by said Wagner Company, or said liquidating trustees, to the shareholders in said Wagner Company in proportion to their respective shares in such assets and property.

"Third. Said property and assets shall be conveyed, transferred and assigned by said Wagner Company, or said liquidating trustees, or both, and the certificates for said two hundred thousand shares of capital stock of said Pullman Company shall be issued and delivered in payment therefor on the thirtieth day of December, 1899.

"Fourth. Until such conveyance and assignment shall be executed, the officers of said Wagner Palace Car Company shall carry on the current business thereof, and shall not make any new contracts with railway companies or cause extraordinary or unusual liability or expenditure to be incurred; and shall not make any change in the organization of the company by the employment of new officers or increasing the compensation of officers and employees or otherwise; and the property and assets to be conveyed and transferred, as aforesaid, shall be the property and assets the said Wagner Company shall have, or be entitled to, on said thirtieth day of December, 1899. The intent of this provision is that the present condition of the assets, liabilities, obligations, contracts and business arrangements of the Company shall be preserved as it now is until such conveyance, so far as the same shall be consistent with the ordinary routine conduct of its business. As the Pullman Company is now paying dividends at the rate of eight per cent. per annum, therefore in order to equalize the rates of dividends upon the two stocks, pending the carrying out of this agreement, it is further agreed that the Wagner Company shall hereafter declare a dividend of no more than one-third of one per cent. upon its capital stock, the payment whereof, with the dividend already declared and payable on the fourth day of November, A. D. 1899, making a total of one per cent. upon the capital stock.

"Fifth. In order to enable said Wagner Company to make an immediate settlement of its affairs and distribution of its assets without the delay incident to the payment of its indebtedness and liabilities, said Pullman Company agrees that it will, as a part of the transaction, satisfy and discharge the indebtedness and liabilities of said Wagner Company of any and every kind which may be unsatisfied at the time of the transfer of said assets, and the Pullman Company further agrees to indemnify and save harmless the said Wagner Company and said liquidating trustees and the shareholders in said Wagner Company from all costs, damages and expenses by reason of the failure or neglect of either of said companies to pay, satisfy and discharge the same.

"This agreement is made subject to such ratification by the stockholders of both companies as may be required by law, or the charter or articles of association of said companies, or either of them.

"In witness whereof, the parties hereto have caused the signatures of their respective Presidents and their respective corporate seals to be affixed hereto, this eighth day of November, 1899.

"[Seal.]

"Wagner Palace Car Company,  
By W. Seward Webb, President.

"[Seal.]

"Pullman's Palace Car Company,  
By Robert T. Lincoln, President."

This agreement was consummated, and the Wagner Palace Car Company ceased to do business.

The insurance company tendered the renewal of the insurance in accordance with the agreement of March 10, 1898, and offered to fully perform same; but the Pullman Company, denying any obligation under said agreements to take insurance and pay premiums, refused to take the insurance tendered.

There is no question as to the amount of damages, if any, provided it is found that the Pullman Company, by making the agreement of November 8, 1899, with the Wagner Palace Car Company, assumed the obligations of the agreement of March 10, 1898, and there was an obligation created by that agreement, as it actually was made, on the part of the Wagner Palace Car Company, to accept the insurance therein mentioned, and this complainant may maintain this action. It is contended by the defendant (1) that the Wagner Palace Car Company, or its liquidating trustees, are indispensable parties to this suit; (2) that this complainant cannot maintain an action on the contract between the Wagner and the Pullman Companies, whereby the Pullman Company agreed to discharge the indebtedness of the Wagner Company, since neither he nor his assignor, the Agricultural Insurance Company, was a party to that contract, and it was not made for their benefit or for the benefit of either of them; (3) that to hold the defendant upon the contract between the Agricultural Insurance Company and the Wagner Company, there must have been a novation, the original contract canceled, and a new one between the Agricultural Company and the defendant substituted therefor, and the Wagner Company released from its obligations under the old contract; (4) that the complainant fails to show any title in himself to any alleged right of the Agricultural Insurance Company to secure a reformation of the contract; (5) that the complainant has failed to show any mutual mistake or other ground upon which the agreement between the Wagner Company and the Agricultural Insurance Company can be reformed by the insertion of the words proposed to be inserted, or their equivalent, and that in no event can this complainant maintain an action for the reformation of that contract; (6) the Pullman Company never agreed to discharge the liability of the Wagner Company, if any, on the contract between the Wagner Company and the Agricultural Insurance Company, even should it be reformed as asked; (8) that, under the proofs the Agricultural Insurance Company suffered no damages by reason of the refusal of the Pullman Company to take the policy tendered, and that as, under the statutes of the state of New York, the holder of a fire insurance contract has the absolute right to terminate it at any time, there could be no liability for damages in the present case under any circumstances. The defendant also insists that, conceding, for the purposes of argument, that the contract was performed for the Agricultural Company, and that it should be reformed as prayed, still no breach of it on the part of the Wagner Company has been shown.

The agreement of March 10, 1898, is complete and perfect in itself. In consideration of \$1 and other valuable considerations (not mutual covenants and agreements therein contained, implying that such were in fact made, and should have been inserted), the Agricultural

Company agrees, on the expiration of a then existing policy of insurance, to renew the same on the terms mentioned. It may be claimed that it could not renew insurance unless the Wagner Company accepted the policy. But this agreement, as written, is in the nature of an option. The Wagner Company has paid for the agreement of the insurance company to renew the insurance, and may enforce the agreement, and insist on having what it has contracted for. But this is very far from justifying an implied agreement on the part of the Wagner Company to accept the insurance. There is nothing in the context of the agreement indicating the necessity for any such covenant to make it a complete contract, and one in accordance with the intent of the parties. It will be presumed, with such language only, that the Wagner Company did not intend to obligate itself to accept the renewal of the insurance. *Zorkowski v. Astor*, 156 N. Y. 393, 50 N. E. 983; *Hale v. Finch*, 104 U. S. 261, 26 L. Ed. 732; *Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall. 276, 19 L. Ed. 349.

Indeed, complainant admits that no covenant or agreement to accept the renewal of the insurance can be implied. The brief of his counsel says, "Under the authorities, no implied covenant may be drawn from the language employed in the agreement herein." Hence equitable relief is sought in this action, with the recovery of damages as an incident, on the ground that the covenant or agreement to accept the renewal of the insurance was omitted from the written contract by mutual mistake. That is, that both parties agreed that such a provision should go in the written agreement, but that by the error or oversight of the parties or draftsman it was left out, and the omission not discovered and assented to by the parties at the time. The defendant denies any error or omission or mutual mistake. What is the evidence on this subject?

Charles S. Barker, the complainant, and the agent of the Agricultural Insurance Company at the time the agreement was made, says, in substance, that he had authority to make the contract, and conducted the negotiations on the part of his company; that prior to March 10, 1898, and in February, he called on F. G. Smith, the private secretary of Dr. W. S. Webb, the then president of the Wagner Palace Car Company, at Webb's office, in the city of New York, and had the following conversation (given here, with the other evidence on this subject, in full):

"A. I called on Mr. Smith, and told him that, if the doctor would give me a three-years contract for placing the insurance, that I could do it for two and a half years' premium, thereby saving nearly one-sixth of the premium, or reducing the rate from 35 cents to 29.17 per hundred dollars worth of insurance. Q. You have referred to 'the doctor' in your answer. Who did you mean? A. The president of the Wagner Palace Car Company. Q. What did Mr. Smith say? A. Mr. Smith said that he thought it was a good idea, and he would communicate with the doctor. Q. Did you have any further conversation on that subject at that time? A. I did not."

He then says:

"Q. When next did you hear from the Wagner Company, or any one representing it, in regard to the fire insurance? A. Within a few days I received word from Mr. Smith to call and see him; he had an answer from the doctor. Q. State what took place, and who was present? A. Mr. Smith and I were alone, and he stated that he had received an answer to a telegram that he

had sent to the doctor, stating to leave it until he got home, and he would look into the matter. Q. Subsequently did you hear further from Mr. Smith, or any one representing the Wagner Company? A. I did. Q. About when? A. It was about the first part of March I received word from Mr. Smith to call at their office. Q. Did you call at Mr. Smith's office? A. I did. Q. With whom, if any one, did you have a conversation? A. With Mr. Smith. Q. Was any one else present? A. There was not. Q. State the conversation in the early part of March? A. Mr. Smith said the doctor had agreed to accept my offer for three years' insurance for two and a half years' premium. Q. Was there any change in the fire insurance to be effected for the Wagner Company, other than the length of time for which you would effect the insurance? A. A lower rate of premium. Q. The subject of discussion between you and Mr. Smith was for a reduction of the premium on the agreement of the Wagner Company to take insurance for three years. Is that right? A. Yes, sir. That was it. Q. What next occurred in regard to the fire insurance of the Wagner Company? A. Mr. Smith thereupon asked me if I wanted a contract. I told him I did, and he drew up a rough sketch of a contract, and asked me if that was about what I wanted. I told him it was. He said then, 'I will have it typewritten and forward it to the doctor, or the doctor will be down in a few days, and have him sign it, and when that is done I will send it to you.' Q. Did you later hear from Mr. Smith in regard to this contract? A. I did. Q. About when? A. About the 7th or 8th or 9th or 10th—somewheres along the first part of March, 1898. Q. Had the draft agreement been typewritten? A. It had. Q. What was said when you called on him at the time you last referred to? A. He handed me the agreement, and told me the doctor had signed it, and it awaited my signature. Q. Is the paper shown you the typewritten agreement which he then handed you? (Handing witness paper.) A. It is. Q. Do you know the signature of Dr. Webb, the president of the Wagner Company? A. I do. Q. Is the signature attached to that paper the signature of Dr. Webb? A. It is. Q. And is this other paper which I show you an exact copy? A. Yes, sir. \* \* \* Q. Was a duplicate original of this paper, marked 'Complainant's Exhibit A,' signed on behalf of the Agricultural Insurance Company, and, if so, by whom? A. It was, and signed by me, 'Agricultural Insurance Company, Charles F. Barker, Agent.' Q. And was the duplicate original so signed by you, as agent of the Agricultural, delivered to Mr. Smith? A. It was. Q. At the same time that you received the copy signed by Dr. Webb? A. It was. Q. Was the first draft of the contract prepared by Mr. Smith before you called upon him? A. It was. Q. Was the typewritten copy which was subsequently signed, made by Mr. Smith, or in his office? A. It was. Q. Is it a fact that you had no part whatever in the preparation of the written contract? A. Yes. I had no part in it. I had nothing to do with it. Q. Did you make any examination of the draft contract, except as you have testified, when you read it over once in the office of Mr. Smith? A. No, sir. \* \* \* Q. What did you do with the contract of March 10, 1898, after you signed it? A. I gave it to Mr. Smith. Mr. Smith had it. I signed it in his presence, and he kept it. Q. The duplicate—what was done with that? A. I took the duplicate. Q. What did you do with it? A. It is here. Q. Have you always had it in your possession, ever since? A. No; it was in Watertown. The company had it there for a while. Q. How long did they have it? A. Oh, I don't know. Some time. Q. When did the company first know that that contract was made? A. When it was made. Q. Did you advise them immediately? A. I did. Q. This alleged contract of March 10, 1898, was made and executed by you after you and Mr. Smith had fully discussed the terms upon which it was to be made, was it not? A. After the doctor had executed it, then I signed it; yes. Q. But you and Mr. Smith had discussed it before it was submitted to Dr. Webb—discussed the matter? A. Yes, sir. Q. And then the contract was drafted? A. Yes, sir. Q. Then it was submitted to you? A. Yes, sir. Q. And after it was approved by you it was signed by Dr. Webb, and then signed by you. Is that right? A. Yes, sir. Q. Did you take the draft away from Mr. Smith's office after it was handed to you? A. I don't think I did. Q. You think you sat there and read it and passed upon it there? A. Yes, sir. Q. Is your recollection clear about that? A. I think it

is. Q. Did you discuss it with any one else than Mr. Smith? A. Yes. Q. After it was done? A. No; it was before it was done. Q. Who did you discuss it with? A. Our superintendent. Q. Did you show him the contract? A. I did not show him the contract. I told him what was going to be done. Q. Did you make any suggestions when you talked to Mr. Smith about the draft, as to the terms of the contract? A. No; only that they did not want—As the contract says, they did not want to pay for all the three-years policies at once, and therefore we put in that they should pay on the 1st day of September, October, and November in each year one-third of the amount on each month, the same as they had previously done. They never paid for their policies all down at once. Q. That was a matter of discussion between you and Mr. Smith at the time the draft was before you? A. Yes, sir; and I told him that would be satisfactory. Q. Was the policy issued in 1898 a standard form policy, of the New York form? A. Yes, sir. Q. And all policies issued subsequent to the 10th day of March, 1898, were standard policies? A. Yes, sir. Q. As provided by the New York law? A. Yes, sir. Q. Did you send the original of the contract of March 10, 1898, to the office in Watertown? A. I took it there. Q. And left it there? A. I left it there. Q. When did you get it back? A. Oh, I got it back within three or four days. I took it up, showed it to the president and secretary, and they looked at it, and I brought it back with me and kept it in my safe. Q. Did they make any objection to it? A. No, sir. Q. And you kept it from that time to the present time, did you, except as you have given it to your attorneys? A. Yes, sir. \* \* \* Q. There is nothing in your contract of March 10, 1898, giving you compensation from the Wagner Company, is there? A. Giving me compensation from the Wagner Company? Q. Yes? A. No, sir. Q. The only compensation that you looked for, then, was from the insuring companies? A. Yes, sir. \* \* \* A. That was put there, not that I offered the policies to them in Chicago at all, but I was in Chicago in July. The policies then had not been written. Q. In July, 1900? A. Yes, sir. Q. Did you go there for the purpose of getting the Pullman business? A. Yes, sir. Q. And they at that time notified you that they were going to cancel the existing insurance, and that they refused to take any more insurance from the Home, did they not? A. They told me that my policies would not be needed—the renewal would not be needed. Now, if you will let me put a little explanation in here, Mr. Robertson, when he was here, and when I was doing that work for them, gratis, you may say—all those changes for them, and canceling policies—he told me that my contract would be carried out up to the minute, to the letter; and Mr. Hough, his assistant, told me the same thing. They told me that they would give me a schedule of the Pullman business, and if I was the lowest man I should have it. That is what took me to Chicago. Not to see them in reference to this. Q. Well, when you say 'my contract,' what do you mean? A. I mean the contract of the Agricultural Insurance Company—the contract with the Wagner Company, that that should be lived up to. Q. They told you that if you put in the lowest bid that you would get the business? \* \* \* Q. You have said that you discussed with Mr. Smith the time at which premiums should be payable. Is it not the fact that such discussion was prior to the first draft in writing of the contract? A. Yes, sir. Q. And is it a fact that you made no changes in the form of the contract as first prepared by Mr. Smith and as subsequently typewritten in his office? A. No changes whatever."

Frank G. Smith, private secretary to Dr. W. S. Webb, says:

"A. I had a conversation with Mr. Barker in the office of the president of the Wagner Palace Car Company. Q. When, about? A. It was some time in the latter part of February or March, 1898. I don't recall the exact date. Q. Did that conversation relate to placing fire insurance for the Wagner Company subsequent to the renewals of existing policies? A. Yes, sir; it did. Q. You remember the contract of March 10, 1898 (Exhibit A), do you not? A. Yes, sir; I remember that. Q. By whom was that contract first drafted? A. My recollection now is, it seems to me, that I dictated it to some one, or I may have written it in my own writing. I don't recall. Q. But it was either your draft or your dictation? A. Yes, sir; either one or the other. I

could not say which. Q. Was that done in your office? A. Yes, sir. Q. Do you recall, in substance, the conversation that you had with Mr. Barker in regard to the making of this contract? A. Yes, sir; I do. Q. Will you state the substance of the conversation had with the complainant prior to the making of that contract, Exhibit A? A. Why, in substance— We heard that the powers in insurance circles were making rules and fixing to increase our rates, so then— Q. Was this a part of the talk? A. That was a part of the talk; yes, sir. So I sent for Mr. Barker, and that is why I sent for him. I said to Mr. Barker that we had heard of a likelihood of the rates being increased, and would like to take what action we could to protect ourselves, and asked him if he could help us out, in the way of making any suggestion for our benefit. Mr. Barker suggested that we make a three-years agreement then and there, if we could, and that would protect us anyway for three years. It seemed an excellent suggestion to me, and I sent word immediately to the president, who happened to be out of town, and in the meantime I went on with Mr. Barker. It seems to me that he was there twice. I am sure he was there twice. And I drew up this agreement. (Indicating Exhibit A.) Q. Before making that contract, what was said about the three-year term? A. That it would protect us for three years, and operate as a very substantial reduction in our yearly premium. Q. Was it a part of the conversation that the Agricultural Insurance Company should take the insurance through Mr. Barker for three years? A. Yes, sir; it was. Q. So far as you recollect, was any change made in the draft contract which you dictated? A. I don't recollect. I don't think there was. Q. And was the contract signed by W. S. Webb, president of the Wagner Company? A. Yes, sir. Q. And was a duplicate signed by the Agricultural Insurance Company, by C. S. Barker, agent? A. Yes, sir. Q. Was that contract, so signed by the Agricultural Insurance Company, turned in to the Wagner Company? A. Yes, sir. Q. And did the Wagner Company, after the execution of that contract, receive from the Agricultural Insurance Company a policy or policies on the Wagner Company's property for the year commencing from August 13, 1898? A. Yes, sir. Q. And did the Wagner Company likewise receive through the Agricultural Insurance Company policies on its property for the year beginning from August, 1899? A. Yes, sir; it did. Q. Did the Wagner Company receive about the first of August, 1900, a third policy for \$7,008,100, or thereabouts, covering property which was then or had theretofore been owned by the Wagner Company? A. Well, such a policy was delivered to me, representing Dr. Webb; and he can be, I suppose, considered as representing the Wagner Company, if there was any at that time. Q. What did you do with the policy thus received in the early part of August, 1900? A. I handed it immediately to some representative of the Pullman Company; probably Mr. Yaeger, he being the nearest. Q. Do you mean Mr. J. C. Yaeger, an assistant general superintendent of the Pullman Company? A. That is the man. If it was he to whom I handed it. Q. Are you sure you handed it to some one in charge of the Pullman office in the city of New York? A. I am quite sure I did; yes, sir. \* \* \* Q. You had no authority yourself to execute contracts for the Wagner Company, did you? A. Not except in matters that Dr. Webb might delegate to me. Q. Did you ever execute a contract for the Wagner Company? A. No, sir. Q. All contracts which you drafted or had submitted to you, you submitted to the president, did you not, for his action? A. Yes, sir. Q. And in this case, after the contract in suit (Exhibit A) was drafted, you submitted that to the president, did you not? A. Yes, sir. Q. In the form of which it was executed? A. Yes, sir. Q. So far as you know, President Webb had no conversation with Mr. Barker, or with any person representing the Agricultural Insurance Company, with reference to the terms of the contract, before it was executed? A. I am not sure about that. Mr. Barker was in the office at times when Dr. Webb was there. Q. So far as you know, did he have any such conversation? A. I can hardly say positively. I know he was in the office. What kind of an answer do you want from me— 'Yes' or 'No,' or what? Q. I want to know, 'Yes' or 'No,' whether you know of his having had any conversation with the president? A. I don't remember. He might have, but I don't remember. Q. You don't know that he did? A. No, sir. Q. Do you know the date of the conversation as to which you have

testified? A. I don't remember; no. Q. Have you any means of fixing it? I am referring to the conversation with Mr. Barker. A. I cannot think of any open to me now. Q. Do you know how long it was before the contract was signed that you had that conversation? A. No; it was some little time. \* \* \* Q. After your conversation with Mr. Barker, shortly prior to the execution of the contract of March 10, 1898, did you have a conversation with Dr. W. Seward Webb, the president of the Wagner Company, in regard to the proposed contract? A. Yes, sir; I did. Q. In that conversation with the president of the Wagner Company, did you say that the Wagner Company was to take insurance for three years, and secure an agreement from the Agricultural Insurance Company to furnish it for three years, in substance? A. Why, I certainly said the substance of that, for the reason that the whole intent of our getting that three years' insurance was that it saved us one-sixth of the premium we were paying. It was the lowest insurance we had ever had, and by agreeing to take it for three years we certainly did save one-sixth of our regular premium, which was quite a sum of money. We were well pleased. Q. State in substance just what you said to Dr. W. Seward Webb, president of the Wagner Company, in regard to the terms of the contract? A. I explained the matter fully to President Webb—the object in our taking the three years' term of insurance was to protect ourselves against— Q. If you said that to Dr. Webb, state it. A. Yes, sir; I did. Q. Now, state what you said to Dr. Webb. A. I said to Dr. Webb, 'We had better take this three years' insurance, as it will not only protect us against an increase in the rate of premium during the three years, but positively saves us one-sixth over the rate we are now paying.' That was the conversation, in substance. Q. What did the doctor say, in substance, in response to that proposition? A. He agreed with my suggestion. Q. And was it a part of the proposal between you and the complainant that the Wagner Company should accept insurance for the three years stated? A. The question we had in our mind was whether he would be able to deliver us the policy for three years. We wanted it, and stood ready to take it. Our only fear was he would lay down on us, and not give it to us. Q. Mr. Smith, what you were looking for, and what Mr. Webb was looking for, was to have some contract which would protect the Wagner Company, was it not? A. Surely. Q. Did you not also wish to be in a position to cancel the insurance if you found you did not want the whole of it or part of it? A. Well, that question certainly did not cross my mind, and I don't think it did the president's. Q. Hasn't it been your practice, in drawing Wagner contracts, to, as far as possible, get a contract which would protect the company and give it what it wished, and at the same time not bind it too strongly to the other party to the contract? A. Well, that is a business policy, of course, to do that. Q. That has been the policy of the company, has it not? A. Why, surely, as far as it could be done honorably. Q. But your main purpose in making this contract was to bind the Wagner Company, if you could, to deliver the insurance during those years, if you wished it. Wasn't that your main purpose? A. Well, we did wish it, and that was our main purpose; yes."

May the complainant maintain this action in equity for the reformation of the contract of March 10, 1898? That is, as against the Pullman Company, may he have it reformed so as to express the intent and actual agreement of the parties thereto, assuming that the Pullman Company has obligated itself to perform the conditions thereby imposed, and that in fact there was a mutual mistake in drawing the agreement, as claimed? The contract of March 10, 1898, between the Agricultural Insurance Company and the Wagner Company, as written, imposed no obligation whatever on the Wagner Company to accept the renewal of insurance. As the contract existed in fact, and ought to have been written (the claim is), it did impose such an obligation, but of this omission or mistake the Pullman Company had no notice whatever when it entered into the agreement of Novem-



ber 8, 1899. The language of this last-mentioned agreement is as broad and comprehensive as well it could be when drawn in general terms, except it does not in terms contain an express agreement to execute all existing contracts of the Wagner Company. The Pullman Company, in consideration of the transfer to it of all the property, etc., of the Wagner Company, says:

"In order to enable said Wagner Company to make an immediate settlement of its affairs, and distribution of its assets, without the delay incident to the payment of its indebtedness and liabilities, said Pullman Company agrees that it will, as part of the transaction, satisfy and discharge the indebtedness and liabilities of said Wagner Company, of any and every kind, which may be unsatisfied at the time of the transfer of such assets."

And then follows an agreement to indemnify the Wagner Company and its trustees and shareholders.

Does this language cover an existing contract, not broken, or constitute an agreement to perform contracts by their terms to be performed thereafter by the Wagner Company, and, if so, was this agreement (fifth clause of the contract of November 8, 1899) made for the benefit of the creditors of said Wagner Company, and with their benefit as its object, or, as pertinent here, for the benefit (or would it inure to the benefit) of the promisees in such existing unbroken contracts made by the Wagner Company with third parties, with the benefit of such persons as its object, whereby it had agreed to do certain things in the future, but which after such dissolution it could not do? Was this contemplated by the parties? Was this their intent and purpose? Is the clause mentioned equivalent to an agreement to perform all the existing contracts of the Wagner Company made with third persons?

In *Goodyear Shoe Machinery Co. v. Dancel*, 119 Fed. 692, the Circuit Court of Appeals in this circuit (per Wallace, J.) held that where the defendant (in court below) purchased letters patent from the Goodyear Company, and, in the assignment thereof to it, expressly agreed in consideration thereof to assume all the obligations of the said Goodyear Company to pay a certain sum of money to Dancel, the plaintiff below, while such letters patent should remain in force, the effect of the agreement was to create the relation of principal and surety between the Goodyear Company, a Connecticut corporation, the original promisor, and the Goodyear Shoe Machinery Company, the defendant below, assignee of the Connecticut corporation, and as between those parties the defendant became primarily liable, and that in equity Dancel could have enforced the obligation of the Goodyear Machinery Company to pay such sum. The action having been brought by Dancel at law, the complaint was dismissed. The Goodyear Shoe Machinery Company took title to the letters patent from Dancel, the patentee, and in the assignment from Dancel there was this covenant:

"(1) That the Goodyear Company, in consideration of said assignment and of the agreements of said Dancel herein contained, doth agree to pay the said Dancel in each year while the United States letters patent No. 459,036 remain in force as a valid patent, the sum of \$5,000 as an annuity, such annuity to be payable monthly in installments of \$416 $\frac{2}{3}$  each."

Judge Wallace said:

"The assignments of error also present the question whether the promise can be enforced against the present defendant. The complaint alleges that the defendant (a Maine corporation) purchased the letters patent from the Goodyear Company (a Connecticut corporation), and in an instrument of assignment to it, and in consideration thereof, agreed to assume all the obligations of the Goodyear Company to pay the annuity provided for in the contract between the latter and Dancel. This averment is admitted by the answer. The effect of this agreement was to create the relation of principal and surety between the defendant and the Connecticut corporation, and as between those parties the defendant became primarily liable for the obligations arising from the contract of the Goodyear Company with Dancel; and, upon the equitable doctrine that a creditor shall have the benefit by subrogation of any obligation or security given by the principal to the surety for the satisfaction of the debt, the plaintiffs, if this action had been brought in equity, would have been entitled to enforce the covenant of the defendant. According to the decisions in *Second Nat. Bank of St. Louis v. Grand Lodge of Free & Accepted Masons of Missouri*, 98 U. S. 123, 25 L. Ed. 75, *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903, and *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667, the plaintiffs could not maintain an action at law against the defendant upon the covenant. The latter case was a bill in equity by a mortgagee against the grantee of the land subject to the mortgage, which mortgage the grantee had agreed to pay. It was held, after full examination of the authorities, that the mortgagor could not sue at law. It was also held that in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, created no direct obligation of the purchaser to the mortgagee; but it was also held that, upon the doctrine that the mortgagee was entitled as a creditor to the benefit of any obligation or security given by the purchaser to the mortgagor for the payment of the debt, he could enforce the agreement to pay the mortgage in a court of equity. The cases of *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210, and *Insurance Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118, are to the same effect."

In that case there is no question that the agreement between the Goodyear Company, a Connecticut corporation, and the Goodyear Shoe Machinery Company, a Maine corporation, was made for the benefit of Dancel and with him and his benefit as its object. In consideration of the assignment of the patent to the Connecticut corporation by Dancel, it agreed to pay him the sum fixed; and, in consideration of the assignment of the same patent by the Connecticut corporation to the Maine corporation, it agreed to assume all the obligations of said Connecticut corporation to pay said Dancel the sum falling due to him each year. This particular creditor and this particular obligation and its discharge was on the mind of the parties, and mentioned in the transfer. True, this holding in the Goodyear Case was not necessary to the decision of the case, as all that was necessary was a holding that Dancel could not maintain the action at law.

In *Austin v. Seligman* (C. C.) 18 Fed. 519, it was held:

"Although the subject is one of much controversy, the result of the better-considered decisions is that a third person may enforce a contract made by others for his benefit whenever it is manifest, from the nature or terms of the agreement, that the parties intended to treat him as the person primarily interested."

Such was the Goodyear Case.

Judge Wallace said:

"According to good sense and upon principle, there is no reason why a person may not maintain an action upon a contract, although not a party to it, when the parties to the contract intend that he may do so. The formal or immediate parties to a contract are not always the persons who have the most substantial interest in its performance. Sometimes a third person is exclusively interested in its fulfillment. If the parties choose to treat him as the primary party in interest, they recognize him as a privy in fact to the consideration and promise. And the result of the better-considered decisions is that a third person may enforce a contract made by others for his benefit whenever it is manifest from the nature or terms of the agreement that the parties intended to treat him as the person primarily interested. The cases of *Hendrick v. Lindsay* [93 U. S. 143, 23 L. Ed. 855] and *Nat. Bank v. Grand Lodge* [98 U. S. 123, 25 L. Ed. 75], and the expressions in the opinions, do not antagonize upon this proposition, but accord with it. The language of *Folger, J.*, in *Simson v. Brown*, 68 N. Y. 355, may be adopted as a correct and accurate statement of the law, as follows: 'It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited.' There is a class of cases where, under a contract between two persons, property has come to the hands of one of them which in equity is charged with a lien or trust in favor of a third person, in which the latter may sue in his own name upon the promise to discharge the lien or assume the trust. These cases have no proper application to a case like the present, where a copartnership transfers its assets to a purchaser, and the only interest of the plaintiff is that of a creditor at large of the selling partners. Such creditors have no lien for their debts upon the partnership assets, except in cases of insolvency or administration. *Colly. Partn.* § 894; *Story, Partn.* §§ 358, 360; *Crippen v. Hudson*, 13 N. Y. 161. If upon such a transfer the purchaser assumes to pay certain specified creditors or certain enumerated debts of the seller, it may be fairly urged that the parties contemplate a direct liability to the specified creditor on the part of the purchaser. On the other hand, when the agreement is silent respecting any specific obligation to be assumed to a third person, the natural inference is that it was intended primarily for the benefit of the promisee, and to adjust the rights and duties of the parties as between themselves."

In *Constable v. National Steamship Company*, 154 U. S. 73, 74, 14 Sup. Ct. 1062, 38 L. Ed. 903, the Supreme Court of the United States said:

"As observed by the Court of Appeals of New York in *Simson v. Brown*, 68 N. Y. 355: 'It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit, as its object, and he must be the party intended to be benefited.' See, also, *National Bank v. Grand Lodge*, 98 U. S. 123 [25 L. Ed. 75]; *Garnsey v. Rogers*, 47 N. Y. 233 [7 Am. Rep. 440]. The principle above announced was still further limited by the Court of Appeals in *Vrooman v. Turner*, 69 N. Y. 280 [25 Am. Rep. 195], in which it was said that, to give a third party, who may derive a benefit from the performance of a promise, an action, there must be, first, an intent by the promisor to secure some benefit to the third party; and, second, some privity between the two—the promisor and the party to be benefited—and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally."

In view of these cases, it would seem that the first question is, was this agreement of November 8, 1889, between the Wagner and Pull-

man Companies, made (as to this particular part of the contract) for the benefit of the third parties holding the obligations of the Wagner Company, and with their benefit as its object, or merely for the benefit and convenience of the parties named therein? The Wagner Company was about to dissolve—to cease to exist. For a valuable consideration its property of all descriptions was to pass to the Pullman Company, including contracts with railroad companies for the running of sleeping and other cars. The Pullman Company was to increase its capital stock, and deliver 200,000 shares thereof to the Wagner Company for distribution to its directors, as liquidating trustees, in full payment for such property and good will of the Wagner business. Pending the transfer no new contracts with railway companies were to be executed, and no unusual or extraordinary liability or expenditure was to be incurred, and no new officers were to be chosen, and no increase of compensation to officers or employees was to be made. The agreement then says:

"The intent of this provision [the fourth clause] is that the present condition of the assets, liabilities, obligations, contracts, and business arrangements of the company shall be preserved as it now is until such conveyance, so far as the same shall be consistent with the ordinary routine conduct of its business."

Then follows the provision by which the Pullman Company agrees that it will "satisfy and discharge the indebtedness and liabilities of said Wagner Company of any and every kind," as "a part of the transaction," which may be unsatisfied at the time of the transfer of the property.

It is clear that the creditors, etc., of the Wagner Company were incidentally intended to be benefited; but it is equally clear that the benefit of the two companies was equally intended—especially the benefit of the Wagner Company—and to relieve it from the delays incident to a payment and settlement of its obligations before a transfer of the property. In fact, this is the declared purpose and object of the assumption of these liabilities. It is not so clear that the object of this clause of the agreement was the benefit of these creditors of the Wagner Company at all, or that their interests were in the minds of the contracting parties. The property of the Wagner Company was not transferred to secure their payment, nor did they have a lien thereon. Still their interests and their benefit must have been in the minds of the contracting parties to some extent. Do the authorities go to the extent of holding that the benefit of these creditors, etc., of the Wagner Company, must have been the sole object of the agreement, or of the clause in question? The question is not free of doubt, but this court is of the opinion that it was not necessary to name the creditors, etc., of the Wagner Company, or specify their respective claims, their nature and amount, or that the benefit of such creditors should have been the sole object of this clause of the agreement.

In *Coster v. The Mayor*, 43 N. Y. 399, Folger, J., said, in discussing this subject:

"The ultimate beneficiary is uncertain. It is settled in this state that an agreement, made on a valid consideration, by one with another, to pay money

to a third, can be enforced by the third in his own name. [Citing cases.] \* \* \* This was a promise made by the state for the benefit of any third person to whose property damage was caused. Nor is it an anomaly that the liability which the city assumes is not in existence at the date of its obligations, nor that the person who is to be benefited by it is not then known."

See, also, the following cases: *Arnold v. Nichols*, 64 N. Y. 117-119; *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582; *Little v. Banks*, 85 N. Y. 258; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

The consideration for the promise of the Pullman Company was the dissolution of the competing Wagner Company, and the transfer to it of all the assets, etc., of said company—the property to which the creditors of the Wagner Company would primarily look and resort for the payment of their claims. Can it be said that the creditors of the Wagner Company were strangers to this consideration?

But can this agreement be reformed—changed—the Pullman Company having had no notice of the alleged mistake when it assumed the payment or performance thereof?

The complainant cites *Citizens' National Bank v. Judy*, 146 Ind. 322, 43 N. E. 259. There it was said:

"Such mistake may not only be corrected against the mortgagor, but against subsequent purchasers with notice of the facts, and against judgment creditors of the mortgagor or such purchasers with notice. *White v. Wilson*, 6 Blackf. 448 [39 Am. Dec. 437], and authorities cited; \* \* \* *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559]."

There is no evidence in this case that the Pullman Company at the time of the execution of the agreement of November 8, 1899, actually knew of the agreement between the Wagner Company and the Agricultural Insurance Company; and, while it may be assumed that this makes no difference, that the Pullman Company is presumed to have made inquiries, and to have ascertained the liabilities which they assumed, still it cannot be presumed it had notice of any mutual mistake in the making of that written agreement, or that it assumed a liability to have it so changed or reformed as to create a liability, when none existed by its terms. But the agreement of the Pullman Company goes further than a mere assumption of known and well-defined debts and liabilities. The Pullman Company agrees to "satisfy and discharge the indebtedness and liabilities of said Wagner Company of any and every kind which may be unsatisfied at the time of the transfer." Evidently it was the purpose of the parties to cover each and every debt owing and each and every liability incurred that might ripen into a cause of action, and to bind the Pullman Company to perform all the contracts of the Wagner Company. This is what the Pullman Company agreed to do. It took all the property and business of the Wagner Company, and assumed and agreed to perform all its contracts and pay and satisfy all its obligations.

When we consider the transaction broadly, and the sweeping effect of it in wiping out of existence the joint-stock company, and in taking possession of all its assets and assuming all its obligations, in order that there might be no delay in consummating the transaction, we find something more than a mere promise made by one to an-

other, for a consideration, to pay the debt of another. As part of the transaction, which in effect merged the two companies into one—the Pullman Company, for payment was made by an increase of the stock of the Pullman Company, and a distribution thereof to the shareholders in the Wagner Company—the Pullman Company assumed a relation in the nature of a trust towards the creditors, etc., of the Wagner Company, and became the surety, and in a sense the successor, of the Wagner Company. Surely every right existing in favor of third persons against the Wagner Company was preserved, and its discharge or satisfaction assumed by the Pullman Company. It is not sought to make a new contract or agreement, but to have the writing express the one already made and in existence; and it is within the terms of the agreement between the Wagner and Pullman Companies, "liabilities of said Wagner Company of any and every kind," etc. Here was, it is asserted, a liability to have this agreement reformed.

The conclusion is that the complainant can maintain this action in equity against the Pullman Company for the reformation of this agreement, if there was a mutual mistake of fact, and the contract, as drawn, failed to express the actual agreement of the parties thereto.

But has any such mutual mistake been proved? The burden of proof was on the complainant, and in such cases the evidence must be clear, convincing, and satisfactory. "The mistake must be clearly shown. If the proofs are doubtful and unsatisfactory, and if the mistake is not made entirely plain, equity will withhold relief." *Baltzer v. R. Co.*, 115 U. S. 645, 6 Sup. Ct. 222, 29 L. Ed. 505. "The rule is well settled that an application to reform a written contract on the ground of accident or mistake must be supported by clear and satisfactory proof, otherwise it will not be granted. If the testimony is conflicting, or of such undecisive character as to raise a substantial doubt in the minds of the court, the contract as written must stand. Besides the ordinary burden of proof which rests upon every litigant who holds the affirmative of an issue, there is in this class of cases the additional burden of overcoming the strong presumption created by the contract itself which the proceeding seeks to reform." *Harrison v. Hartford Fire Ins. Co.* (C. C.) 30 Fed. 862, 863. "In an action for the reformation of a written instrument upon the ground of mistake, the party seeking the reformation must prove that there was a mistake by evidence that is clear, positive, and convincing. It is to be presumed that the written instrument was carefully and deliberately prepared and executed, and therefore is evidence of the highest character, and will be regarded as expressing the intention of the parties to it until the contrary appears in the most satisfactory manner." *Christopher & Tenth St. R. Co. v. Twenty-Third St. Ry. Co.*, 149 N. Y. 51, 58, 43 N. E. 538, 539 (opinion of the court, per Martin, J.). "Before such relief [i. e., reformation] can be granted, however, the party invoking the interference of the court must show with entire clearness that the mistake alleged has been made, and that it was mutual; that is, it must clearly be shown that the minds of the parties had met as to certain matters, and that the paper, as written, failed to express that agreement." *Gray*, Circuit Judge, for

Circuit Court of Appeals in Third Circuit, in *Fulton v. Colwell*, 112 Fed. 831, 836, 50 C. C. A. 537, 542.

The complainant, Charles S. Barker, as the agent for the Agricultural Insurance Company, his assignor in this action, had all his negotiations with F. G. Smith, who was the private secretary of Dr. W. S. Webb, then president of the Wagner Company. Smith had no power whatever to make a contract, and what the agreement actually was is to be determined by what was put in the written agreement, and by what was communicated to Webb and assented to by him, not by the conversation that took place between the complainant and Smith. Not the meeting of the minds of Smith and Barker, but the meeting of the minds of the duly authorized representatives of the Wagner Company and the Agricultural Company, is the material consideration here. It is material and necessary, therefore, to ascertain and determine what proposed contract or agreement was presented to the mind of Dr. Webb, the president of the Wagner Company, and how much thereof he assented to in behalf of the Wagner Company.

It appears from the evidence that Smith had heard that rates of insurance were to be increased. The Wagner Company was desirous of protecting itself by making an agreement for insurance of some character for three years. Barker waited upon Smith, and told him that, if Webb would give a three-years contract for placing the insurance, he would do it for  $2\frac{1}{2}$  years' premium, thereby saving nearly one-sixth of the premium, or reducing the rate from 35 cents to 29.17 cents per \$100 worth of insurance. Smith merely said that he thought this a good idea. Smith communicated something to Webb—what, does not appear—and Webb replied, let the matter rest until he reached home. Barker said that in March he had a further conversation with Smith, and that the subject of discussion was the reduction of the premium on the agreement of the Wagner Company to take insurance for three years. He does not say that any agreement was made to that effect, but he does say that Smith asked if he wanted a contract; that he (Barker) said he did; and that Smith thereupon drew up a rough sketch of a contract, and asked Barker if that was about what he wanted. Barker read it over, and told him it was. Smith then said he would have it typewritten and forward it to Webb, and would have Webb sign it. Barker is an intelligent man, and was accustomed to doing insurance business, and probably understood what an agreement would be or should be on the part of the Wagner Company to accept the insurance offered. Later Barker called again on Smith, who handed the agreement, previously drawn, to Barker, and told Barker that Webb had signed it, and that it awaited the signature of Barker. Webb had signed the agreement. A duplicate of that agreement, made by some one, was signed, "Agricultural Insurance Company, Charles F. Barker, Agent." Barker must have seen this written contract on at least three different occasions, and must have read it at least three different times. Barker's statement that he had no part whatever in the preparation of the written contract cannot be accepted as stating the fact as it was, as he was present when it was drawn, and saw it after it was reduced to writing. He read it over

in the office of Smith. He then gave it to Smith, in whose presence he signed it. Barker says that he took the duplicate, and had it in his possession, except that he took it to Watertown, and left it in the possession of the Agricultural Insurance Company for some time. Barker says that at the time the written agreement was drawn he made suggestions only as to the terms of payment. Barker says he took the original of the contract to Watertown, and left it there three or four days, and that he showed it to the president and secretary of the Agricultural Insurance Company, and that they looked at it, and that then he brought it back with him and kept it in his safe. Barker further says that the president and secretary of the Agricultural Insurance Company made no objection to this written contract as it was drawn. Further on in his testimony, Barker testifies to going to Chicago and communicating with certain officers of the Pullman Company, and that they told him the contract would be lived up to, etc. There is nothing in these conversations that concedes any mutual mistake in the written contract, and nothing that indicates that the Pullman Company admitted that any contract was in existence, except the one found in the writing. Violence would be done to the intelligence of the president and secretary of the Agricultural Insurance Company, should we say that on reading that written contract they supposed it contained a covenant on the part of the Wagner Company to accept the insurance when tendered. They examined and they assented to a written agreement by which they offered to write a renewal of certain insurance at certain rates. In the exercise of ordinary intelligence, they must have observed that the written agreement contained no covenant on the part of the Wagner Company to accept that insurance. If they relied upon an implied covenant, it was a mistake of law, and not of fact.

We now come to a consideration of what was communicated by Smith to Webb. Smith says that he submitted the written agreement to Webb in the form in which it was executed. This question was put to the witness by counsel for the complainant:

"Q. In that conversation with the president of the Wagner Company, did you say that the Wagner Company was to take insurance for three years, and secure an agreement from the Agricultural Insurance Company to furnish it for three years, in substance?"

This question is leading and suggestive. The witness says in reply to that question:

"Why I certainly said the substance of that, for the reason that the whole intent of our getting that three years' insurance was that it saved us one-sixth of the premium we were paying. It was the lowest insurance we had ever had, and by agreeing to take it for three years we certainly did save one-sixth of our regular premium, which was quite a sum of money. We were well pleased."

Then he says:

"I said to Dr. Webb, 'We had better take this three years' insurance, as it will not only protect us against an increase in the rate of premium during the three years, but positively saves us one-sixth over the rate we are now paying.' That was the conversation, in substance."



Then this question was put:

"And was it a part of the proposal between you and the complainant that the Wagner Company should accept insurance for the three years stated?"

The answer to this question is:

"The question we had in our mind was whether he would be able to deliver us the policy for three years. We wanted it, and stood ready to take it. Our only fear was, he would lay down on us, and not give it to us."

Then:

"Q. Mr. Smith, what you were looking for, and what Mr. Webb was looking for, was to have some contract which would protect the Wagner Company, was it not?"

The answer is, "Surely."

It is impossible to find in this any specific oral agreement on the part of Dr. Webb to take this insurance, or to assent to a written agreement containing a covenant to accept the insurance and pay the premium. Webb was seeking to protect his company, which was as well done by having the agreement as it is as would have done by putting in a covenant binding the Wagner Company to accept the insurance.

The testimony of the witness Smith that Webb agreed with his suggestion that they had better take this three years' insurance, as it would protect them (the Wagner Company) against an increase in the rate of premium during the three years, and positively save them one-sixth of the rate they were then paying, does not establish an agreement between Webb and Barker to accept the insurance. Barker was not present, and Webb's approval of, or acquiescence in the wisdom of, such a suggestion, is not proof that it was ever agreed to put a clause in the written agreement binding the Wagner Company to accept. These were expressions of opinion. No statement was made that a clause to that effect should go in the proposed agreement, which was then in writing and being discussed. All that was said had reference to the written agreement then under consideration, and which had been drawn up before that time, and was then submitted to Webb for his approval and signature. There is no suggestion of any proposed change in the writing as drawn. The officers of both companies had it, read it, and assented to it. Webb accepted the offer made in writing, but did not agree to accept and pay the premium. Well might he say it is wise to accept this offer made in writing, which he had before him, and so protect the company, so long as it imposed no obligation to accept. It is urged that the agreement, as drawn and executed, is one-sided. This may be, but this fact does not establish a different agreement or a mutual mistake of the parties. There is no suggestion that the agreement was hastily drawn or executed. There is no suggestion that it was executed in any but a deliberate manner after full consideration, and with a full understanding of its terms. This court cannot find from the evidence before it that there was a mutual mistake by which the provision sought to be inserted, in substance or effect, was omitted.

The bill of complaint must be dismissed, with costs, and it is so ordered.

**SPRING VALLEY WATERWORKS v. CITY AND COUNTY OF SAN FRANCISCO et al.**

(Circuit Court, N. D. California. June 29, 1903.)

No. 13,395.

**1. MUNICIPAL CORPORATIONS—DETERMINING VALIDITY OF ORDINANCE—SCOPE OF JUDICIAL INQUIRY.**

The question whether an ordinance reducing the rates to be charged by a water company is in violation of the Constitution of the United States, as depriving the company of its property without due process of law, or as denying to it the equal protection of the laws, when presented to a court must be determined on an original, independent investigation, and without reference to the sufficiency of the evidence on which the action of the municipal body was based.

**2. WATER COMPANIES—REGULATION OF RATES—CONSTITUTIONALITY OF ORDINANCE.**

In determining whether rates to be charged by a water company, fixed by a municipality, are just and reasonable, and such as do not exceed the power to regulate such charges conferred by the Constitution and laws of California, or amount to a taking of the property of the company without due process of law, in violation of the Constitution of the United States, the basis of calculation is the reasonable value of the property necessarily employed in rendering the public service and the fair value of the service rendered; and in arriving at such property value the amount and value of the bonds and stock of the corporation, if not in excess of the real value of the property, may properly be considered.

**3. SAME—ELEMENTS OF PROPERTY VALUE—FRANCHISE AND ESTABLISHED BUSINESS.**

The franchise of a water company in California to collect rates for water supplied, which, by the Constitution of the state, is declared to be property, and made taxable as such, is an element to be considered in determining the value of the corporate property necessarily employed in the supplying of water to a city and county, city or town, or the inhabitants thereof, as is also the enhanced value of the property by reason of the fact that the company has an established business, and is a going concern actually using the property in supplying water to consumers.

**4. SAME—REASONABLENESS OF RATES—ORDINANCE CONSIDERED.**

An ordinance passed by the board of supervisors of the city and county of San Francisco, reducing the rates to be charged by a water company to private consumers, and under which, as shown by the proofs—resolving all doubtful questions against the company—its annual net earnings would not exceed  $4\frac{40}{100}$  per cent. on the value of the property necessarily employed in the service, or  $3\frac{80}{100}$  per cent. on its stock after deducting its fixed charges, *held* unconstitutional and invalid on a motion for a preliminary injunction, as fixing a rate so low as to be unreasonable and unjust, and which would amount to the taking of private property for public use without just compensation and without due process of law; and especially in view of expert testimony showing that the usual net income from capital invested in similar large corporations on the Pacific Coast is not less than 6 per cent., and of the state statute relating to the fixing of water rates in counties, which provides that they shall be so adjusted that the net annual receipts to the companies shall not be less than 6 nor more than 18 per cent. on the value of the property used.

**5. CONSTITUTIONAL LAW—TAKING PROPERTY FOR PUBLIC USE—"JUST COMPENSATION."**

"Just compensation," as used in Constitutions, means full compensation, and the taking of private property for public use for anything less is an invasion of constitutional rights, irrespective of the extent of the infringement.

**¶ INJUNCTION—PERSONS BOUND—SUIT AGAINST MUNICIPALITY.**

In a suit against a municipal corporation and its officers to enjoin the enforcement of an ordinance reducing the rates to be charged by a water company, the defendants represent the rate payers, who are bound by the proceedings and by an injunction issued therein.

**In Equity.** On motion for preliminary injunction.

Order to show cause why a preliminary injunction should not be granted restraining the city and county of San Francisco and its board of supervisors, and each of them, and all consumers of water in said city and county, during the pendency of this action and until its final determination, from bringing or causing to be brought any suit or action against the complainant, in law or in equity, to enforce a certain bill or ordinance passed by said board on March 9, 1903, or any suit or action against the complainant for the forfeiture of complainant's franchise, works, or property, or for any other purpose, on account of complainant's failure or refusal to conform to the rates prescribed by said bill or ordinance, and from any attempt or suit or action, directly or indirectly, to compel complainant to furnish water at any other rates than those which may be permitted by this court pending this litigation, or legally or reasonably fixed by said board of supervisors in obedience to any decree or mandate of this court in this action; and why the complainant should not, pending this litigation, be permitted by this court to collect rates for water supplied by it to said city and county of San Francisco and its inhabitants in accordance with the terms of a bill or ordinance passed by said board of supervisors on March 24, 1902, and now in force in relation to such rates.

M. B. Kellogg and Francis J. Heney, for complainant.

Franklin K. Lane, City Atty., and George W. Lane, for defendants.

**MORROW**, Circuit Judge (after stating the facts). The ground upon which the preliminary injunction is sought in this case is that the ordinance in question violates the Constitution of the United States by depriving complainant of its property without due process of law; that it takes complainant's property for public use without just compensation, and deprives complainant of the equal protection of the laws.

The complainant is a corporation incorporated under the laws of the state of California in the year 1858 for the purpose of supplying the city and county of San Francisco and its inhabitants with pure fresh water for domestic and other purposes. It is alleged in the bill of complaint that the company has complied with all the terms of the statutes of the state, and acquired the necessary lands, water rights, and reservoir sites in and in close proximity to the said city, and has from the time of its organization in 1858 down to the present time, as the city has grown in territorial extent, wealth, and commercial importance, and in necessary anticipation thereof, added to and increased, under the advice of the most able and competent engineers, its means and appliances for supplying water to the said city and its inhabitants, and has distributed the same by means of pipes laid underground through the streets of the city, keeping in view the continued growth of the city in extent and population, as well prospective as actual, its peculiar geographical position and climatic conditions, its great exposure to the dangers of fire and the necessity of providing for its requirements in advance of their occurrence, as well as the probable demand at any time for a very large supply of water to meet the contingency of contagious sickness, war, and the occurrence of a long

period of drought. It is alleged that it acquired all the property and water rights of the San Francisco Waterworks in 1864; that the policy of the complainant is to have a storage capacity equaling at least a three-years supply, on account of the varying annual quantity of rain, which has been as low as 7.40 inches and as high as 50 inches, the average for the past 51 years having been about 25 inches, but the average for the last past 5 years previous to the winter season of 1902-1903 having been only 16.64 inches. It is alleged that complainant furnished:

|                       |        |         |         |
|-----------------------|--------|---------|---------|
| In the year 1865..... | 865    | million | gallons |
| " " " 1870.....       | 2,204  | "       | "       |
| " " " 1875.....       | 4,266  | "       | "       |
| " " " 1880.....       | 4,627  | "       | "       |
| " " " 1885.....       | 6,223  | "       | "       |
| " " " 1890.....       | 7,457  | "       | "       |
| " " " 1895.....       | 7,264  | "       | "       |
| " " " 1900.....       | 9,295  | "       | "       |
| " " " 1901.....       | 9,736  | "       | "       |
| " " " 1902.....       | 10,101 | "       | "       |

The bill of complaint describes the principal properties acquired by the complainant for the purpose of supplying water to the city and county of San Francisco and its inhabitants, including the ownership of nearly 20,000 acres of watershed lands in San Mateo county, on which four reservoir sites are situated; nine distributing reservoirs in the city and county of San Francisco; nine pumping stations (seven of which are in duplicate), having an aggregate capacity of 72,000,000 gallons daily or over, so located that they supply the high portions of the city with water under a first-class fire pressure up to 600 feet above tide, and are so arranged that the various districts can be supplemented when necessary; tunnels of an aggregate length of 35,141 feet, and the following pipe lines:

|     |               |    |                    |
|-----|---------------|----|--------------------|
| 22  | miles of pipe | 44 | inches in diameter |
| 28½ | "             | 36 | "                  |
| 22¾ | "             | 30 | "                  |
| 1½  | "             | 23 | "                  |
| 1¾  | "             | 22 | "                  |

—Four hundred and ten miles of distributing pipes laid in the streets of the said city, by which water is supplied under great pressure to consumers for domestic and other uses, and to the government authorities of said city for the extinguishment of fires and the cleansing of sewers, for which last-mentioned purpose and for other municipal purposes the complainant has, at the request of the said city, erected and connected with said distributing pipes 3,939 hydrants in the streets of said city, which, on being opened, deliver water for the purposes aforesaid under enormous pressure (greater than that of any others in any of the large cities in the United States), in consequence of the height of the said distributing reservoirs above the streets whereon said hydrants are situated.

It is alleged that "all of the said reservoir sites, water rights, watersheds, and sources of supply have been purchased by the said complainant at prices much less than their present values, respectively, and the said reservoirs and other works have been erected and constructed as skillfully and economically as possible, under the direction of

engineers of the highest skill and learning, and without any useless or unnecessary outlay; and have been so purchased, prepared, and constructed for the sole purpose of supplying the said city of San Francisco and its inhabitants with water as aforesaid, and are not profitably applicable to any other purpose. Taken together, they constitute a system of water supply for a great city, absolutely unique in the world, and are not only ample for the needs of the city with its present population, but are capable of extension by the construction of additional dams and aqueducts, such as will store and supply sufficient water for the wants of more than 2,000,000 inhabitants and for a small expenditure, compared with the fundamental expenditures already made. The value of these properties already acquired for such extensions is not included in the value of the plant in use by complainant as hereinafter set forth. Taken together, they are reasonably worth over \$50,000,000. In fact, if they had not, by the foresight of the complainant, been secured in advance of any visible actual necessity thereof, they would have been practically unattainable, not only on account of their largely increased value, but they would have been devoted to other uses, such as would have contaminated and unfitted them for domestic water sources. "That the said complainant has caused the actual cost of said waterworks to its stockholders, down to the 1st of January, 1903, to be carefully computed by competent accountants, on the basis of setting down the sums derived by it from sales of its stock, and contribution by stockholders, at the date of their respective payments, and adding thereto interest thereon at contemporary current rates down to the next succeeding 1st of January, and deducting therefrom dividends paid during the year, with interest thereon at the same rate from the time the same became payable down to the same date, and carrying forward the difference as a new balance; and, so computed, the actual cost of said works to the stockholders of the said complainant at the date aforesaid has been ascertained to be, and the complainant avers that the same has been and is, the sum of \$36,256,235.70, whereof there were derived from sales of stock and invested earnings belonging to stockholders and interest as aforesaid, \$22,281,235.70, and from sales of bonds \$13,975,000."

The bill sets forth the rate of annual dividends complainant has divided with its stockholders from its organization in 1858, down to and including 1902, from which it appears that with the exception of six years, when no dividends were declared, the dividends have ranged from  $\frac{3}{8}$  of 1 per cent., in 1863, to 9 per cent. per annum in 1875 and 1876. The failure to declare dividends is explained by the bill in the allegation that for several years after its incorporation complainant divided none of its earnings among its stockholders, but reinvested the same in the increase and extension of its works.

It is further alleged that under the ordinance in controversy, adopted by the Board of Supervisors on March 9, 1903, the complainant verily believes that the dividends which complainant would be able to pay to stockholders for the fiscal year of July 1, 1903, to June 30, 1904, would not exceed 3.78 per cent. on the issued stock of the complainant, amounting to \$14,000,000, no reference being had to the value of the property actually in use by complainant, which it is al-

leged is largely in excess of \$40,000,000. It is alleged that the ordinary rate of interest for money lent on first-class mortgages on city property was 24 per cent. per annum in 1858, from which rate the interest has declined to 6 per cent. during the past four years, except that in 1901 and 1902 a very few most desirable loans were made at a rate slightly below 6 per cent. It is alleged that the purposes of the incorporation of complainant were and are to supply said city and county and its inhabitants with pure fresh water; that the complainant has a franchise for that purpose, although it is not and never has been an exclusive franchise, and does not constitute and never has constituted a monopoly of the right to furnish water to said city and county and its inhabitants; that for many years last past the complainant has been, and is now, supplying the larger portion, or nearly all, of the fresh water consumed by said city and county and its inhabitants, and that there are no waterworks in said city and county, except those owned by complainant, capable of supplying all the water required by said city and county and its inhabitants, and that there are not, and were not at any of said times in this bill mentioned, any municipal or public waterworks in said city and county; that, in order to carry out the purposes of its incorporation, complainant has, since its incorporation, acquired reservoir sites, buildings, and reservoirs, and obtained riparian and other rights and properties necessary to secure the absolute ownership of water caught and impounded in its reservoirs, and has purchased water rights and has bought large tracts of land for the purpose of obtaining an adequate supply of pure fresh water and of preserving the same in good and potable condition, and has constructed aqueducts and pumping plants and other works, and has laid many miles of large water pipes for conveying the water to said city and county and distributing the same to its said consumers, and has purchased and acquired and owns other properties necessary and essential in the conduct of its business and the purposes of its incorporation; and that all said properties and rights above referred to have been and are now actually used and are necessary and essential in supplying said city and county and its inhabitants with pure fresh water, and that the aforesaid rights, lands, works, pipes, improvements, and properties are and were at all the times in the complaint mentioned of a value largely in excess of \$40,000,000.

It is further alleged that, in order to procure funds required in acquiring water rights and other properties necessary in the conduct of its said business and in constructing its works and in making the improvements necessary and essential for the purposes of its incorporation, the complainant has, during the last 37 years, been compelled to borrow and has borrowed, in addition to funds furnished by its stockholders, large sums of money, amounting in the aggregate to more than \$15,000,000, and that it has now an aggregate interest-bearing indebtedness secured by mortgages on its property of \$13,975,000, and that the interest upon said mortgage indebtedness and other indebtedness which will accrue and will be necessary to be paid during the fiscal year ending June 30, 1904, will amount in the aggregate to not less than \$708,500. And complainant alleges, upon its best information and belief, that during said fiscal year ending June 30, 1904,

the operating expenses of complainant which will actually and necessarily be incurred in operating its works in actual use for the purposes of its business and in carrying on its business will amount to the sum of at least \$506,000; and that during the said fiscal year ending June 30, 1904, and before the expiration thereof, the complainant will be compelled to pay at least the sum of \$286,000 as state and city and county and county and school taxes levied upon its property for that year.

It is further alleged that the amount of the issued capital stock of complainant is, and was at all the times hereinafter stated, \$14,000,000, divided into 140,000 shares of the par value of \$100 each, and is owned and held by more than 1,800 shareholders; that for a long time prior to February, 1901, the actual or market value of said shares averaged about \$97 per share, and that, but for the ordinances or bills of the board of supervisors of said city and county passed in April, 1901, and in February, 1902, and pretended to be passed in March, 1903, purporting to fix water rates, the actual market value of said stock would now be about \$97 per share, but that the same is only about \$83 to \$85, by reason of the passage of said pretended ordinances, and particularly the ordinance pretended to be passed in March, 1903.

It is alleged that the usual rate of annual income or interest realized in said city and county for permanent investments in dividend-paying stocks of the character of the stock of complainant is not less than 6 per cent. per annum upon the par value thereof, and that the holders of the stock of complainant are justly and reasonably entitled to receive dividends upon their said stock at not less than 6 per cent. per annum upon the par value of said stock, and that the complainant is fairly entitled to have and receive as rates for water supplied by it to said city and county and its inhabitants an income which would realize at least 6 per cent. upon the actual value of the actual property in use in furnishing and supplying said water, and, in addition thereto, its annual operating expenses and the amount of taxes levied for state and city and county and county and school and other purposes, and an annual sum or per cent. for depreciation of its plant.

It is alleged in the bill that the ordinance of March 9, 1903, purports to fix rates to be charged for supplying water to the said city and county and its inhabitants for the fiscal year ending June 30, 1904, but that the same is null and void, and of no effect, and was adopted without due process of law. The bill sets out the proceedings under which it was pretended that the ordinance was passed, from which it appears that the chairman of the water rates committee of the board of supervisors made a minority report to the board, recommending the final passage of a bill providing for a horizontal reduction of 7 per cent. in fixed and meter rates of consumers other than shippers from the rates established by the ordinance then and now in force. The report contained a statement of the business of complainant for the year ending June 30, 1904, relating to its revenue, operating expenses, and taxes, and an estimate of the value of complainant's property in actual use. This report, it is alleged, was received and placed on file, and a bill was pretended to have been passed by said board by

a vote of 10 ayes to 5 noes, and was ordered numbered as Ordinance No. 661; but it is alleged upon information and belief that no bill in the premises was ever introduced or passed, and the particulars in which the proceedings are alleged to have been defective and void are set out. The answer of the defendants alleges the passage of a second ordinance, approved May 23, 1903. Obviously the purpose of the second ordinance was to cure the defects in the first ordinance, although it is not so stated in the answer. These two ordinances are substantially the same, and hereafter the ordinance in controversy will be designated as the "Ordinance of May 23, 1903." The reduction in rates provided in this ordinance is based upon the following statement, contained in the minority report of the chairman of the water rates committee:

"Schedule in Matter of Revenue of Spring Valley Waterworks,  
Prepared by Chairman of Water Committee.

|  |                      |
|--|----------------------|
| Total amount estimated by the company they will receive from all sources during this fiscal year.....          | \$1,998,906 19       |
| From the city .....  | \$133,236 30         |
| From shipping .....  | 83,000 00            |
| From rents .....   | 47,012 50            |
|  | <hr/> 263,248 80     |
| Deduct this amount from gross receipts, and it gives the net revenue from rate payers other than shipping..... | \$1,735,657 39       |
| Add 5 per cent. for increase in business.....  | 86,782 86            |
|  | <hr/> \$1,822,440 25 |
| Upon the reduction of 7 per cent., if made, which amounts to...  | 127,570 81           |
|  | <hr/> \$1,694,869 44 |
| The amount from rate payers after the 7 per cent. reduction...   | \$1,694,869 44       |
| To which we add the amount from city.....  | \$136,000 00         |
| From shipping .....  | 83,000 00            |
| From rents .....   | 47,012 50            |
|  | <hr/> 266,012 50     |
|  | <hr/> \$1,960,881 94 |
| Amount allowed for operating expenses.....   | \$450,000 00         |
| Amount allowed for taxes.....  | 242,000 00           |
|  | <hr/> 692,000 00     |
| Amount they will receive for interest.....   | \$1,268,881 94       |

It is alleged that the said pretended bill or ordinance is, and the rates purporting to be fixed thereby are, void, null, grossly unjust, unreasonable, unconstitutional under the said provisions of the Constitution of the United States, and oppressive and confiscatory; that said rates do not permit of or provide for just or fair or reasonable compensation for water to be supplied during said year by complainant or any other person to said city and county and its inhabitants, and that, if said pretended bill or ordinance is enforced in its terms and their effect, complainant's gross income for said fiscal year therefrom (after deducting operating expenses and taxes) will, according to complainant's best information and belief, be less than \$1,000,000, and will be wholly insufficient to pay the operating expenses of complainant and taxes upon and in reference to property of complainant actually in use in such supply, and any reasonable income or interest



upon the actual value of the property of complainant in actual use in supplying said city and county of San Francisco and its inhabitants with water, or any greater income or interest upon said actual value than the rate of  $2\frac{1}{2}$  per cent. per annum, according to complainant's best information and belief.

The bill alleges certain particulars in which the ordinance is unjust and unreasonable, and specifies wherein the rates do not permit of or provide for just or fair or reasonable compensation. Among other particulars, it is alleged that the board willfully and arbitrarily allowed the complainant only the sum of \$450,000 for operating expenses, whereas the truth and the fact is alleged to be that the operating expenses for the said fiscal year will, according to the best information and belief of the complainant, amount to the sum of \$506,000; that said sum is reasonable, and was by complainant so proven to said board by sworn and undisputed testimony; and that by said deduction the board arbitrarily, unfairly, and unjustly reduced the income of complainant upon the actual value of its plant in use in supplying water the sum of \$56,000 below the amount which the board had in the first place determined was the reasonable amount of such income. It is also alleged that the taxes levied upon the property of complainant for the fiscal year 1902-1903 were the sum of \$239,537.05; that since such levy the property of complainant has been added to by the expenditure of more than the sum of \$730,000, and that without any other or different evidence or statements whatever, except as to the amount of taxes which would in all probability be levied against complainant for the fiscal year 1903-1904, the said board willfully and arbitrarily fixed the amount to be allowed complainant for taxes for state and city and county and county taxes at the sum of \$242,000, which sum it is alleged is less by the sum of \$44,390 than the state and city and county and county taxes which will be levied, according to the best of complainant's knowledge, information, and belief, upon the property of complainant, and thereby again reduced the income upon the actual value of the property actually used by complainant in so supplying water by the further sum of \$44,390 below the amount which the said board determined was a reasonable income. It is further alleged that in passing the bill or ordinance in question, and in fixing the rates therein set forth, the said board refused and omitted to allow to complainant, either as part of its operating expenses, or otherwise, or at all, any sum or amount whatever as a rate or part of a rate or compensation for depreciation from natural causes resulting by use or ordinary wear of any part of the property actually employed in so supplying water, or to take such depreciation into consideration at all in fixing said rates; that a large part of the said property is subject to annual depreciation by natural causes resulting from use and ordinary wear; and that such refusal was unjust, inequitable, oppressive, and illegal, and greatly to the damage and injury of complainant. It is alleged that the issues in the case involve federal questions; that the enforcement of the ordinance will abridge the privileges and immunities of the complainant, will deprive the complainant of its property without due process of law, and will deny to the complainant the equal protection of the law; and that the matter involved exceeds, exclusive of interest and costs, the sum of \$2,000.

In the answer to the order to show cause the defendants have appeared, and by affidavits have introduced in evidence: The ordinances of the board of supervisors fixing water rates from the year 1889 to and including the fiscal year ending June 30, 1903. Transcripts of the proceedings of the board of supervisors, and papers relating to the passage of the ordinances of March 9, 1903, and May 23, 1903. Copies of certain documents submitted to said board in connection with the investigation conducted by said board with respect to water rates for the fiscal year ending June 30, 1904. The affidavit of A. B. Thompson, an expert accountant, who avers that he has examined the books of account of the complainant, and has found that the entire tangible assets of the company are \$24,111,974.36, and no more, and that the outstanding floating indebtedness of the complainant is \$1,002,180.15. The affidavit of Harry Schwartz, secretary of the Stock and Bond Exchange of San Francisco, containing a statement of the official monthly high and low quotations of the Spring Valley Waterworks stock from January, 1899, to April, 1903. From this statement it appears that the stock sold in 1899 at, highest, \$103, lowest, \$92; in 1900, highest, \$99.25, lowest, \$90 $\frac{7}{8}$ ; in 1901, highest, \$94 $\frac{3}{4}$ , lowest, \$82; in 1902, highest, \$93 $\frac{1}{2}$ , lowest, \$83 $\frac{1}{4}$ ; in 1903, highest, \$88 $\frac{1}{8}$ , lowest, \$83. The affidavit of James D. Phelan, president of the Mutual Savings Bank of San Francisco, in which affiant says he is familiar with the investment of capital in quasi public corporations; that the usual and customary net income from such investments, in cases where the corporations are judiciously managed, is between 4 and 5 per cent. annually on total investments of \$10,000,000 and upwards; that the usual and actual income of capital invested in first-class improved real estate in the city and county of San Francisco, when such investment amounts to \$1,000,000, is between 4 and 5 per cent. annually. The affidavits of W. H. Kline and Charles W. Fay as to rate of taxation and assessed valuation of complainant's property in San Francisco and various other localities. The defendants have also filed their answer, consisting mainly of literal denials of the material allegations of the bill of complaint. This answer will be accepted as a pleading, but under the equity practice prevailing in this court, the denials cannot be considered as evidence in favor of the defendants.

The complainant has introduced in evidence, in rebuttal, the affidavit of Pelham W. Ames, secretary of the complainant, who avers that as such secretary he has charge of the books of account of the corporation; that the total cost of the entire assets of said corporation, as shown by its books of account, is the sum of \$36,256,235.78, and upwards. Another affidavit of Pelham W. Ames is introduced, in which he stated the bonded indebtedness of the complainant on the 9th day of March, 1903, to be as follows:

|  |                     |
|--|---------------------|
| First mortgage bonds, drawing interest at the rate of 6 per cent. per annum .....  | \$ 4,975,000        |
| Second mortgage bonds, drawing interest at the rate of 4 per cent. per annum ..... | 5,000,000           |
| Third mortgage bonds, drawing interest at the rate of 4 per cent. per annum .....  | 4,000,000           |
| <b>Total .....</b>   | <b>\$13,975,000</b> |

—And, in addition thereto, the following floating or unsecured indebtedness: \$492,500, drawing 6 per cent. interest per annum, and \$525,000, drawing 5 per cent. interest per annum.

The complainant has also introduced in evidence the affidavit of Daniel Meyer, who states that for the last 43 years he has been engaged in the banking business, and is and has been for that time familiar with the income yielded by investments of large amounts of capital on the Pacific Coast; that the usual and customary net income from investments of capital in corporations, where judiciously managed, is not less than 6 per cent. per annum, and that, in his opinion, capital could not be obtained for investment in the business of a quasi public corporation unless a net income of at least 6 per cent. per annum could reasonably be assured. Also, the affidavit of William Alvord, president of the Bank of California, of this city, who states that he has been engaged in the banking business for 25 years, and that the usual net income from investments of capital in corporations, where judiciously managed, is not less than 7 per cent. per annum; that, in his opinion, capital could not be obtained for the business of a quasi public corporation unless a net income of from 8 to 10 per cent. per annum could be reasonably assured. The affidavit of John Lloyd, president of the German Savings & Loan Society, states that he has been engaged in the banking business for the last five years, and has been familiar with the income yielded by investments of large capital on the Pacific Coast for the past 20 years; that such income is usually not less than 6 per cent. per annum net; and, in his opinion, capital could not be obtained for the business of a quasi public corporation unless a net income of from 6 to 7 per cent. per annum could be reasonably assured. The affidavit of George Tourny, secretary of the German Savings & Loan Society, states that he has been engaged in the banking business for 25 years; that, in his opinion, large amounts of capital could not be obtained for the business of a quasi public corporation unless a net income of from 6 to 7 per cent. per annum could be reasonably assured. The affidavit of H. Wadsworth, cashier of Wells, Fargo & Company's Bank, states that he has been engaged in the banking business for the last 27 years, and for the last 30 years has been familiar with the income yielded by investments of large amounts of capital on the Pacific Coast; that the usual net income from investments of capital in corporations, where they are judiciously managed, is not less than 7 per cent. per annum; and that, in his opinion, capital could not be obtained for the business of a quasi public corporation unless a net income of from 8 to 10 per cent. per annum could be reasonably assured. The affidavit of W. H. Crocker, president of the Crocker-Woolworth National Bank of San Francisco, states that he has been engaged in the business of banking for the last 20 years, and is familiar with the usual income yielded by investments of large capital on the Pacific Coast; that such income is not less than 6 to 7 per cent. per annum, net, from investments of capital in corporations where judiciously managed; and, in his opinion, capital could not be obtained for the business of a quasi public corporation unless a net income of at least 6 per cent. per annum could be reasonably assured. The affidavit of Frederick W. Zeile, president of the

Mercantile Trust Company of San Francisco, states that he has been engaged in the banking business for the last four years; that the usual net income from investments of capital in corporations, where judiciously managed, is not less than 6 per cent. per annum, and, in his opinion, capital could not be obtained for the business of a quasi public corporation unless a net income of 6 per cent. per annum could be reasonably assured. The affidavit of Adam Grant, a merchant, and a director of the Bank of California, states that he has been engaged in the banking business for the last 40 years; that the usual net income yielded by investments of capital in corporations, where judiciously managed, is not less than 7 to 8 per cent. per annum, and, in his opinion, capital could not be obtained for the business of a quasi public corporation unless a net income of at least 7 to 8 per cent. per annum could be reasonably assured. The affidavit of Charles Sutro states that for the last 15 years he has been engaged in the business of a stockbroker, and is familiar with the income yielded by investments of large amounts of capital on the Pacific Coast; that such income is not less than 7 to 8 per cent. per annum net, and, in his opinion, capital could not be obtained for the business of a quasi public corporation unless a net income of 8 per cent. per annum could be reasonably assured. The affidavit of H. Schussler, chief engineer of the complainant, sets forth in detail the value, location, and character of complainant's property, excluding its water rights and franchises, and including, among other things, its reservoir sites, watersheds, filter beds, head works, conduits, and distributing systems, which are at the present time used in distributing water to the city and county of San Francisco and its inhabitants, and stating the total valuation of these various properties to be \$34,718,600.

It is not the province of the court to review the evidence upon which the board of supervisors acted in adopting the ordinance under consideration. Whether the ordinance deprives the complainant of its property without due process of law, denies to it the equal protection of the laws, or abridges the privileges and immunities of the complainant, are questions to be determined by the court in this action upon an original independent investigation, and not by an examination of the proceedings of the board to ascertain what evidence it received and acted upon, and whether that evidence was sufficient to justify the conclusion reached. This does not mean that the same evidence submitted to the board may not be submitted to the court, as appears to have been done in this case; and, if the evidence is competent and relevant to the issues before the court, it will be considered. But it does not follow that, because the board may have received evidence that the court would have rejected, or has rejected evidence the court would have received, the proceedings of the board are to be regarded as illegal, and the ordinance as depriving complainant of constitutional rights. So with respect to the proceedings of the board in determining the value of complainant's property in actual use, and the necessary expense that will be incurred in keeping it in operation, elements may have been considered by the board that should have been omitted, and elements omitted that should have been considered, and still the ordinance be, in effect, just and constitutional.

As said by the Supreme Court of the United States in the recent case of *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892:

"We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one."

In *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, Mr. Justice Van Fleet declared the province of the court in such a case very clearly when he said:

"The function of the courts is merely to ascertain whether the power had been carried beyond the constitutional limits so fixed; and, if such be found to be the case, to declare the acts of the council void. They do not sit as appellate tribunals to review the correctness of the council's determination, nor need they know anything about the evidence upon which that body has acted. All they have to consider is whether, in a given case, the result of the council's action will be to take the property of the complaining party without just compensation. That is a mixed question of fact and law, to be decided by the court upon the evidence produced before it."

The scope of judicial inquiry for the purpose of determining the limitations imposed by the Constitution of the United States upon legislative authority in cases of this character has been the subject of elaborate discussion for more than a quarter of a century; and, while some of the most difficult and vexatious problems remain undetermined, certain principles of constitutional law have been settled, to which reference should be had before proceeding to consider the questions at issue in this case. In the recent case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, the Supreme Court of the United States reviewed the decisions of that court upon this subject, and indicated the extent to which the court had gone. It said that as to those individuals and corporations who have devoted their property to a use in which the public had an interest, although not engaged in a work of a confessedly public character, there had been no further ruling than that the state may prescribe and enforce reasonable charges, and that with respect to parties engaged in performing a public service, while the power to regulate had been sustained, negatively the court had held that the Legislature might not prescribe rates which, if enforced, would amount to a confiscation of property. It was said, further, that the court had not held affirmatively that the Legislature might enforce rates which stop only this side of confiscation, and leave the property in the hands and under the care of the owners without any remuneration for its use; but it has "declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the Legislature is to be presumed to be just, and must be upheld, unless it clearly appears to result in enforcing unreasonable and unjust rates."

In the late case of *San Diego Land & Town Co. v. Jasper*, which was a water rate case from this state, the court said further: "It no

longer is open to dispute that under the Constitution what the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public;" citing *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154—another water rate case from this state.

The important feature of these cases is the declaration that the Supreme Court of the United States has ruled (1) that individuals and corporations engaged in performing a public service are entitled to have just compensation for the use of their property employed in such service, and (2) that the determination of the Legislature is to be presumed to be just and must be upheld, unless it clearly appears to result in enforcing unreasonable and unjust rates. The first inquiry must therefore be, what has the Legislature determined upon the subject? and this inquiry must extend, not only to the acts of the local legislature, or board of supervisors, authorized to fix rates for the public service in a particular locality, but to the acts of the state Legislature authorized to enact general laws under the Constitution of the state. In prosecuting this inquiry in the present case, what do we find?

The complainant was incorporated on the 19th day of June, 1858, under the general act of the Legislature passed April 22, 1858, providing for the incorporation of water companies. St. 1858, p. 218, c. 262. The present Constitution was adopted in 1879, and upon going into effect on January 1, 1880, the complainant became subject to its provisions. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173. Under the Constitution, the complainant, in supplying water to the city and county of San Francisco and its inhabitants, is performing a public service, and is subject to all the limitations and entitled to all the rights pertaining to that service. In article 14 of the Constitution, relating to water and water rights, it is provided in section 1:

"The use of all water now appropriated or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the state in the manner to be prescribed by law."

The remainder of the section provides in general terms for the procedure of fixing water rates by the board of supervisors, or city and county, or city or town council. Section 2 provides:

"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

To carry these provisions of the Constitution into effect, the Legislature has passed two acts. The first, approved March 7, 1881 (St. 1881, p. 54, c. 52), prescribes in more detail than the Constitution the method of procedure to be followed by the board of supervisors, town council, board of aldermen, or other legislative body in fixing the water rates that shall be charged and collected by any person, company, association, or corporation for water furnished to any city and county, or city, or town, or the inhabitants thereof. It provides for

an annual statement to be made by water companies under oath, showing the name of each water rate payer and the amount paid for water by each water rate payer during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time. The water company is also required to furnish a detailed statement, verified in like manner, showing the amount of money actually expended annually since commencing business in the purchase, construction, and maintenance, respectively, of the property necessary to the carrying on of its business, and also the gross cash receipts annually for the same period from all sources. The second act was approved March 12, 1885 (St. 1885, p. 95, c. 115), and is entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use." It provides a method of procedure to be followed by the board of supervisors of the state in fixing water rates for the sale, rental, or distribution of appropriated water to the inhabitants of the several counties, and among other things it provides:

"Said boards of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants, shall be not less than six nor more than eighteen per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water-rights or water-works shall not be included as part of the said expenses of management, repairs, and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said board of supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations, and to said inhabitants." St. 1885, p. 96, c. 115, § 5.

It will be observed that the first act provides no limitation upon the amount of net annual receipts and profits which the persons, companies, associations, and corporations may derive from the business of supplying water to the cities and towns and the inhabitants thereof, but in the last act the net receipts for water furnished to the inhabitants of a county are limited to not less than 6 nor more than 18 per cent. upon the value of all the property actually used and useful to the appropriation and furnishing of such water. But the first act has been the subject of judicial construction by the Supreme Court of the state, and the limitations there determined and declared have become as much a law of the state, and binding on this court, as though written into the statute books. The first case was that of *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 6 L. R. A. 756, 16 Am. St. Rep. 116. That action was brought by the complainant in this case to set aside and declare void an ordi-

nance of the board of supervisors of the city and county of San Francisco fixing water rates to be charged for water to be furnished to the city and its inhabitants for the year commencing July 1, 1889. The plaintiff alleged that the value of its property at that time exceeded the sum of \$25,000,000. It was objected to the ordinance, among other things, that the rates prescribed and fixed thereby were grossly unjust, unreasonable, and oppressive, and did not provide a just or fair or reasonable compensation for the water to be supplied under the provisions of the ordinance. The judgment of the lower court was entered upon demurrer, declaring the ordinance void, enjoining its enforcement, and directing the board of supervisors to fix rates giving just compensation. This judgment was affirmed by the Supreme Court of the state. In the course of its opinion, the Supreme Court said:

"When the Constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of duty."

It is true the court, in the further discussion of the question, said:

"But the courts cannot, after the board has fully and fairly investigated and acted by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified, because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

These last observations of the court were directed to certain allegations of the plaintiff (admitted by the demurrer to be true), wherein it was alleged and charged that the ordinance was passed without notice or opportunity to be heard; that the rates purporting to be fixed by the ordinance or order were fixed absolutely at random and by mere guesswork, without any regard to or consideration for the right of the plaintiff to a reasonable compensation for supplying water to the said city and county and its inhabitants, or to a reasonable income or any income upon its investment, and without any consideration of or regard to the value of the plaintiff's works and property, or the amount of its interest-bearing indebtedness and the annual interest charge thereon, or its operating expenses, or the amount of taxes which it would be required to pay, or the right of the plaintiff's stockholders to reasonable or any dividends upon their stock, and without any reference to or consideration of the actual cost of supplying said water, but in total disregard of all such matters. The language of the court last quoted was plainly directed against the failure of the board of supervisors in that case to fix rates in the manner provided by law, but further than this the opinion cannot be considered as declaring that, if it appears that the legislative body has proceeded according to the forms of law, the court will not inquire whether an ordinance deprives a person or corporation of constitutional rights, unless there is actual fraud in fixing rates, or that the rates fixed are so palpably and grossly unreasonable and unjust as to amount to the same thing.



In nearly all of these cases two questions are presented to the court for consideration: First. Has the state or local authority, in fixing rates, acted arbitrarily, without investigation, and without the exercise of judgment or discretion, as required by law, thereby depriving the complainant of property without due process of law? Second. Are the rates as fixed so low as to amount to the taking of property without just compensation? In discussing these two questions, the facts of the particular case are often of such a character that both questions are answered in one general line of argument, by which the court reaches a conclusion that the complainant has or has not been deprived of property without due process of law, and that property has or has not been taken without just compensation. The fact remains, however, that the single question of just compensation may be the only one to be determined; and while, in the present case, the bill of complaint challenges the legality of the ordinance by reason of defective procedure of the board of supervisors, and alleges that complainant's property is being taken without due process of law, and that complainant is being deprived of the equal protection of the laws, it is convenient to determine at this stage of the inquiry what, if any, limitations have been placed upon the power of the board of supervisors by the laws of the state to fix rates for this character of public service. The complainant having undertaken to do that which is a proper work for the state, and having accepted the conditions of public service which attach to like service performed by the state itself, it becomes important to know what conditions the state has imposed upon this service.

The case of *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, is a most carefully considered and instructive case upon this subject. The common council of the city of San Diego had passed an ordinance fixing water rates for the year beginning July 1, 1891. The water company brought suit against the city, the common council, the mayor, and the individual members of the council, to annul the ordinance and enjoin its enforcement. The complaint alleged, in substance, that the entire revenue the water company could receive during the year in question, under the rates so fixed, would be insufficient to pay its operating expenses and fixed charges for that year, and would, therefore, afford no reward whatever to the company for furnishing the water, and that the ordinance would deprive the company of its property without due process of law, and without compensation. It was also alleged that by reason of certain fraudulent practice on the part of the council the company was deprived of a fair opportunity to be heard before the council, and prevented from properly presenting its side of the case. In discussing the question whether the rates fixed by the board of supervisors were just and reasonable, Mr. Justice Van Fleet, speaking for himself and Justices Henshaw and McFarland, said:

"Whether the fixing of rates by the council be called a legislative, judicial, or an administrative act, it is certainly not an adversary judicial proceeding, such as, under the Constitution, will conclude private rights. It is a proceeding on the part of the government to which neither the water company nor the rate payers are parties, conducted without notice to them, and without

any right on their part to effectually intervene. Such a proceeding cannot operate to divest private rights; and, though the Supreme Court of the United States holds it to be a legitimate exercise of governmental powers, that court also holds that, when it is carried so far as to deprive anyone of his property without just compensation, it is an unlawful exercise of such power, and simply void. The function of the courts is merely to ascertain whether the power has been carried beyond the constitutional limits so fixed, and, if such be found to be the case, to declare the acts of the council void."

Referring to the constitutional provision of the state relating to water rights, the court said:

"The meaning of the section is that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty, and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 6 L. R. A. 756, 16 Am. St. Rep. 116, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the Supreme Court of the United States, and contains some observations which perhaps may require modification, we are satisfied with the correctness of the conclusion [construction] there given to this section of the Constitution."

The court continues:

"It is apparent that the water company does not own the water which it collects and supplies, or the plant which it uses to collect and distribute that water, in the same sense in which a man is said to own his house or his farm. By the very nature of the use to which it is applied, the company has devoted that property to a public use. Having once undertaken to perform that public duty, it must continue to perform it, and must carry on its business under the lawful regulations of the government. In effect, the state may be said to have appropriated the water and the plant to public use. For that appropriation it is bound to make just compensation, and it has provided for such compensation by requiring the municipal authorities to fix just and reasonable rates at which the water is to be furnished to and received by the consumers. Since the state has 'taken' the use of this property, it is bound to provide a just compensation for that use, and article 14 of the Constitution must be construed as providing for that just compensation. The question of what is just compensation in such a case is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain; and it may be reduced to the formula that the public must pay the actual value of that which it appropriates to the public use."

Chief Justice Beatty, dissenting with respect to certain questions, expressed views in harmony with those of Mr. Justice Van Fleet upon this subject. He said:

"In fixing water rates, it is the duty of the city council to provide for a just and reasonable compensation to the water company. Anything short of that is simple confiscation, and is not only a violation of constitutional rights, but is an extremely short-sighted policy. Rates ought to be adjusted to the value of the service rendered, and this means that the water companies should be allowed to collect annually a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency, and declare a dividend to stockholders equal to at least the lowest current rates of interest, not on the par or market value of the stock, but on the actual value of the property necessarily used in providing and distributing the water to consumers."

The effect of this decision is to declare it to be the law of this state that the public service in which complainant is engaged is not required to be performed without reward; that the state has, by operation of law, appropriated to public use the water distributed by the complainant and the plant used in its distribution, and for this appropriation from year to year the defendants will be required to make just compensation. What this just compensation should be is the difficult question to be determined. It will be presumed, as declared by the Supreme Court of the United States, that the rates fixed by the board of supervisors are just and reasonable, and will be upheld, unless it clearly appears that they will result in taking complainant's property without just compensation. This question cannot be finally determined in this case upon this hearing, but, for the purposes of this motion, the court must ascertain from the evidence before it what the complainant will probably be able to establish on the final hearing.

In this inquiry the important question is the basis upon which just compensation is to be determined. It may be considered as established that it is the reasonable value of the property at the time it is being used for the public service, but how this value is to be ascertained, and what elements are to be included in the estimate, are still subjects of controversy. In the case of *San Diego Water Co. v. San Diego*, supra, it was held that bonded indebtedness was to be disregarded. But this was said with reference to the findings in that case. The court below had found as facts: (1) That the water plant and system of the water company at the time the ordinance was enacted was of the value of \$750,000. (2) That the cost of the plant and property of the water company necessary to furnish and supply the water to said city and its inhabitants at the time of the enactment of the ordinance was \$750,000. (3) That the reasonable and necessary operating expenses of the water company in managing and conducting its said property and plant for the year, and the amount actually expended for that purpose, was \$40,000. (4) That at the time the ordinance was enacted the water company was indebted upon its outstanding bonds regularly issued in the sum of \$1,000,000, bearing interest at 5 per cent. per annum, of which sum \$750,000 was necessarily expended in the construction of the plant, and the interest upon which (\$1,000,000) was \$50,000 per annum. In connection with findings covering specifically valuation and operating expenses, it is clear that an additional finding as to the bonded indebtedness and the interest on the same had no place as separate and distinct elements of valuation or just compensation. In the case of *Redlands, etc., Water Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843, the *San Diego Case* was cited, and the principles there announced deemed applicable to the later case. It was accordingly held that, for the purpose of fixing rates to be charged for collecting and furnishing water to the inhabitants of a city, provision should not be made for the bonded or other indebtedness of the company, or of the interest thereon, but that the fair value of the property necessarily used in furnishing the water was the basis upon which to determine the amount of revenue to be provided by the ordinance fixing rates, and that this basis should be the

same whether the works were acquired or constructed by the company with its own resources or with money borrowed from others. It was further said that the amount of the capital stock paid into the water company by its stockholders, and the amount of its bonded and floating indebtedness and the interest thereon, were immaterial factors in the question of reasonableness of rates. But in this case there was no averment in the complaint as to the value of the plant, and no showing before the court as to what this value was; and manifestly neither the amount of the capital stock nor the amount of the bonded indebtedness could supply this omission, and the conclusion which the court reached was that, as the value of the plant was the basis upon which the court was to determine the sufficiency of the compensation, it was essential to present that fact to the court before the water company was entitled to a judgment that the rates were unreasonable. But neither of these cases go to the extent of holding that in determining the value of the property of a corporation neither the capital stock nor bonded indebtedness can be considered. It is doubtless true that in many cases these elements may be excessive or fictitious, and represent speculative, rather than real or substantial, values. But there may be cases where both stock and bonds represent in the market a present actual value in the property of the corporation, and a value that could not be otherwise very well established. In such a case, what objection can there be to giving the evidence such consideration as, under all the circumstances, it deserves? It seems to me there can be none, and such seems to be the opinion of the Supreme Court of the United States.

In *San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, one of the questions sought to be determined in the action was the right of the water company to charge and collect for so-called "water rights" at reasonable rates as a condition upon which the company would furnish water for the purposes of irrigation, notwithstanding the rates fixed by the trustees of National City for water sold and furnished. Another question was whether the losses to the water company arising from the distribution of water to consumers outside of the city were to be considered in fixing the rates for consumers within the city. The water company contended, with respect to these two questions, that in ascertaining what were just rates the court should take into consideration the cost of the plant; the cost per annum of operating the plant, including interest paid or money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it had expended for the public use, or upon some other fair and equitable basis. In answer to this contention the court said:

"Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as, under all the circumstances, will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to

demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just, both to the company and to the public."

The court also cited the previous case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, a railroad rate case, and held that the principles of that case were applicable to the water case; citing the following from the former decision:

"The basis of all calculation as to the reasonableness of rates to be charged a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its stock and bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

It follows that in determining the value of corporate property the amount and value of the bonds and stock, if not in excess of the real value of the property, may be considered.

The complainant contends that an element of value in its corporate property is its franchise. Section 2 of article 14 of the Constitution of the state provides:

"The right to collect rates or compensation for the use of waters supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The Constitution also provides, in section 1 of article 13, that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law; and franchises are declared to be property. Under this constitutional provision and the law passed to carry it into effect, the complainant's franchise is taxed by the city and county of San Francisco at a valuation of \$5,395,233. The defendants claim that this franchise has no element of value as property in use by the complainant in supplying water to the city and county of San Francisco and its inhabitants. This claim appears to be based upon an observation made by Mr. Justice Temple in *San Diego Water Co. v. San Diego*, supra, that:

"There is no limit to the number of companies which may bring water into the city. The franchise is freely offered to all in the Constitution. If there are many companies, and thereby the cost of management is increased, this fact would not call for increased rates. The service is worth no more when rendered by ten companies than when one company furnishes all the water."

This observation does not appear to have been concurred in by the other members of the court, and it is doubtful if it can be accepted as disposing of the question.

The case of *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, was a condemnation proceeding in the Circuit Court of the United States for the Western District of Pennsylvania, under an act of Congress providing for the condemnation of a lock and dam in the Monongahela river. It was provided in the act that "in estimating the sum to be paid by the United States the franchise of the said corporation to collect tolls shall not be considered or estimated." 25 Stat. 411. Upon the trial in the Circuit Court evidence of the value of the franchise was rejected. In the Supreme Court the correctness of this ruling was considered, and upon this question the court said:

"The power to regulate commerce is not given in any broader terms than to establish post offices and post roads, but, if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal there can be no question, and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. \* \* \* The theory of the government seems to be that the right of the navigation company to have its property in the river and the franchises given by the state to take tolls for the use thereof are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual."

It is true this was a condemnation proceeding, and the question was to determine what was just compensation for the appropriation of corporate property to a public use, while the case before this court relates to the fixing of water rates which shall be a just compensation for the appropriation of complainant's property to a public use. It is not perceived that there is any difference in the principles ap-

plicable to the two cases, and this appears to have been the view of the Supreme Court in *San Diego Water Co. v. San Diego*, supra.

The complainant next contends that it has an established business as a water company and as a going concern in supplying water to consumers, and that its plant has a value by reason of these advantages beyond the mere cost of reproducing the plant. In support of this view the complainant cites the case of *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827. The opinion is by Mr. Justice Brewer of the Supreme Court. On page 865 he says:

"A completed system of waterworks, such as the company has, without a single connection between the pipes and the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction."

This was also a condemnation proceeding, but, as before stated, the principles of compensation applicable to such a case appear to be applicable to the present case.

The principles of just compensation established by the courts in the several cases they have had under consideration are of great assistance in solving many of the difficult questions involved in this character of litigation; but the application of these principles to the facts of a particular case is, after all, the simple rule of determining what, under all the circumstances, is reasonable and just as between the rate payers and the corporation engaged in performing the public service. With these decisions and this rule before the court, we proceed to inquire whether, upon the evidence submitted in support of the motion for a temporary injunction, it appears probable that the complainant will be successful upon the final hearing in showing that the ordinance under consideration will have the effect of depriving complainant of just compensation for the public service in which it is engaged.

The bill of complaint, verified by the oath of the president of the complainant corporation, alleges that the property now actually used and necessary and essential in supplying said city and county and its inhabitants with pure fresh water is of the value largely in excess of \$40,000,000. The bill also alleges that the city engineer has estimated the value of complainant's property to be \$28,024,389, but that said estimate is unjust, unreasonable, unfair, inequitable, untrue, and oppressive, and that on the 28th day of February, 1903, and on March 9, 1903, the actual value of the property actually in use and owned by complainant in supplying said city and county and its inhabitants with water was and is a sum largely in excess of \$40,000,000. The affidavit of Pelham W. Ames, the secretary of the complainant, alleges that the entire tangible assets of the complainant, as shown by its books of account, are \$36,356,235.78 and upwards. The affidavit of H. Schussler, the chief engineer of the complainant, alleges that the value of complainant's property, excluding its water rights and

its franchise, and including, among other things, its reservoir sites, watersheds, filter beds, head works, conduits, and distributing systems, which are at the present time used in distributing water to the city and county of San Francisco and its inhabitants, in affiant's opinion, based upon his knowledge and experience, is at least the amount set forth in a detailed statement, which amounts to a total of \$34,-718,600.

The defendants, in their answer, deny literally the allegation of the bill that complainant's property is of the value of \$40,000,000, or of any value exceeding \$20,000,000. In support of defendants' claim that the value of complainant's property does not exceed \$20,000,000, they have introduced in evidence the affidavit of Charles W. Fay, clerk of the board of supervisors, to the effect that complainant's property, assessed in a number of localities in the state, aggregates in assessed valuation the sum of \$13,785,632, including an assessment in the city and county of San Francisco upon the franchise amounting to \$5,332,079, leaving the assessed valuation of complainant's property in this state, exclusive of franchise, the sum of \$8,453,553. That this valuation is of little value in determining the actual value of the property is disclosed by the difference between this valuation and a valuation of tangible assets of the complainant as shown by its books. The affidavit of A. B. Thompson, introduced in evidence by the defendants, avers that he has examined complainant's books, and finds that the valuation of complainant's tangible assets amounts to \$24,-111,974.36. This valuation is, of course, exclusive of the franchise. The city engineer appears also to have made a careful appraisalment of complainant's property for the board of supervisors for the present year. This appraisalment is summarized as follows:

|  |              |
|--|--------------|
| Estimated value of works actually in use.....                                    | \$24,124,389 |
| Estimated value of established business.....                                     | 1,400,000    |
| Suggested value of franchise, about 10 per cent. of estimated construction ..... | 2,500,000    |
| Total .....  | \$28,024,389 |

These estimates, made for the defendants, show that, as usual, the assessed valuation is much below the real value.

Another method of determining the value of complainant's property is the value placed upon it by the public in dealing with complainant's bonds and stocks. This is one of the elements which I understand the Supreme Court of the United States to say may be considered, and which I do not understand the Supreme Court of the state to say may not be considered in this connection. The capital stock of the complainant is \$14,000,000, divided into 140,000 shares, of the par value of \$100 each. These shares have all been issued and the capital paid in at par. No part of this stock appears to be fictitious. The stock is not divided into preferred and common shares, but is all one class of stock. There is no evidence before the court that the capitalization of the corporation is excessive, except a general charge, unsupported by any facts. The complainant has a bonded indebtedness of \$13,975,000. It is not claimed that the borrowed money represented by this indebtedness had not gone into the property of the corporation, nor is it claimed that this indebtedness is



excessive or fictitious. The annual interest charge on this indebtedness is \$659,000, or less than 5 per cent., indicating that those who took the bonds considered complainant's property as affording ample security for the loans. It appears, further, that the floating or unsecured indebtedness of the complainant is \$1,017,500, and that the annual interest charge on this indebtedness is \$55,800, or a little more than 5 per cent. There is no claim that this indebtedness is fictitious or excessive in amount, or that the complainant does not have property actually representing this indebtedness. The rate of interest on this indebtedness indicates that those who have advanced the funds considered the business and property of the complainant sufficient guaranty for the loans. The capital stock and indebtedness of the complainant may be summarized as follows:

|                             |              |
|-----------------------------|--------------|
| Capital stock .....         | \$14,000,000 |
| Bonded indebtedness .....   | 13,975,000   |
| Floating indebtedness ..... | 1,017,500    |
|                             | <hr/>        |
|                             | \$28,992,500 |

There is, however, one objection to this estimate. During the month of April of the present year the stock of the corporation sold as low as \$83 $\frac{3}{8}$  per share and as high as \$85, the average selling price being about \$84 per share. If the whole capital stock of the corporation were valued at the rate of \$84 per share, the entire capital stock would be worth only \$11,760,000, and it is contended by the defendants that under this method of ascertaining the value of complainant's property no greater sum than the present market value of the stock should be considered. It is contended, on the other hand, that this reduced valuation would be unfair and unjust. It is probably true that only a small part of the capital stock could be bought at this price. It is also true that the stock market is not always a safe guide to values. It may be influenced by considerations that do not affect the real value of the property, and in the present case it is alleged in the bill of complaint that the action of the board of supervisors in passing ordinances reducing water rates has caused the reduction in the value of the stock. It is also suggested that the action of the city in adopting the new charter, which went into effect on January 8, 1900, and which contains provisions for the acquisition of public utilities, and specifically the acquisition of waterworks by the city and county, has affected the market value of the stock of the complainant corporation. However this may be, the fact remains that in the year 1899 the stock of this corporation sold as high as \$103 per share, and there is nothing in the record tending to show any depreciation in the value of the property since that time; on the contrary, the phenomenal growth of the city during the past three years, and the increase in the consumption of water, should rather have tended to at least maintain the par value of the stock. But, for the purpose of the present inquiry, evidence of the influences operating upon the market price of the stock may well be disregarded, and the court confine itself to the consideration of the simple question, what does the public consider complainant's stock to be worth? We will assume, for the present purpose, that it is \$84 per share, at which rate

the entire capital stock would be worth \$11,760,000. The present market value of complainant's capital stock and the indebtedness may then be summarized as follows:

|                                    |              |
|------------------------------------|--------------|
| Capital stock, present value ..... | \$11,760,000 |
| Bonded indebtedness .....          | 13,975,000   |
| Floating indebtedness .....        | 1,017,500    |
| Total .....                        | \$26,752,500 |

For present purposes this appears to be a fair valuation of complainant's property. It is less than the appraisement of the city engineer, including the values of the franchise and the established business. It is also less than the tangible assets of the company, as estimated by the defendants' expert accountant, A. B. Thompson, if we add to his estimate the franchise and the value of the established business as determined by the city engineer. The evidence may establish a greater valuation for the final determination of the case upon the merits. It does not seem probable that it will be less.

The next question to be considered is, what will be a fair and reasonable income for the complainant to receive as a just compensation for the public use of its property? A number of bankers have testified as to the usual and customary net income from investments of \$10,000,000 and upwards of capital in corporations of a quasi public nature, where judiciously managed. The affidavits of four bankers of long experience and well-known character and standing fix the rate at not less than 7 per cent. per annum, and aver that a net income of less than 7 per cent. per annum from large investments would not be a reasonable or fair return. The affidavits of five bankers of like standing and character and similar experience fix the rate at not less than 6 per cent. per annum, and aver that a net income of less than 6 per cent. per annum for large investments would not be a reasonable or fair return. The affidavit of one banker of large wealth and experience fixes the rate of net income from such investments at between 4 and 5 per cent. per annum. The weight of evidence is clearly in favor of a rate of not less than 6 per cent. per annum. This evidence is further supported by the provisions of the act of the Legislature approved March 12, 1885 (St. Cal. 1885, p. 95, c. 115), providing for the control, sale, rental, and distribution of appropriated water in the several counties of the state. This act provides that the rates fixed by the board of supervisors for the various counties shall be so adjusted that the net annual receipts and profits to the persons, companies, associations, and corporations furnishing water to the inhabitants of such counties shall not be less than 6 nor more than 18 per cent. per annum, presumably because the Legislature considered that investments of capital by private individuals in a public work and service that the state might otherwise undertake would be reasonably entitled to receive at least 6 per cent. income on the investment, and that more than 18 per cent. would be unreasonably large. This act does not, in terms, apply to the city and county of San Francisco, but there seems to be no good reason why private capital invested in a public use for the benefit of the people of the city and county of San Francisco is not entitled to the same presumption as to what

would be reasonable compensation for its use as capital invested for the benefit of the people in other counties of the state. But in the present inquiry all doubts as to facts in controversy should be resolved in favor of the defendants, having in view what was said by the Supreme Court in *San Diego Land Co. v. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154, that judicial interference should never occur unless the case presents clearly and beyond all doubt a flagrant attack upon the rights of property. In view, therefore, of all the circumstances, the court is of the opinion that the complainant is entitled to receive at least 5 per cent. as the net compensation it is entitled to receive on the value of its property. With these estimates determined, the following result is reached: The value of complainant's property is at least \$26,752,500. The rate of income or profit should not be less than 5 per cent., or \$1,337,625, as the net compensation for the year. It appears from the evidence that the operating expenses of the corporation for the year will be \$506,000, and taxes \$286,390; making the total expenses \$792,390. Adding this sum to the net compensation of \$1,337,625, the gross income for the year should be \$2,130,015. The complaint asks that an allowance be made of \$196,000 for the element of deterioration of the perishable part of the plant during the year. It seems just and proper that such an allowance should be made. It is sanctioned by authority, but I do not think it necessary to take that element into consideration at this time.

The question now occurs, will the ordinance under consideration produce a gross income of \$2,130,015? It appears that the estimated receipts of the complainant for the fiscal year ending June 30, 1903, under the present ordinance, will be \$1,998,906; that for the year ending June 30, 1904, there will probably be an increase in the delivery of water to private consumers. What this increase will be, or the income therefrom, cannot be determined very satisfactorily from the record before the court. One estimate is that there will be an increase in income amounting to \$80,000; another, \$86,786; and still another, \$102,000. The first and last estimates appear to be made by the officers of the complainant, and the second by a member of the board of supervisors. In the absence of more definite proof upon the subject, the doubt as to the actual fact will be resolved against the complainant, and the increase estimated at \$102,000. The total receipts of the complainant from all sources for the year ending June 30, 1904, would, therefore, not exceed \$2,100,906. From this sum is to be deducted the reduction upon present rates for private consumers, as provided in the ordinance under consideration, namely, a reduction of approximately 7 per cent. It is estimated that this reduction will amount to the aggregate sum of \$130,361. The gross income of the complainant, under the ordinance, would then be \$1,970,545, or \$159,470 less than the income it is entitled to receive as just compensation for the public use of its property at a reasonable and fair valuation. The effect of this reduction upon the rate of income that complainant would receive, under the ordinance, upon these estimates, would be the relation which the amount of the net income, namely, \$1,178,155, bears to the value of complainant's property,

namely, \$26,752,500, which would be  $4^{40}/_{100}$  per cent., or  $60/_{100}$  per cent. less than just compensation for the public use of complainant's property, considered with respect to its valuation in the manner herein adopted.

The same general result is reached by still another calculation. The gross income of the complainant will be, as stated, \$1,970,545. The operating expenses will amount to \$506,000, and taxes the sum of \$286,390. Deducting these two sums from the gross income of the complainant, there remains the sum of \$1,178,155 available for the payment of interest on complainant's bonded and floating indebtedness and dividends for stockholders. Deducting from this sum the total annual interest charge on the indebtedness, there remains the sum of \$462,855 as net income available for dividends to stockholders, a sum which equals  $3^{3}/_{10}$  per cent. on the par value of \$14,000,000 of stock. These various sums may be tabulated, as follows:

|   |               |
|---|---------------|
| Receipts for fiscal year ending June 30, 1903.....  | \$1,998,906   |
| Estimated increase in receipts for fiscal year ending June 30, 1904 .....                     | 102,000       |
| Total receipts for year ending June 30, 1904.....   | \$2,100,906   |
| Deduct reduction of rates for private rate payers, provided in ordinance .....                | \$130,361     |
| Operating expenses for year .....   | 506,000       |
| Taxes .....   | 286,390       |
|   | <hr/> 922,751 |
| Balance remaining for payment of interest on indebtedness and dividends to stockholders ..... | \$1,178,155   |
| Total annual interest charge on bonded and floating indebtedness amounts to .....             | <hr/> 715,300 |
| Amount available for dividends ( $3^{3}/_{10}$ per cent. on \$14,000,000) .....               | \$ 462,855    |

But, before reaching a final conclusion upon the subject, one other element should be considered, and that is, from the standpoint of the consumer, is the water rate he is paying excessive? If it is, there should be an adjustment for that condition. From the brief of the city and county attorney it appears that the average water rate required to be paid for a six-room house in 30 of the large cities of the Union is \$17.25 per annum. The present rate in San Francisco for the same house is \$17.40 per annum, or a very little above the average. This does not appear to be excessive or unjust, in view of the fact that the conditions prevailing on the peninsula of San Francisco with respect to a water supply are very different from those prevailing in or near most of the large cities of the United States.

In the case of the Spring Valley Waterworks v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173, heard in the Supreme Court in the year 1883, Mr. Justice Field, in a dissenting opinion, correctly described the situation at San Francisco as to the water supply as it then existed, and the relation of the complainant to the work of supplying the demand. He said:

"The necessary supply of water could not be obtained from any natural streams or lakes on the peninsula, upon the upper end of which the city and county are situated. A small lake near the city furnished an insufficient

supply, and of inferior quality. The company, therefore, soon after its incorporation, undertook to collect the required quantity in artificial reservoirs, as it descended in rain from the heavens. At a distance of about twenty miles from the city there is a natural ravine lying between the mountains near the ocean and the hills bordering the Bay of San Francisco. The company acquired the lands within this ravine and on its sides, amounting, as represented by counsel, to eighteen thousand acres, and erected in it heavy walls at long distances apart, thus making great reservoirs, into which the water was collected until lakes were formed extending several miles in length. With aqueducts, pipes, and other conduits, the water thus collected was carried to the city and distributed in mains. It is said that the cost of these works to the company amounted to nearly fifteen millions of dollars. Before their construction and the introduction of this water, the inhabitants of the city were poorly and inadequately supplied. With the completion of the works of the plaintiff all this was changed. Water was furnished to all persons calling for it at their houses, and, if desired, in every room, and to the city in abundance for all its needs."

From the affidavit of Mr. Schussler, complainant's chief engineer, it appears that the present area of the several tracts of land used as watersheds, reservoir sites, and filter beds aggregate 65,752 acres, and are of the value of \$16,503,600, and that the head works, conduits, and distributing system is of the value of \$18,215,000, making a total of \$34,718,600. In comparing the water rates of San Francisco with the water rates in other cities, these facts may well be considered, and in this light the rates do not appear to be unreasonable.

If, as appears from the weight of the expert evidence before the court, 6 per cent. per annum is the smallest income that can be considered reasonable for the investment under consideration, and 5 per cent. per annum the smallest income which the court can, under all the circumstances of this inquiry, consider as reasonable and just, manifestly  $4^{40/100}$  per cent. on the value of the property, or  $3^{30/100}$  per cent. on the capital stock of the corporation, is unreasonably low and confiscatory, and amounts to the taking of private property for public use without just compensation, thereby depriving the complainant of its property without due process of law. The small difference between a rate of income that would yield just compensation and one that would not, does not render the controversy any the less important, or the result any the less an infraction of a constitutional right.

What is the meaning of "just compensation"? It is a constitutional phrase, and is found in section 14 of article 1 of the Constitution of this state, where it is provided that property shall not be taken or damaged for public use without just compensation. It is in this constitutional sense that it is used by the Supreme Court of this state in the San Diego Case, and by the Supreme Court of the United States in the cases where this question has been under consideration. In *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 329, 13 Sup. Ct. 622, 37 L. Ed. 463, the Supreme Court of the United States, referring to what constituted "just compensation," said, "Before this property can be taken away from its owners, the whole value must be paid." And in *Virginia and Truckee R. R. Co. v. Henry*, 8 Nev. 170, the Supreme Court of Nevada said:

"It is difficult to imagine an unjust compensation; but the word 'just' is used evidently to intensify the meaning of the word 'compensation,' to cor-

vey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample; and no Legislature can diminish by one jot the rotund expression of the Constitution."

Neither is it in the power of the court to diminish the measurement of just compensation in any degree. Just compensation is an absolute fact, and, when ascertained, must be so regarded in any judgment the court may render. As said by Mr. Guthrie, in his lectures on the fourteenth amendment to the Constitution of the United States, in construing or expounding a constitution, the ancient maxim, "*De minimis non curat lex*," has no application. "The violation of a constitutional right should never be measured or met by any such plea. It is said that counsel once attempted to argue before Chief Justice Marshall that in the particular instance before the court the invasion of constitutional rights was slight; but he was sternly reminded that the case involved the Constitution of the United States, and that the degree or extent of the invasion had no bearing upon the point. When a constitutional right is invaded, we are not bound to stand silent so long as moderation is practiced. There can be no greater political blindness, no more dangerous policy, than to sanction the infringement of constitutional rights because the particular instance is in itself apparently harmless, or seems expedient. Admit the wedge ever so little, and there is nothing to prevent its being driven home. We are not compelled to wait until the unconstitutional measure becomes ruinous confiscation, or an intolerable interference with personal liberty. In respect of constitutional guaranties, we have a right to expect absolute security and protection, and the courts are under a duty to enforce the constitutional provisions guarantying our rights wholly irrespective of the degree of infringement. Present inconvenience, however great, present expediency, however tempting, can never justify the slightest disregard of any provision of a constitution."

In this discussion I have not considered the controversy concerning hydrant rates for water supplied to the city, alleged by the complainant to be unreasonably low, nor have I considered the water rates for public buildings paid for by the city. The questions discussed have had relation only to the rights of private consumers, and in this connection the court at the close of the oral argument suggested a query as to the effect of an injunction upon private consumers directed to the defendants the board of supervisors, or the officers of the municipal corporation. An examination of the authorities submitted by the counsel for the complainant with this question in view has satisfied me that there will be no difficulty in this aspect of the case. The board of supervisors, or the municipal corporation, or perhaps both, represent the water rate payers in this controversy, and are bound by the proceedings. This has been established by abundant authority. *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego L. & T. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; *San Diego L. & T. Co. v. Jasper (C. C.)* 110 Fed. 702; *San Diego L. & T. Co. v. Jasper*, 23 Sup. Ct. 571, 47 L. Ed. 892; *Los Angeles City Water Co. v. Los Angeles (C.*

C.) 88 Fed. 720; *Chicago & Northwestern Ry. Co. v. Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744; *Spring Valley Waterworks v. Bartlett* (C. C.) 16 Fed. 615, 8 Sawy. 555; *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 6 L. R. A. 756, 16 Am. St. Rep. 116; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

It follows that, in view of all the circumstances of this case, the court is of the opinion that the ordinance will not furnish the complainant a just or fair compensation for the service to be rendered, or a reasonable and just return for the use of its property; that the ordinance will be confiscatory in effect, and deprive complainant of its property without just compensation and without due process of law; and that it is probable that upon the final hearing it will be so determined.

A preliminary injunction will therefore issue, restraining the defendants pendente lite from enforcing either the ordinance of March 9, 1903, or the ordinance of May 23, 1903; and the complainant will give bond in the sum of \$135,000 to answer all damages which the defendants or any person injured by reason of this injunction may sustain if, upon the entry of a final decree upon the merits, it shall be determined to have been improperly issued.

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VON FABER et al. v. FABER.

(Circuit Court, S. D. New York. August 18, 1903.)

1. UNFAIR TRADE—USE OF NAME.

Plaintiff was the successor of the original Faber pencil manufacturing business, established in 1761, which business became and is widely known under the name "A. W. Faber," who succeeded the originator of the business. Thereafter defendant's father, Eberhard Faber, was appointed sole agent for the United States of the German house of Faber, and was authorized to manufacture a low grade of lead pencils, but was never given the right to use either the name "Faber" or "A. W. Faber." Defendant's father, however, wrongfully labeled certain of his pencils with the name "Faber," and defendant, on succeeding to his father's business, over plaintiff's protest, continued to label his pencils "E. Faber," "Faber," "Faber Pencil Company," and "Eberhard Faber Pencil Company," which resulted in misleading plaintiff's customers to think that defendant's pencils were manufactured by the original house of Faber. The agency was subsequently terminated by reason of these practices, and defendant subsequently signed a written contract agreeing not to use the word "Faber" without the word "Eberhard," or the initials of defendant's first name. Defendant, however, failed to comply with this contract, and continued to stamp his pencils as before. *Held*, that defendant was guilty of unfair trade, and that plaintiff was entitled to an injunction restraining him from using the word "Faber" without the prefix "Eberhard" or "John E." or "J. Eberhard."

2. SAME—FAMILY NAME.

Where a family name has become a trade-mark applied to a manufactured article, no special right to use the same accrues by virtue

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¶1. Unfair competition, see notes to *Sheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

of the relation which descendants bear to the original manufacturer of the same name; such descendants being entitled to use such family name only in connection with some distinguishing name or initial where the use of the surname alone would create unfair competition in trade.

### In Equity.

The bill of complaint was filed, praying a writ of injunction enjoining the defendant, his servants, etc., from making, selling, or causing to be made or sold, or advertising, or causing to be advertised, any lead pencils, erasive rubber, rubber bands, etc., bearing on said goods, or on the labels, wrappers, boxes, or other coverings affixed thereto, or in which they are contained, stamp lettering, or other marks, containing the name of "Faber," or "Faber Pencil Company," or any like or kindred designation in which the name "Faber" is used without the prefix "Eberhard," or in which the name "Faber" is used, associated with "Eberhard Faber," or "E. Faber," or otherwise, in such a way as likely to cause a purchaser or consumer to believe that the defendant's business is complainants' business, or that defendant's goods are the original Faber goods, or the products or goods of these complainants or of their predecessors in business. The gist of the charge of the complaint is that the defendant is wrongfully and unlawfully using the name "Faber" in the manufacture and sale of lead pencils, to the confusion of the public, and the great damage and injury of the complainant and its business. The bill of complaint also demands an accounting and a judgment for damages.

Fred. W. and Alfred E. Hinrichs (Frederic W. Hinrichs, of counsel),  
for complainants.

Forbes & Haviland, for defendant.

RAY, District Judge (after stating the facts as above). The house of A. W. Faber was established in 1761, and is one of the oldest and best-known houses engaged in the manufacture of pencils in the world—possibly the oldest and the best-known house. The central seat of its business is at Stein, Bavaria, where its pencil manufactory is situated. As a lead-pencil manufacturer and dealer, the house is principally known. This house started business on a moderate scale, which grew to enormous proportions. At the present time it has more than one factory, and branch houses at Berlin, Paris, London, and New York, with agencies at other large and central cities. In a circular issued by the defendant about the year 1890, and which is in evidence, a condensed history of the house is given as follows:

"Kasper Faber settled in the little village of Stein, near Nuremberg, and there commenced the manufacture of Faber's pencils in 1761. He carried the weekly product of his factory to Nuremberg in a hand basket. But the high price paid for his goods furnished the best proof of their early superiority. Anthony William Faber, whose name the firm bears to this day, succeeded his father, Kasper Faber. The business gradually grew under the successive owners, but under the management of Mr. John Lothar Faber, who afterwards became Baron Lothar von Faber, the business increased rapidly. He associated with him his two brothers, Mr. Johann Faber, who remained at Stein, and Mr. Eberhard Faber [the father of this defendant], who came to the United States, and established a branch house in New York, in which was centered the trade of North America. In 1861 a centennial festival was held at Stein, in which employers and employes joined. All of the Faber's pencils used in the United States were made in Germany or here in New York, the more expensive ones being the imported pencils. The graphite used in making the very best pencils was drawn from Siberia."



The defendant, having the same family name as the complainants, has, it is contended, failed to use his name when competing with the complainants, A. W. Faber, in such a way as to differentiate his establishment and his goods from those of the complainants; and the charge is that the defendant simulates complainants' mode and manner of putting up and placing on the market its most popular lines of pencils. The complainant contends that the defendant tends to breed and has bred confusion in the market, and caused purchasers and users of lead pencils, etc., to purchase the goods made and sold by the defendant, when they desired to purchase and use the goods made by the complainant.

The evidence in this case, which is very voluminous, shows that formerly the relations of the defendant's house to the complainants' house were those of sole agent for the United States, in a very broad and comprehensive sense. For many years the father of the present defendant was the sole agent for the United States of the complainants' predecessor, and there was not only a business but a family relationship. In the beginning and for many years the A. W. Faber house furnished capital for the defendant's predecessor, including manufactured goods, and the defendant house sold the A. W. Faber house goods; but after a time the defendant house was given the right to manufacture and sell a low grade and inferior quality of lead pencils, but was not given the right ever to use either the name "A. W. Faber" or "Faber." After a time the defendant, formerly known as John Robert Faber, John Eberhard Faber, also known as Eberhard Faber and E. Faber, following out certain practices in which his father, as agent for the plaintiff house, had indulged, began to use the name "Faber" upon lead pencils, and in connection with other stationary goods which he was making and selling in the United States on his own account and for his own profit and gain, in competition with the plaintiff house; the agency having been terminated March 31, 1894, because, mainly, of the alleged wrongful and illegal practices of the defendant. The defendant has made, against the protest of the complainant, the principal lines of A. W. Faber's pencils, distinctly imprinted and labeled "E. Faber"; and these lines of pencils have been made of the same size and shape as complainants' pencils, and the same quality of pencils have been put up in packages of the same size and shape, with labels of the same color and markings, and in such a manner as to actually confuse the public, and induce those who desire to purchase the A. W. Faber pencils to purchase the pencils made by the defendant. In the manner mentioned, and by using the name "E. Faber" instead of the name "Eberhard Faber," the trade has been easily misled, and, to quite an extent, in different parts of the United States; many persons having purchased the defendant's pencils, believing they were purchasing the A. W. Faber pencils. These practices, persisted in by the defendant, have not only injured the complainant in its business, but, if allowed, will still further injure the complainant. The court is satisfied that these practices of the defendant have been persisted in and were adopted for the purpose of taking away and injuring the legitimate business of the complainant. The defendant knew that the house of A. W. Faber had come to be known

generally as the Faber House, or the House of Faber, and that its pencils were known the world over, wherever used, as the Faber pencils.

The defendant has not used his full name in designating his goods, nor has he used the initials "J. E. Faber." The defendant, in putting up and packing his goods for the market, has in many instances extensively so packed them and so placed the labels about packages as to conceal from the ordinary observer the initial "E.," and in this way has still further confused the public and purchasers, and caused his product to be purchased, sold, and used as the Faber pencil, the purchasers and users believing that they were purchasing the goods of the ancient, established house of A. W. Faber. Formerly the defendant, in his ordinary correspondence and in his business and social relations, gave and used and signed the name "John Eberhard Faber," and it was mainly, if not entirely in connection with the practices above mentioned, which interfered with and seriously affected and injured the business of the house of A. W. Faber, that the defendant used the name "E. Faber."

As early as the year 1897 the attention of the defendant was called to his unfair methods of trade and competition in the pencil business and in the rubber stationery business. The defendant denied that he had misused the name of Faber, and denied that there had ever been any agency on the part of his house for the house of A. W. Faber; and the defendant then claimed that the numbers on the pencils had been devised by him (the defendant). It appears from the evidence that the defendant, in carrying on his business, has used the same numbers on certain goods or qualities of pencils used by the house of A. W. Faber, for the same grade and quality of pencil. The defendant also used the words "Faber Pencil Co." and the words "Faber Pencil Works" to designate his works, business, etc.—substantially the names that had been used by the defendant, as agent for the plaintiff house, to designate the business, etc., of the complainants. In 1894, and before the dissolution of the agency, the defendant had agreed that all pencils made by him should be sold under the name of "Graphite Pencil Co." For many years, while the agency continued, A. W. Faber had permitted the defendant and his predecessors to counterstamp the A. W. Faber lead pencils with the words, "E. Faber, New York, sole agent." In this way the words "E. Faber" had for many years prior to the dissolution of the agency been associated with the name "A. W. Faber," and with the pencils made and sold by the complainant house. Hence the use by defendant of the name "E. Faber," when he came to set up the pencil business for himself, does not, in fact, distinguish the business or the pencils of the defendant from those of the complainant.

Formerly and generally during the agency, pencils, pencil cases, and rubber goods were advertised as "A. W. Faber's Domestic Pencils," "A. W. Faber's Gold Pens and Pencil Cases," "A. W. Faber's Rubber Goods," while penholders and miscellaneous stationer's articles were advertised as "E. Faber's," he conducting a business in that line for himself. All pencils of foreign or domestic

make were labeled "A. W. Faber," when they bore the name "Faber" at all. About 1895 or 1896 the word "Faber" was introduced by defendant into price lists, etc., of rubber goods. Instead of "A. W. Faber's Rubber Goods," we have "Faber's Rubber Goods." These rubber goods were made by C. Roberts & Co. for A. W. Faber and for Eberhard Faber. It was after or at about the time the defendant became a partner in the firm of C. Roberts & Co. that he made this change. The defendant, while agent for A. W. Faber, claimed that the word "Faber" was the very essence of the designation of A. W. Faber's goods. About the year 1895 or 1896 the defendant commenced to apply the name "Faber" alone to his goods.

In March, 1898, a contract or agreement was made as follows:

"Between the firm A. W. Faber, represented by Baroness Ottilie von Faber in Stein, as proprietress, and the firm Eberhard Faber, represented by Mr. Lothar W. Faber, in as partner, the following agreement was made to-day.

"Par. 1. The firm of Eberhard Faber is indebted to the firm A. W. Faber, as a result of the business relation formerly subsisting between them in the total sum of \$200,000, subject to interest at 4%. For this amount a mortgage has been recorded in the name of Baron Lothar von Faber, the late owner of the firm A. W. Faber, on the property Nos. 541, 543, 545 and 547 Pearl Street, New York; and by agreement of February 26th, 1894, the firm of Eberhard Faber has undertaken to reduce this mortgage to \$100,000, and to repay during the years 1896, 1897 and 1898, respectively, one-third part of these \$100,000. The interests accruing out of the above \$200,000 were paid by the firm of Eberhard Faber down to the end of the year 1897. But the payments agreed upon on account of capital have remained in default, and the firm of A. W. Faber has, therefore, brought suit against the firm of Eberhard Faber to enforce the payment of the two-thirds remaining due and payable for the years 1896 and 1897.

"Par. 2. Baron Lothar von Faber being deceased and having been succeeded by his widow, Ottilie von Faber, as heir; and said Pearl Street property, referred to in paragraph 1, having likewise passed in the meanwhile to Mrs. Jenny Faber, mother of the former proprietors; it is hereby agreed that a new mortgage is to be executed to Baroness Ottilie von Faber in the amount of \$200,000, for the term of three years, during which time the mortgagee shall have no right to call for payment of the principal debt, which is to bear interest at 4% and be secured on the property in Pearl Street above described. To render this possible, measures are to be taken exactly in accordance with proposals already made and communicated during the last year by Messrs. Fred W. & Alfred E. Hinrichs on behalf of the firm of A. W. Faber to the firm of Eberhard Faber—i. e., the property at present standing in the name of Mrs. Jenny Faber is to be transferred temporarily to her son Lothar W. Faber, in order that he, jointly and severally with Mr. John Eberhard Faber, execute a new bond, which is to accompany the mortgage newly to be executed by Mr. Lothar W. Faber. As soon as this bond, which is to be given by both partners of the firm of Eberhard Faber, shall have been executed, the title in the property is to be retransferred to Mrs. Jenny Faber.

"Par. 3. This agreement, as laid down in paragraph 2, is to be performed within four months from the date of this instrument. For the same period of time, of four months, the firm of A. W. Faber agrees to desist from further proceeding in the suit brought against the firm of Eberhard Faber.

"Par. 4. As soon as Baroness Ottilie von Faber shall have come into the possession of the new properly executed mortgage deed, and into possession of the bond described in paragraph 2, she will withdraw completely the suit brought against the firm of Eberhard Faber, and the provisions inserted into the Contract of February 26th, 1894, regarding the repayment of \$100,000, shall then be considered as canceled.

"Par. 5. The firm of Eberhard Faber binds itself to stamp all manufactures connected with lead pencils traceable to its establishment, not without first name, or at least with the initials of the first name, and under all circumstances to avoid anything which could tend to confusion as to the manufactures of the two firms.

"This agreement shall have full validity only after Mr. John Eberhard Faber, as copartner of the firm of Eberhard Faber, shall have added his signature here below.

"Stein and New York, March 16th, 1898.

A. W. Faber.  
"Lothar W. Faber.  
"Eberhard Faber."

Under this agreement, the defendant should have labeled his pencils, etc., either "J. E. Faber," or with his full name, "J. Eberhard Faber," or "John E. Faber." This is evidently the letter and spirit of the agreement. The purpose was to sufficiently separate the designations, and there is a wide difference, on such a question as is presented in this case, between "J. E. Faber" and "E. Faber." March 16, 1898, the signs on defendant's factory at Greenpoint were "Faber's Pencil Co." The complainant protested, but defendant did not change the signs until about the time the bill of complaint herein was filed. As late as September, 1900, the defendant's pencils were being sold, even at Calcutta, Asia, marked, "Faber Pencil Co., U. S. A." In short, the defendant violated both the letter and spirit of the agreement. Owing largely, if not entirely, to these acts of the defendant, communications intended for the one house would go to the other, and vice versa. If either has the right to use the name "Faber" alone, in designating pencils and kindred goods, that right belongs to the complainant. The house of A. W. Faber was so old and so well established and so well known, and its goods were so popular and reliable, that, in the estimation of the public and of the trade, "Faber pencils," etc., and "Faber Pencil Co.," conveyed to them the idea of A. W. Faber's pencils, etc. The name "E. Faber" does not sufficiently distinguish the defendant's goods from the complainants' to prevent confusion with the public and the trade, and the result has been, is, and will be, as stated, that the trade and users of pencils, etc., purchase and use defendant's goods when intending to purchase and use the complainants'. This fact is well known to the defendant, and such result was and is intended by him, and is the natural result of his conduct and business methods.

There is a great mass of evidence in this case, to which the court has given careful attention. Some five days were given to the argument, and this court has given the briefs of counsel a careful reading and careful consideration, with the above result as to the salient facts.

The question is, what remedy, if any, can this court give the complainant? It seems plain that the defendant ought to be restrained and enjoined from using the name "E. Faber," alone, in making, advertising and designating his goods, so far as they compete with those of the complainants. The complainants use the name "A. W. Faber." The defendant should use the name "J. E. Faber," or "J. Eberhard Faber," or "Eberhard Faber," as he may elect. Both are carrying on the business of manufacturing lead pencils

and the other goods mentioned. They are in competition. Such competition should be fair. Neither has the right to monopolize the name "Faber," or resort to unfair methods, resulting in confusion or injury to the business of the other, of the character mentioned. Many other transactions and occurrences might be mentioned, demonstrating the facts found as above stated, but it is unnecessary to enter into details.

It is not assumed that the defendant, as an original proposition, may not put his pencils in packages to suit himself, or use such colored wrappers and labels as he pleases, or number the grades as he sees fit; but when this is done by him in imitation of the goods of the house of A. W. Faber, for the purpose of injuring the business of that house, and supplanting their pencils, etc., by his own, and leading the purchasing and consuming public and the trade to think they are still purchasing and using the goods of A. W. Faber, a different question is presented. The father of the defendant, when acting as sole agent for the United States for his uncle, the complainant house, took out for himself, and registered as his own, the trade-mark "A. W. Faber," but subsequently assigned it to the Baron Lothar von Faber, then the house of which the complainant is the successor. Subsequently the defendant applied in his own behalf for the trade-mark "A. W. Faber." This is mentioned as bearing on the intent of defendant. Defendant admits he did not know of the taking out of such trade-mark and its assignment.

The defendant urges that the complainant has acquiesced in the acts of the defendant, especially in his use, etc., of the names "E. Faber," "Faber Pencil Company," etc., and that the complainant's laches should bar the granting of injunctive relief. The court does not agree with this contention. The complainant has been constantly objecting when these acts of defendant have become known to it. Negotiations have been had, changes made, etc., but defendant has failed to comply with just demands—even with the terms of his own written agreement. The complainant, at last, was compelled to resort to the courts. No undue haste was shown to precipitate a family litigation, and the court holds that there has been, under the circumstances, no laches. There are cases where resort to the courts should be speedy, and others where a resort to litigation should be the last remedy resorted to.

Actions to restrain unfair competition in trade, it is said, are based essentially upon fraud. That fraud must be proved. It cannot be inferred from unimportant similarities not calculated to mislead the purchaser. That the action may be maintained where it appears that the defendant is destroying or attempting to destroy an honest business by dishonest means. That the gravamen of the action is a fraudulent purpose on the part of the defendant to represent to the public that the plaintiff's business is his business, and by fraudulent misstatements to deprive the plaintiff of profits which he would otherwise receive. *Per Cox, J., Second Circuit, October term, 1902 (Kipling v. G. P. Putnam's Sons, 120 Fed. 631).* The court cites *Lawrence Manufacturing Company v. Tennessee Manufacturing Company, 138 U. S. 537-549, 11 Sup. Ct. 396, 34 L. Ed. 997.*

In *Globe-Wernicke Co. v. Brown & Besly*, 121 Fed. 90, the court (C. C. A., Seventh Circuit) held, "The imitation of complainant's box letter files, by defendant, by the use of the same names, emblems, and colors, in such manner as to deceive purchasers as to their origin (that is, their true maker," constitutes unfair competition, which entitled the complainant to an injunction. Headnote 1 is as follows:

"Complainant for many years made and sold box letter files under the names of 'Leader' and 'Eureka' files. The names were printed on the back of each file, and also on an emblem on the first of the index sheets inside. Complainant's name did not appear on the files, but they became thoroughly well known to the trade by the names, make-up, and markings as the product of its factory, and attained a large sale. Subsequently defendant placed on the market files which copied those of complainant in names, emblems, colors, size, and style of type and general make-up, so exactly that it would mislead the ordinary consumer, and have nothing thereon to indicate the maker. Held, that such action constituted unfair competition, and entitled complainant to an injunction restraining defendant from the use of such imitations, including the names and emblems, without regard to whether or not they constituted trade-marks."

See, also, *Hires Co. v. Consumers' Co.*, 41 C. C. A. 71, 100 Fed. 809; *Sterling Remedy Co. v. Spermine Medical Co.*, 50 C. C. A. 657, 112 Fed. 1000.

In *Globe-Wernicke Co. v. Brown et al.* (C. C.) 121 Fed. 185, held, that the word, "elastic," under the evidence, had been used by the plaintiff for such a length of time as to have acquired a secondary meaning in the trade and with the general public, as identifying its sectional bookcases, and similar articles of its manufacture, and to entitle it to protection against the use of such word in connection with the goods of other manufacturers, even if not valid as a technical trade-mark.

In *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C. A., D. Mich.) 121 Fed. 357, held, that "the right to relief in an action for unfair competition in trade is not dependent upon an actual fraudulent intent, where the conduct of defendant was such as would naturally deceive the public as to the origin of the goods, and where it is shown that such deception actually resulted." A person is ordinarily held to intend the consequences of his acts, when he understands his acts, and they are deliberate, especially; and, if such acts by a business competitor are calculated to deceive the trade, the public, and the user, and to palm off the goods or manufactures of such person for those of his competitor, and such is the actual result, and such person refuses to cease such conduct, the legitimate conclusion is that he intended and intends to cheat and defraud not only the competitor, but the trade, the general public, and the users and consumers. Such acts, persisted in, constitute fraud.

In the case last cited (121 Fed. 357) the first headnote is as follows:

"Complainant corporation was organized in 1881 under the name of 'The South Bend Pulp Company,' and engaged in business at South Bend, Ind., in the manufacture of wood pulp, and also in the manufacture and sale of plows. Its largest stockholder, who was president and general manager, was T. M. Bissell, who had been in the manufacture of plows for some years, and was the holder of patents for improved methods of making the same, which he transferred to the corporation. Its plow business was separate, and

was always conducted under the department name of 'The Bissell Chilled Plow Works,' and all of its plows were marked with the name 'Bissell,' in connection with other designations, and became known to the trade by such name. The making of plows was or became its principal business, and in 1891, with the consent of Bissell, its name was changed, through statutory proceedings in the court, to 'The Bissell Chilled Plow Works,' and it continued its business from that time under such name. About that time, Bissell, having sold a part of his stock, retired from the management, and he thereafter organized a corporation under the name of 'The T. M. Bissell Plow Company,' which engaged in the manufacture and sale of plows in South Bend, making substantially the same plows as complainant, and marking them with the name 'Bissell.' After a year or so Bissell died, and the business of such corporation was discontinued. Subsequently certain of defendants residing at Eaton Rapids, Mich., purchased a part of the stock, patterns, etc., of the corporation, taking an assignment of the right to use its corporate name, and organized the defendant corporation under the same name which engaged in making plows at Eaton Rapids. Circulars were issued, stating the removal of the company from South Bend, and containing pictures of Bissell, and referring to him as 'the inventor of chilled plows, once made in South Bend, Indiana, now only by the T. M. Bissell Plow Co., Eaton Rapids, Mich.' Its plows were also all marked with the name 'T. M. Bissell,' and were similar in design and appearance to those of complainant. The original Bissell patent for chilling was owned, and the process used, by complainant, which also held shop rights for the use of later patents, some of which were afterward owned and used by defendant. No one by the name of Bissell, or connected with the prior Indiana corporation of the same name, had any connection with defendant. There was evidence that retail purchasers in many cases did not know the difference between the two makes, and would accept either as a Bissell plow. Held, that the second Indiana corporation had no right to use the name 'Bissell' as it did, either in its corporate name or as a mark on its product, as against complainant, which had acquired the prior right, and that defendant obtained no right by the attempted assignment; that the action of defendant in the use made of the name in both respects constituted unfair competition."

In *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220 held:

"One entering into competition with another person of the same name, who has an old, established business, is bound to distinguish his goods from those of the latter so as to prevent confusion." Also: "When, by long use, the words 'Baker's Chocolate' had come to mean, in the minds of the public, complainant's goods, held, that a subsequent maker of chocolate, with the same name, was not entitled to use that name, whether with his given name or its initials, in such manner as to announce that the goods he sells are 'Baker's Chocolate.'"

This rule seems to be just and equitable. While ordinarily every man has the right to use his own name as he pleases, still he has no right to use it in such a way as to deceive the public or the trading or business world, or in such a manner as to purposely injure the business of his competitor of the same name by disposing of his own wares as the manufactures of this business rival. Especially is this true when such business competitor has the older business, and the first long-established use of the name.

In *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365, the Supreme Court held:

"Words which are merely descriptive of the place where an article is manufactured cannot be monopolized as a trade-mark, and this is true of the word 'Elgin,' as in controversy in this case. Where such word has acquired a secondary signification in connection with its use, protection from

imposition and fraud will be afforded by the courts, while at the same time it may not be susceptible of registration as a trade-mark under the act of Congress of March 3, 1881 [21 Stat. 502, c. 138, U. S. Comp. St. 1901, p. 3401]."

In the opinion the court said:

"In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those and other goods: and protection is accorded against unfair dealing, whether there be a technical trade-mark or not. The essence of the wrong consists of the sale of the goods of one manufacturer or vendor for those of another. \* \* \* But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, the relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense, by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of."

Citing *Lawrence M. Co. v. Tennessee M. Co.*, 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

This being true of a mere geographical name—the name of a place where the business is carried on or the goods are made—how much more ought the same principle to apply in the case of the name of the manufacturer or vendor of an article!

It, of course, stands to reason, and is in accord with common sense, that no man can be compelled to forego the use of his own name in carrying on his business. That is not what the courts have done or attempted to do. This is not attempted in this case. But the courts have and will, in a proper case, direct two persons of the same name, or doing business in the same place, to so use their names, or the name of the place, as to prevent the one from intentionally injuring the legitimate and established business of the other, or deceiving the public as to the origin of the goods they are purchasing or using. If the defendant is willing to rely on the merits and reputation of his own goods, he should be willing to label, mark, and advertise them as the goods or manufactures of "J. Eberhard Faber," or "John E. Faber," or "Eberhard Faber" (the name of his house); and there is no necessity, if honest competition is the intention, for using the mere initial "E." in connection with the word "Faber." It must always be remembered in this connection that the house of "A. W. Faber" established the lead pencil business not only in Europe, but in the United States, and that Eberhard Faber, the father of the defendant, and brother of Baron von Faber (plaintiff's predecessor), was merely the agent of the house of A. W. Faber, and that until 1895 or 1896 the defendant was merely agent, having the right to make and sell some inferior grade of domestic pencils on his own account. The defendant has no right to the name "Faber," but, as he succeeded his father, it is not improper to allow him the use of the name "Eberhard Faber," although that is not his full name. That is the name of defendant's house, as "A. W. Faber" is the name of complainants' house.



In this connection it may be well to call attention to *Allen B. Wrisley Co. v. Iowa Soap Co.* (C. C. A.) 122 Fed. 796, and the cases there cited, although the case declares no new principle. In *Royal Baking Powder Co. v. Royal* (C. C. A. 6th Circuit, March 16, 1903) 122 Fed. 337, we have another decision relating directly to confusion, etc., unfair competition, growing out of the use of the same name, and the power and duty of the court in such cases.

It has been intimated and suggested that the confusion has resulted largely from the acts and conduct of the complainant, or complainant house. If this were true, or such confusion was contributed to by complainant, the court would deny relief. *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282. That is a trade-mark case, but the same principle should apply here. But this court cannot find evidence that the complainant house is at all responsible for the existing conditions, unless it be said that, desiring to avert family litigation, it allowed the defendant too much time, "too much rope," during which he grew bolder and more aggressive, instead of desisting from conduct calculated to confuse and mislead the public, etc.

In *R. W. Rogers Co. et al. v. William Rogers Manufacturing Co.*, 70 Fed. 1017, 17 C. C. A. 576, the headnote is:

"A corporation which, by arrangement with one R. W. R., takes his name, and stamps it upon articles sold by it, with the purpose of inducing the public to think that in purchasing such articles they are purchasing the product of another 'R' Company of established reputation, will be restrained from using such stamp."

In the opinion of Shipman, C. J., he says:

"There cannot be much controversy in regard to the aspect with which the law regards the state of facts disclosed in the affidavits. The fair and honest use of a person's own name in his ordinary and legitimate business, although to the detriment of another, will not be interfered with. A tricky, dishonest, and fraudulent use of a man's own name for the purpose of deceiving the public, and of decoying it to a purchase of goods under a mistake or misapprehension of facts, will be prevented. Every case under this branch of the law of trade-marks turns upon the question of false representation or fraud. In this case Rogers helped to establish a corporation which took his name for the purpose of inducing the public to think that they were buying the well-known Rogers goods, and for the purpose of surreptitiously obtaining the advantage of the good reputation which other manufacturers had given to articles stamped with that name. The use by the defendant corporation of this name is not merely an injury to the complainant, but it is an intentional fraud upon the public. The difference in the result with which a court of equity follows an honest and a dishonest use of one's own name, although each use injured the person who had honestly acquired a use of the name as a trade-name, is shown in the valuable cases of *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.* [C. C.] 11 Fed. 498, and *Same v. Simpson*, 54 Conn. 527 [9 Atl. 395], where, as well as in *Rogers v. Rogers*, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675 [55 Am. Rep. 78], a large number of reported cases upon this portion of the law of trade-marks are collected."

There is nothing in *Rogers v. William Rogers Mfg. Co.*, 70 Fed. 1019, 17 C. C. A. 576, to conflict with the three cases cited.

In *Wyckoff et al. v. Howe Scale Co.* (C. C.) 110 Fed. 520, it was held:

"Plaintiffs acquired from the original manufacturers of Remington typewriters the sole right to use the name 'Remington' as a name for typewriters."

Thereafter descendants of the original manufacturers, also named 'Remington,' became members of a corporation making a typewriter under the name of 'Sholes,' when the name was changed to the 'Remington-Sholes.' Held that, since ultimate purchasers of typewriters might be led to think that the addition of the name 'Sholes' was a new style of the old machine, coming from the same source, such use of the name 'Remington' was an attempt to deceive the public and unwarranted. No special right to use a family name which has become a trade-mark applied to a manufactured article accrues by virtue of the relation which descendants bear to the original manufacturer of the same name, such descendants being entitled to no other than their natural rights to use their own names in the transaction of their own business."

This would seem to dispose of the claim of the defendant that he has inherited the right in any manner to use the name "Faber" as he pleases, when such use interferes with the right of the complainant.

In *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.* (C. C.) 118 Fed. 657, held:

"It is within the discretion of the court to enjoin an imitation of another's goods in the matter of form, color, or lettering of packages, when it is proven directly, or by strong inferential evidence, that the imitation was willfully made, or when such imitation, though innocently made, results in damage to the one whose rights are infringed. A manufacturer who so dresses his goods as to enable retail dealers to sell them to customers as those of a competitor earlier in the market is chargeable with unfair competition, although he is careful himself to sell them as his own."

In *Walter Baker Co. v. Baker* (C. C.) 77 Fed. 181, it is held:

"A man has a right to use his own name in connection with any business he honestly desires to carry on, but he will not be allowed to use it in such a way as to injure another having the same name; and, to prevent such injury, equity will direct him how he shall use his name to denote his own individuality. The court cannot give great weight to mere denials by defendant of any intent to infringe, but will deduce his intent from his acts. One who enters into competition with another person of the same name, who has an old and established business, is under an obligation to more widely differentiate his goods from those of the latter than is required of third persons having different names."

*Meyer v. Medicine Co.*, 58 Fed. 884, 7 C. C. A. 558, and *Landreth v. Landreth* (C. C.) 22 Fed. 41, and *Pillsbury v. Flour Mills*, 64 Fed. 841, 12 C. C. A. 432, are instructive cases on the subject of the use of the same name by competitors in trade and in manufacture.

It does not seem necessary to cite further authority in this case. In this country the law preventing unfair competition in trade has been of slow growth, but the doctrine stated in the most recent of the preceding cases appears to be firmly established. This court agrees with the principles there laid down. The complainant in this case is not a resident of this country, while the defendant is. This makes no difference, however. The complainant has the right to carry on business here, and, while conforming to our laws, is entitled to their protection.

The complainant is entitled to a decree enjoining and restraining the defendant from using the name "Faber" alone as applied to pencils or rubber stationer's goods, and from using the name "Faber Pencil Company," or "E. Faber Pencil Company," and from making, selling, or causing to be made or sold, or advertising, or caus-

ing to be advertised, any lead pencils, erasive rubber, or rubber bands, bearing thereon, or on the labels, wrappers, boxes, or other coverings affixed thereto, or in which the same are contained, either stamp lettering or other marks containing the name "Faber," or "Faber Pencil Co.," or "E. Faber Pencil Co.," or any like or similar designation in which the name "Faber" is used without the prefix "Eberhard," or "John E.," or "J. Eberhard," but the defendant may use the word "Faber" with either of said prefixes, as he may elect.

This court at this time, and under the evidence, is of the opinion that injunctive relief to this extent is all that the complainant is entitled to, and all that is necessary. This court is of the opinion that it would not be justified in enjoining or restraining the defendant from using such colored wrappers as he may elect or see fit to use, or from putting up his pencils in such form of packages as he desires to use. See *Globe-Wernicke Co. v. Fred Macey Co.* (C. C. A.) 119 Fed. 696.

The defendant has no right, in advertisements, to represent himself as the successor to the house of A. W. Faber, or as in any way representing it. He never had any connection with it, except as sole agent. The complainant is entitled to an accounting and to a judgment for such damages as it may show. The court will make some provision as to goods now on hand bearing the name "E. Faber."

The decree may be settled before me on October 6, 1903, at Auburn, N. Y., or at such prior time and other place as may be agreed upon by the parties.

Decreed accordingly.

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DE PASS et al. v. BIDWELL, Collector.

(Circuit Court, S. D. New York. August 14, 1903.)

**1. CUSTOMS DUTIES—IMPORTATIONS FROM PORTO RICO—FORAKER ACT.**

Section 5 of the Foraker act, providing a temporary government and revenues for Porto Rico (Act April 12, 1900, c. 191, 31 Stat. 77), which provides that on and after the day of its taking effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, or entered without payment of duty, and under bond for warehousing, etc., shall be subject to the duties imposed by the act upon the entry or withdrawal thereof, is constitutional; and goods brought from Porto Rico after its cession, and when there was no duty thereon in force, and voluntarily placed and allowed to remain in a bonded warehouse by the owner until after such act went into effect, became subject to the duty thereby imposed when withdrawn for consumption.

**2. CONSTITUTIONAL LAW—EX POST FACTO LAWS.**

The constitutional prohibition against ex post facto laws applies only to criminal or penal statutes.

This action is brought against George R. Bidwell to recover the sum of \$2,500.97, with interest on various amounts thereof from the times they were paid, and which sums, it is claimed, were illegally collected by the defendant from the plaintiffs as duties on certain su-

¶ 2. See Constitutional Law, vol. 10, Cent. Dig. § 551.

gars brought from the island of Porto Rico to the United States, and which sugars were received at the port of New York June 24, 1899.

John David Lannon, for plaintiffs.

Henry L. Burnett, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

RAY, District Judge. The vessel Lillian Woodruff sailed from the port of Areceibo, Porto Rico, June 12, 1899, and arrived at the port of New York, U. S. A., June 24, 1899. She brought as part of her cargo certain sugars consigned to A. S. Lascelles & Co., the plaintiffs. When the vessel arrived at New York, the sugars were put in bonded warehouses; the warehouse's entry being No. 101,121, and the bond No. 54,386. The entry was liquidated November 14, 1899, and duties assessed, it is asserted, under the provisions of the Dingley tariff act (Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]). June 6, 1900, the entry was reliquidated, and duties were reassessed under the provisions of the Porto Rican act, commonly known as the "Foraker Bill" (Act April 12, 1900, 31 Stat. 77, c. 191). Due protest was made against the imposition of any and all duties. These sugars were withdrawn from time to time, and duties paid thereon as follows: About June 30, 1900, the sum of \$332.99; about August 2, 1900, the sum of \$2,166.79; about August 8, 1900, the sum of \$1.19. George R. Bidwell was collector of the port of New York at all the times mentioned.

The allegations of the complaint, so far as material here, are as follows:

"First. That at all the times hereinafter mentioned the said defendant was the duly appointed and commissioned collector of customs of the United States at the port of New York, in the actual and unrestricted exercise of his functions as such collector, and fully vested with all the powers and authority of his said office.

"Second. That the defendant, being such collector as aforesaid, did, under color of his said office, and through the erroneous exercise of the powers and authority in him vested for the performance of his duties as such collector, unlawfully demand, and by duress of goods collect, from the said plaintiffs, said firm of A. S. Lascelles & Co., as alleged duties upon certain sugars, the product of the island of Porto Rico, consigned to these plaintiffs at the port of New York, and brought thither from the port of Areceibo, in the said island, by the vessel Lillian Woodruff, which said vessel sailed from the said port of Areceibo at or about June 12, 1899, and arrived at the port of New York at or about June 24, 1899 (the said sugars being those mentioned and described in warehouse entry No. 101,121, bond No. 54,386, liquidated November 14, 1899, reliquidated June 6, 1900), the sum of twenty-five hundred dollars and ninety-seven cents (\$2,500.97). The said sum was exacted from these plaintiffs in the amounts and at the times following: On or about June 30, 1900, the sum of three hundred thirty-two dollars and ninety-nine cents (\$332.99); on or about August 2, 1900, the sum of two thousand one hundred sixty-six dollars and seventy-nine cents (\$2,166.79); on or about August 8, 1900, the sum of one dollar and nineteen cents (\$1.19)—which sum plaintiffs were unlawfully and against their will, and in spite of their formal protest, duly made, and compelled to pay, and did pay, in order to obtain possession of the said sugars, to which they were entitled, but which he, enabled so to do by the power and authority of his said office, had detained, was detaining, and threatened to continue to detain from them, exacting as a condition of the delivery thereof such payment of said alleged duties, whereas the said sugars were not liable to duty, the same not having

been imported from any foreign country, within the meaning of any valid statute or executive order of the United States, but were merchandise which must, under and by virtue of the provisions of the Constitution of the United States in that regard, be admitted to free entry in any port of the United States."

To this complaint the defendant demurs on the following grounds:

"That said complaint does not state facts sufficient to constitute a cause of action against the defendant. That said goods were lawfully dutiable under the provisions of section 5 of the act of April 12, 1900, c. 191, 31 Stat. 77, entitled 'an act temporarily to provide revenues and a civil government for Porto Rico and for other purposes.'"

The plaintiff contends that these sugars were entitled to free entry at the time of their arrival at the port of New York; that they were liable to American duties when imported, or not at all; that they were not lawfully dutiable under the provisions of section 5 of the act of April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico and for other purposes," and which act went into effect May 1, 1900, and contained, among others, the following provisions:

"Sec. 3. That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries; and in addition thereto, upon articles of merchandise from Porto Rican manufacture coming into the United States and withdrawn for consumption or sale upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture; such tax to be paid by internal revenue stamp or stamps to be purchased and provided by the Commissioner of Internal Revenue and to be procured from the collector of internal revenue at or most convenient to the port of entry of said merchandise in the United States, and to be affixed under such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall prescribe; and on all articles of merchandise of United States manufacture coming into Porto Rico in addition to the duty above provided upon payment of a tax equal in rate and amount to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture: provided, that on and after the date when this act shall take effect, all merchandise and articles except coffee, not dutiable under the tariff laws of the United States, and all merchandise and articles entered in Porto Rico free of duty under order heretofore made by the Secretary of War, shall be admitted into the several ports thereof, when imported from the United States, free of duty, all laws or parts of laws to the contrary notwithstanding; and whenever the Legislative Assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico."

"Sec. 5. That on and after the day when this act shall go into effect all goods, wares and merchandise previously imported from Porto Rico, for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing,

transportation or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof; provided, that when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."

The plaintiff contends that this action will lie against Bidwell, because the gist of the action is the unlawful detention, and that this is true irrespective of whether, under the circumstances of the case, the Foraker bill applied. The plaintiff further contends that if section 5 of the Foraker bill, by its terms, does impose a duty on these goods, then the said tax is unconstitutional, inasmuch as it lacks uniformity, and also contends broadly that section 5 of the Foraker bill is unconstitutional, being in effect an *ex post facto* law.

The case seems to present these questions: First. Does the complaint charge that prior to April 12, 1900, when the Foraker act was passed, or prior to May 1, 1900, when that act took effect, the defendant unlawfully seized or held or detained the sugars in question? Second. Is not the charge in the complaint solely that these sugars were illegally detained, etc., by the imposition of duties under the Foraker act in June and August, 1900, rather than in November, 1899? Third. Does the complaint charge an illegal detention, etc., both in 1900 and 1899?

If, on the arrival of these sugars at the port of New York in June, 1899, the plaintiff voluntarily placed them in bonded warehouse, and there allowed them to remain until the Foraker act was passed and took effect, then the only question is, was the act of the defendant, as collector of the port, in holding the merchandise for the payment of duties assessed under that act, illegal? In other words, is the Foraker act constitutional, wherein it, in terms, authorized the imposition of the duties actually paid, assuming that the goods were voluntarily placed and allowed to remain in bond until that time? If, however, these sugars were voluntarily placed in bond by the importer, and a duty was imposed thereon under the Dingley tariff act, and they were held for the payment of such duties until the Foraker act took effect, such holding and detention were illegal, for the Supreme Court of the United States has held that goods brought into the United States from Porto Rico after that territory became the property of the United States, and before its organization, and before the enactment of the Foraker law, and not placed in bond, were not subject to the payment of any duty. As there was no tariff law applicable until the Foraker act became a law, inasmuch as Porto Rico had ceased to be a foreign country, and Congress had not acted and passed a law imposing duties on merchandise imported from that territory, it cannot reasonably be claimed that the collector had the right to impose a duty under the Dingley tariff act, and hold the merchandise for the payment of such duties until the Foraker act went into operation, and then impose duties under that law, and claim protection under the provisions of section 5 of that act; that is, under the provision "and all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing, trans-

portation or other purposes for which," etc. This court is of the opinion that the plaintiffs do not charge an illegal detention of these goods, or an unlawful demand, etc., prior to the imposition of duties under the Foraker act; that, so far as appears, the plaintiffs voluntarily elected to make a warehouse entry, and the only compulsion or exaction complained of on the face of the complaint is the payment of the duties when the plaintiffs withdrew the goods in June and August, 1900. No protest is alleged against making any particular entry of said goods on June 24, 1899, on their arrival at the port of New York. The complaint says that the defendant "did, under color of his said office, \* \* \* unlawfully demand, and by duress of goods collect, from the said plaintiffs, \* \* \* as alleged duties upon certain sugars, the product of the island of Porto Rico \* \* \* [here follows a description of the sugars, and of the time of their arrival, etc.], the sum of twenty-five hundred dollars and ninety-seven cents (\$2,500.97). The said sum was exacted, \* \* \* which sum plaintiffs were unlawfully, and against their will, and in spite of their formal protest, duly made and compelled to pay, and did pay, in order to obtain possession of the said sugars," etc. The complaint charges that the duties exacted were demanded and paid in June and August, 1900, at which time, as they were in bonded warehouse, they were, so far as appears from any fact stated in the complaint, subject to duty under the provisions of the Foraker act, and to the rates imposed by that act; and there is no charge that the sums exacted and paid were exacted or demanded under the provisions of the Dingley tariff act. In the absence of such allegations, it must be assumed that the complaint charges, and was intended to charge, that these duties demanded and paid were levied under the provisions of the Foraker act, and not under the provisions of the Dingley act. This being so, the only question is, is the Foraker act constitutional, wherein it provides that goods, imported from Porto Rico before the passage of the Foraker act, but remaining in bonded warehouse after the passage of that act, are subject to the duties imposed by that act?

Porto Rico ceased to be a foreign country on the 11th day of April, 1899, on which day the ratifications of the treaty of peace between the kingdom of Spain and the United States were exchanged, and the treaty proclaimed. This fact has been recognized by the Supreme Court of the United States in *Dooley v. U. S.*, 182 U. S. 222, 230, 21 Sup. Ct. 762, 45 L. Ed. 1074; and also this fact was recognized by the Congress of the United States, in section 3, c. 1, Acts 1900, c. 191, § 8, 31 Stat. 79, of the act entitled "An act to provide a government for the territory of Porto Rico," wherein it is declared that the treaty of peace was ratified April 11, 1899. It has been settled by the Supreme Court of the United States that Congress had power to enact the so-called Foraker law, and to impose duties on goods, wares, and merchandise brought into the United States from Porto Rico after that island ceased to be a foreign country. *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088. In that case it was decided:

"The imposition of duties upon imports from Porto Rico by the act of Congress known as the 'Foraker Act,' approved April 12, 1900 (31 Stat.

77, c. 191), temporarily providing a civil government and revenues for that island, was a constitutional exercise of the power of Congress. Article 4, § 3, of the Constitution, vests Congress with the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. The island of Porto Rico, by the treaty of cession, became territory appurtenant to the United States, but not a part of the United States, within the revenue clauses of the Constitution, such as article 1, § 8, requiring duties, imports, and excises to be uniform 'throughout the United States.' We are therefore of opinion that the island of Porto Rico is a territory appurtenant to the United States, within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island; and that the plaintiff cannot recover back the duties exacted in this case."

Section 20 of the customs administrative act of June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950], provides that "any merchandise deposited in any public or private bonded warehouse, may be withdrawn for consumption within three (3) years from the date of original importation on payment of the duties and charges to which it may be subject, by law, at the time of such withdrawal." At the time the sugars in question were entered and put in bond by the owner, they were not subject to duty, as the Foraker act was not a law, and the Dingley tariff law had ceased to be operative. The importer, however, did not see fit to enter these goods for consumption at that time, and place them upon the market, but, so far as appears, voluntarily placed them in government custody by making a warehouse entry and allowing them to remain. While it is true that this sugar was imported on or about June 24, 1899, such importation was not complete and did not become a closed transaction so long as the goods remained in the custody of the officers of the customs. Until withdrawn from bond and delivered to the importer, whether on shipboard or in warehouse, they were subject to any duties which Congress saw fit to impose. While in this condition the goods were being imported, and became subject to such new legislation in respect to duties and in respect to warehouse laws as Congress saw fit to enact. The goods were in the possession of the government, left there voluntarily, and properly were the subject of new legislation. For duty purposes, not having been delivered to the importer until after the passage of the Foraker act, they are to be regarded and treated the same as though they had actually arrived at the port of New York after the enactment of that law. *U. S. v. McGrath* (D. C.) 50 Fed. 404; *U. S. v. Goodsell Co.*, 84 Fed. 439, 28 C. C. A. 453; *Oppenheimer v. U. S.* (C. C.) 90 Fed. 796; *Fabbri v. Murphy*, 95 U. S. 191, 24 L. Ed. 468.

In *Oppenheimer v. U. S.* (C. C.) 90 Fed. 796, the court followed the Circuit Court of Appeals in *U. S. v. Goodsell*, 84 Fed. 439, 28 C. C. A. 453, and held that where goods were entered on August 27, 1894, but remained in the custody of the government on the 28th of that month, they must be treated as imported on the 28th.

In *U. S. v. Goodsell Co.*, *supra*, the Circuit Court of Appeals in the Second Circuit held:

"The act of August 28, 1894, c. 349, 28 Stat. 509, provides that, unless otherwise specially provided, there shall be levied upon all articles 'imported from foreign countries or withdrawn for consumption' the rates of



duty therein prescribed. An importation of lemons was entered a few days before the passage of the act, and, according to custom and the rules of administration of the port, were designated for examination on the wharf. On August 29th the goods were examined there, having remained in the custody of the government up to that time, and were then sold by the importers. Held, that they were dutiable under the new law."

In *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, 31 L. Ed. 813, the bark containing the goods arrived before July 1, 1883, the date when the act in question there went into effect, but on that date were still on board the vessel; the vessel remaining with hatches unbroken, and with a customhouse officer in charge. The tariff act of 1883, c. 121, § 10, 22 Stat. 525, contained this provision:

"That all imported goods, wares and merchandise, which may be in public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day."

The court said:

"The plain meaning of this section is that, though goods are imported before the act takes effect, yet, if they are kept until after that period in a public store or bonded warehouse—that is, in the custody and under the control of officers of the customs—they shall be subjected only to the duties thereafter leviable when they are entered for consumption."

If importation has not ceased while goods remain in the custody of the custom officers, so that the owner may avail himself of a change in the law reducing duties, while they so remain it is difficult to understand why it should not be held that importation is not so far ended but that goods, in this situation, becomes subject to an increase of duty, or to the imposition by law of duties, when none whatever were imposed at the date of entry. The plaintiffs had no vested right to exemption from duty so long as the goods remained in government warehouse under bond. While the goods remained there, the plaintiffs assumed the risks of the imposition of duties by the lawmaking power of the government.

It is said in *Cooley's Const. Lim.* (6th Ed.) p. 437:

"In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense."

The collector had the right, when the goods were withdrawn, to exact the proper rate of duty under the law existing at the time of withdrawal. *Reimer v. Schell*, 4 Blatchf. 328, Fed. Cas. No. 11,676; *Westfall v. Shook*, 5 Blatchf. 383, Fed. Cas. No. 17,448; *U. S. v. Benzon*, 2 Cliff. 512, Fed. Cas. No. 14,577. And the proper rate of duties was that to which the merchandise was subject by the law in force at the time of withdrawal. See customs administrative act of

June 10, 1890, § 20, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950]. In *re Gardiner*, 58 Fed. 1013, 4 C. C. A. 155; *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, 31 L. Ed. 813; *Sherman v. Robertson*, 136 U. S. 570, 10 Sup. Ct. 1063, 34 L. Ed. 540; In *re Mathews (C. C.)* 45 Fed. 850; *Merritt v. Cameron*, 137 U. S. 542, 550, 551, 11 Sup. Ct. 174, 34 L. Ed. 772.

The only constitutional limitations on the power of Congress to lay taxes which it is necessary to allude to here are that the tax shall be for an object within the scope of the constitutional sovereignty of the United States, and that it shall be a tax of the kind authorized by the Constitution, and that it shall be uniform. *Gibbons v. Ogden*, 9 Wheat. 198, 199, 6 L. Ed. 23; *Hylton v. U. S.*, 3 Dall. 173, 1 L. Ed. 556.

The duty imposed by the Foraker act on "all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing, transportation or any other purpose for which no permit of delivery to the importer or his agent has been issued," is a uniform tax or duty, for the same duty is imposed upon all goods answering that description, no matter when imported or by whom. The importers, bringing in goods from Porto Rico and placing them in bonded warehouse, pay the same duty, respect being had, of course, to the value of the goods. To make taxation uniform, it is not necessary that all persons be taxed. Persons having a certain amount of property or more may be taxed, and those having a lesser amount may not be taxed at all. Such a law is constitutional. Persons having certain kinds or descriptions of property may be compelled to pay a tax on that property, and, so long as all of that class are taxed uniformly, the law is constitutional, even though other persons, having other kinds or descriptions of property, are not taxed at all. But however this may be, the question is definitely settled by the Supreme Court of the United States in *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088, where it is held:

"The island of Porto Rico is not a part of the United States, within that provision of the Constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States.' A long-continued and uniform interpretation put by the executive and legislative departments of the government upon a clause in the Constitution should be followed by the judicial department, unless such interpretation be manifestly contrary to its letter or spirit. As Congress derives its authority to levy local taxes for local purposes within the territories not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress 'to lay and collect taxes, duties, imposts and excises,' and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty, besides, would be repugnant to the requirement of uniformity throughout the United States."

In the opinion it is said:

"Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States,' it becomes necessary to inquire

whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' by which term we understand the states whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people, in adopting the thirteenth amendment, thus recognize a distinction between the United States and 'any place subject to their jurisdiction,' but Congress itself, in the act of March 27, 1804, c. 56, 2 Stat. 298, providing for the proof of public records, applied the provisions of the act not only to 'every court and office within the United States,' but to the 'courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States,' as to the courts and offices of the several states. This classification adopted by the Eighth Congress is carried into the Revised Statutes as follows:

"Sec. 905 [U. S. Comp. St. 1901, p. 677]. The acts of the Legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated," etc.

"Sec. 906 [U. S. Comp. St. 1901, p. 677]. All records and exemplifications of books, which may be kept in any public office of any state or territory, or any country subject to the jurisdiction of the United States," etc.

"Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States, which are not of the United States. In determining the meaning of the words of article 1, § 6, 'uniform throughout the United States,' we are bound to consider not only the provisions forbidding preference being given to the ports of one state over those of another, to which attention has already been called, but the other clauses declaring that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the states which united in forming the Constitution from discriminations by Congress which would operate unfairly or injuriously upon some states, and not equally upon others. The opinion of Mr. Justice White in *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, contains an elaborate historical review of the proceedings in the convention which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (page 105, 178 U. S., page 772, 20 Sup. Ct., 44 L. Ed. 969) that 'although the provision as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption,' they were originally placed together, and 'became separate only in arranging the Constitution for the purpose of style.' Thus construed together, the purpose is irresistible that the words 'throughout the United States' are indistinguishable from the words 'among or between the several states,' and that these prohibitions were intended to apply only to commerce between ports of the several states as they then existed or should thereafter be admitted to the Union. We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States, within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island; and that the plaintiff cannot recover back the duties exacted in this case."

The objection that section 5 of the Foraker bill is unconstitutional because, in effect, it is an *ex post facto* law, is without merit, inasmuch as the prohibition against *ex post facto* laws applies only to criminal or penal statutes. *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648; *Fletcher v. Peck*, 6 Cranch, 138, 3 L. Ed. 162; *Ogden v. Saunders*, 12 Wheat. 266, 6 L. Ed. 606; *Watson v. Mercer*, 8 Pet. 110, 8 L. Ed. 876.

The complaint does say that the vessel *Lilian Woodruff* arrived at the port of New York "at or about June 24, 1899," and adds, in parenthesis, "the said sugars being those mentioned and de-

scribed in warehouse entry No. 101,121, bond No. 54,386, liquidated Nov. 14, 1899, reliquidated June 6, 1900." This falls far short of being an allegation that duties were assessed upon this sugar in November, 1899, under the provisions of the Dingley tariff act, and falls far short, when taken in connection with the other allegations of the complaint, of stating that these goods were held for the payment of duties levied under the Dingley act against the protest of the importers or otherwise. If this be the true construction of the complaint—and this court has no doubt on that subject—the foregoing considerations dispose of the case, and the demurrer must be sustained, with costs. There is no intimation from the Supreme Court of the United States that section 5 of the Foraker act is unconstitutional. In fact, the decision of the court in *Downes v. Bidwell* indicates clearly that that section of the Foraker law was in the mind of the court when it delivered its opinion and made its decision in that case.

The demurrer is sustained, with costs, but the plaintiff may amend on payment of such costs, if so advised, by pleading that the goods were detained, against the will and protest of the importer, for payment of duties under the Dingley act, until after the Foraker act went into effect. So ordered.

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INTERSTATE COMMERCE COMMISSION v. CINCINNATI, P. & V. R.  
CO. et al.

(Circuit Court, E. D. North Carolina. August 10, 1903.)

1. CARRIERS—INTERSTATE COMMERCE LAW—UNDUE PREFERENCE IN RATES BETWEEN LOCALITIES.

Conditions are such at Norfolk and Richmond, Va., by reason of the large number of carrying lines, both rail and water, which enter such places, and the fact that they are in what is known as the "trunk line territory," as to create a very active competition on shipments from the West, and to justify the making of low rates on such shipments; and the fact that such low rates are made on through shipments from Chicago, St. Louis, and East St. Louis by a material reduction from local tariff rates by the connecting lines west of the Ohio river, while substantially the local rates are charged on the same lines on through shipments from the same points to Wilmington, N. C., which is not within the trunk line territory, but in the southern territory, and has fewer lines of transportation, and less active competition, resulting in higher through rates to the latter place, although the length of haul is substantially the same, does not operate to give Norfolk and Richmond an undue or unreasonable preference or advantage, or subject Wilmington to an undue or unreasonable prejudice or disadvantage, in violation of section 3 of the act to regulate commerce (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]).

In Equity. Suit by the Interstate Commerce Commission to enforce an order in respect to rates charged by defendant railroad companies.

L. A. Shaver and Harry Shinner, U. S. Atty., for complainant.  
Ed. Baxter, for respondents.

PURNELL, District Judge. The bill herein by the Interstate Commerce Commission under section 16 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) seeks the enforcement of an order of the commission against the Cincinnati, Portsmouth & Virginia Railroad Company and other carriers. The order was the outcome of a complaint to the commission under section 13 of the act to regulate commerce (24 Stat. 383 [U. S. Comp. St. 1901, p. 3164]), made by the Wilmington Tariff Association, incorporated under the laws of the state of North Carolina. Defendant carriers constitute through lines of transportation and transport traffic under joint through rates from Chicago, St. Louis, East St. Louis, Cincinnati, and Louisville to Norfolk, Richmond, and other Virginia cities, and also to Wilmington, N. C., and the complaint of the Wilmington Tariff Association to the commission charged: First, the rates of the defendants for the transportation of traffic from said cities to Wilmington were unreasonable in themselves, in violation of section 1 of the law (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), which requires all rates charged to be just and reasonable; and, secondly, that the rates to Wilmington, taken in connection with the rates from the same cities to Norfolk, Richmond, and other Virginia cities, subject "merchants and dealers at Wilmington, their traffic, and the city of Wilmington" to undue or unreasonable prejudice or disadvantage, and give the merchants or dealers of Norfolk, Richmond, and other Virginia cities an undue or unreasonable preference or advantage over merchants and dealers of Wilmington, in violation of section 3 of the act to regulate commerce (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]). The commission found that the rates in question were unduly prejudicial to Wilmington, and unduly preferential to Norfolk, Richmond, and Virginia cities, and in pursuance of such finding issued the order for the enforcement of which this proceeding was instituted. The order forbids the continuance of the alleged undue prejudice to Wilmington and undue preference to Norfolk, Richmond, and other Virginia cities. The defendants refused to obey the order, and thereupon the commission instituted this proceeding for its enforcement under section 16 of the act to regulate commerce (24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]).

The bill alleges the due issuance of the order, its service upon the defendants, and their refusal to obey. It further alleges all the proceedings before the commission leading up to the order, and attaches as exhibits the complaint, the answers of the carriers thereto, and the order. After making these allegations, the bill charges that the rates to Wilmington and to Norfolk subject Wilmington to an undue prejudice, and give Norfolk an undue preference over Wilmington, in violation of the law, on the facts as found by the commission and alleged in its bill. The issue presented is under section 3, which is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic in any respect whatsoever,

or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The complaint of the Wilmington Tariff Association related to the rates from Cincinnati and Louisville, as well as from St. Louis, East St. Louis, and Chicago; but the commission found that the rates from Cincinnati and Louisville were not unreasonable, but only the rates from St. Louis, East St. Louis, and Chicago were unlawful, and the order of the commission relates only to those rates. Norfolk and Wilmington are both seaports, and it is conceded there is no material difference in the distance from the shipping points from Chicago and East St. Louis to Norfolk and to Wilmington, respectively, via the short line to Norfolk, being 40 miles less, and from East St. Louis 30 miles more, than to Wilmington. In short, all the facts seem to be conceded, as are the rates and differences; the only contention being, are these rates such as are inhibited, unduly prejudicial to Wilmington, and unduly preferential to Norfolk, Richmond, and other Virginia cities and stations? The rates from St. Louis and East St. Louis being practically the same, it is unnecessary to speak of both, and the one may be understood to include the other. The rates from Cincinnati and Louisville to Wilmington are found by the commission to be in excess of the rates to Norfolk and Richmond on 100 pounds first class 20 cents, second class 14 cents, etc., or, on car-load lots of 40,000 pounds, \$80 first class; \$58 second class; \$50 third class; \$54 fourth class; \$36 fifth class; \$26 sixth class; flour in sacks, \$32; flour in barrels, \$60; packing house products, \$4; grain, \$22. But these rates, as found by the commission, are not such as are prohibited, and no rates not in excess of 135 per cent. of the Norfolk rates are deemed or held to be unlawful. The excess under-rates from Chicago are as follows: On 100 pounds first class, 50 cents; second class, 40 cents; third class, 31 cents; fourth class, 26 cents; fifth class, 20 cents; sixth class, 15 cents; flour in sacks, 15.5 cents; flour in barrels, 29 cents; hay, 5.5 cents; grain, 18 cents. Or, on car-load lots of 40,000 pounds, first class, \$200; second class, \$160; third class, \$124; fourth class, \$104; fifth class, \$80; flour in sacks, \$62; flour in barrels, \$116; grain, \$72; hay, \$22. Excess on rates from East St. Louis, excess of Wilmington rates per 100 pounds: First class, 36 cents; second class, 28.5 cents; third class, 23 cents; fourth class, 20.5 cents; fifth class, 15 cents; sixth class, 11 cents; flour in sacks, 12.5 cents; flour in barrels, 23 cents; grain, 8 cents; hay, 6.5 cents. Excesses of Wilmington rates per car-load lot of 40,000 pounds: First class, \$144; second class, \$114; third class, \$92; fourth class, \$82; fifth class, \$60; sixth class, \$44; flour in sacks, \$50; flour in barrels, \$92; grain, \$32; hay, \$26. The table of tariff rates from which these excesses appear are set out in the bill and exhibits attached, the correctness of which is not denied, but admitted.

The commission, in effect, finds the rates to Wilmington should exceed the rates to Norfolk, Richmond, and other Virginia cities, but say they should not do so by more than 135 per cent. The rates to Norfolk, Richmond, and other Virginia cities are fixed—set forth

in the bill and exhibits—and there is no suggestion these rates should be increased. It would be a simple calculation to determine what 135 per cent. of these rates would be under this rule, or what they should not exceed. The old rule of three would settle this. This is fixing the maximum rates, which the commission cannot do under the statute; hence the last section of the order is unauthorized. Fixing freight rates is a complex science, requiring a trained mind—a specialist experienced in the business. The Interstate Commerce Commission is created as an expert body, not, however, vested with authority to fix rates, maximum or minimum. This is conceded in the argument, as it is that the commission has no power to say what proportion each carrier of a through line shall receive of a through rate; but it is contended that the order relates to the through rate as an entirety, and as to this the commission may dissect a through rate, and consider the proportion received by one carrier of the line, and if it finds that the proportion received by it is its local rate, fixed for a strictly local haul, vitiate the entire rate. As the commission finds the rates from Cincinnati and Louisville are not unlawful, unduly prejudicial, and preferential, the rates found to be unduly prejudicial and preferential, therefore, must necessarily be between these points on the Ohio river and St. Louis, East St. Louis, and Chicago. Conceding the contention above referred to, without, however, deciding it, as it is not deemed essential, the rates found to be unduly prejudicial and preferential are on lines in a territory north of the Ohio river, where there is great competition, and circumstances which tend to fix rates govern freight tariffs. This question, asked during the argument, for a better understanding of the facts, seemed to surprise counsel, but it is apparent from the record, the table, etc., as being the important and essential question in this proceeding. In short, the carriers connecting these points charge their local tariff rates as a part of the through rates to Wilmington, but not to Richmond, Norfolk, and Virginia points, and this when the traffic is carried over the same lines, possibly in the same cars. Is there any valid reason under the law for this difference? These lines are in a highly competitive territory, where the trunk line rates obtain, fixed by competition with the waterway via the lakes, for all lines which serve the great eastern ports on the Atlantic seaboard—Boston, New York, Philadelphia, and Baltimore. That these rates are so fixed and highly competitive is too well recognized and has been too often sustained to require a citation of the numerous authorities to this effect. It is so. These rates, for reasons satisfactory—among others, the numerous steamship lines from Richmond and Norfolk, the competing railroads, and the water transportation from Baltimore to Norfolk or Richmond—have been extended to these points from the West. Wilmington is supplied by branch lines of two railroad systems, the Atlantic Coast Line and the Seaboard Air Line systems, and one weekly line (the Clyde) of steamers to and from New York. These rates have not yet been extended to Wilmington. The one—Norfolk, Richmond, and other points in Virginia—are in what is known as the trunk line territory, while Wilmington is not, but is in southern territory, where the competition for freight is not so active.

The rates from Cincinnati and Louisville are found not be unjustly prejudicial and preferential, though much higher, as shown in the records. It is said freight can be shipped by rail from Chicago, St. Louis, and East St. Louis to New York, thence by steamer to Wilmington, cheaper than it can by rail. But the commission was not asked to remedy this. The remedy is plain; let the freight be so shipped; and this court is not called upon to consider this question. The only effect it can have in this proceeding, as may be said of many suggestions of this character in the argument, is to prove the active competition within, and the absence of such active competition without, the trunk line territory. Wilmington has two systems of railroads without western termini—i. e., they do not connect directly with the territory west of the Ohio river—and one weekly line of steamers to New York. Norfolk has several systems of railroads extending in the direction of and connections to the point where the undue prejudice and preference originates and exists, with several lines of steamers to Baltimore, Philadelphia, New York, and Boston, some of them daily. If competition controls rates—and there is no contention that it should not and does not—Norfolk and Richmond are territorially located to be entitled to trunk line rates which have been extended to that territory. *Interstate Commerce Commission v. Railway Co.*, 168 U. S. 145, 18 Sup. Ct. 45, 42 L. Ed. 414. This trunk line rate is not shown to have been extended to Norfolk and Richmond from any disposition to favor these points or prejudice Wilmington, but on account of the competition referred to, and the construction put upon the long and short haul clause of the act to regulate commerce of 1898, and since insisted on by the Chesapeake & Ohio Railway Company, the lines of which extend from Newport News, on the same harbor as Norfolk, in a commercial sense one and the same with Norfolk, insight, connected with the ocean by the same inlet, etc., virtually the same for the purposes of commerce, to the Ohio river in the territory where the evil complained of exists, if it exists at all in a legal sense.

At both ends of the through lines, then, there is sharp, active, legitimate competition—at Norfolk meaning the termini of all railroad routes to the harbor, for it can make no material difference on which side of the harbor, Chesapeake Bay or Elizabeth river, the terminal station of a railroad system is located, all being deep-water terminals and shipping stations; and at Chicago, St. Louis, and East St. Louis. On the other hand, the competition at Wilmington, with one line of steamers and two systems of railroad, is not near so great, active, and sharp. If the rule established by the courts in the case cited and others, concluding with *E. T., V. & G. R. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719, be applied, there are sufficient reasons for dissimilarity in rates, as said in the decision just cited. The court in the case *supra*, sections 1 and 2 of the syllabus in 181 U. S., says:

"Although the Interstate Commerce Commission found as a fact that the competition at Nashville, which forms the basis of the contention in this case, was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was



asked for the shorter haul to Chattanooga, or to abandon all Nashville traffic, nevertheless they were forbidden by the act of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to make the lesser charge for the longer haul; but since that ruling of the commission was made it has been settled by this court in *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648 [20 Sup. Ct. 209, 44 L. Ed. 309], and other cases cited, that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that, where this condition exists, a carrier has a right of his own motion to take it into view in fixing rates to the competitive point; and it follows that the construction affixed by the commission to the statute upon which its entire action in this case was predicated was wrong. The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that a competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place; and this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it."

The rule cited above applies with equal force to Richmond, with several systems of railroads and steamship lines, though water competition may not be so active.

The various other points—"other cities in Virginia"—do not require to be specifically considered, as they are not subjects of the complaint, only figure in the proceeding incidentally; and, the rates to the termini, Norfolk and Richmond, being fixed in conformity with the law, rates to these intermediate points would be probably controlled by the long and short distance haul rule (section 4 of the act to regulate commerce, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), as construed by the Interstate Commerce Commission and the courts. Rates to these points are used (as are different points in North Carolina to which rates are much higher) in the discussion as illustrations and argument, but the question presented for decision is under section 3, and not under the long and short haul clause (section 4). It will be in apt time to consider this phase when a proceeding is instituted presenting this question. To pass upon these rates now would be aliunde the record, and not germane to the question presented.

Having seen how the rates to Richmond and Norfolk are fixed, and that they are in accordance with the rule laid down by the Supreme Court, there being no complaint that these rates are too low, or should be increased, it is in order to inquire how the Wilmington rates are fixed. The rates to Wilmington are the through rates to Norfolk and Richmond plus the combination or competing rates of two railroads, the Atlantic Coast Line and the Seaboard Air Line and the waterway via the Atlantic Ocean and the Cape Fear river. These rates, for these reasons, because they are combination and competitive rates, are less than to any other point in North Carolina; Wilmington being outside the trunk line territory (as said, in "Southern territory," where trunk line rates do not obtain), but having two systems of railroads and water transportation—about 30 miles from the ocean via Cape Fear river. On this waterway it is said rates

are higher than they would be naturally on account of the stringent laws and high charges for pilotage to and from the bar, and for other incidental expenses. One regular line of steamers and such tramp steamships or other vessels which come irregularly to bring or get special cargoes cannot create such active competition as exists at Norfolk, or even at Richmond. Why, it is not essential to discuss. It does not. The absence of competition causes the differences. Competition fixes freight rates, as it gives life to commerce. The commission finds that "the carriers north of the Ohio river, by accepting less than their local charges on the traffic destined to Norfolk and Richmond and enforcing greatly higher charges, amounting in most instances to their local rates, for identically the same service, are largely responsible for this resulting discrimination against Wilmington; but it is not found that such carriers are altogether in fault. The rates south of Norfolk and Richmond on this traffic are also upon a high basis." And this seems to be a location of the discrimination, as before seen, and the only subject of complaint. As pointed out, the territory north and west of the Ohio river is in a sharply contested section for freights—in the "trunk line" territory, which has been extended to include Norfolk and Richmond, with their several competing carriers by rail and water—a geographic traffic and commercial advantage which Wilmington does not enjoy. The one favored more by natural and artificial (constructed) lines of traffic; both enjoying in proportion thereto their advantages over other points and cities having no water transportation or served by fewer lines of railroad. Courts and commissions must and do recognize these differences, as do carriers in fixing their freight rates. This court is not inadvertent to the rule as laid down by the Supreme Court in *United States v. Moore*, 95 U. S. 763, 24 L. Ed. 588, that "the construction given to the statute by those charged with the duty of executing it is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons"; but the court is no less inadvertent to the rule laid down by the same authority to the effect that, when the government goes into one of its courts, it is entitled to no more consideration than any other litigant; and the fact that the statute requires proceedings of this character to be instituted in the courts for the purpose of enforcing the orders of the honorable Interstate Commerce Commission puts on the court an original, independent responsibility to due inquiry make, exercise its own judgment, and decide causes as they arise or are instituted. To issue the writ provided for in the act the court must be satisfied a case has been made out as for any other litigant in a court of equity. Recognizing the complainant herein as a co-ordinate branch of the government, created as an expert body for specific purposes, and with due deference for that honorable body, for reasons stated, and others not necessary to set out at length, this court is not satisfied there are not "cogent" reasons for a difference of opinion as to the rates discussed being unduly prejudicial to Wilmington and unduly preferential to Norfolk and Richmond and other Virginia cities. Personal and local attachments would incline this court to hold otherwise, but personal feelings, prejudices, or attachments should have no place

in the discharge of official duty—judicial, executive, or legislative—though they do in many instances have a potent influence; in some instances for good, frequently for evil. The reasons set out in the several pleadings and exhibits in the argument, and incidentally hereinbefore referred to, seem to be “cogent” reasons for the difference in traffic rates referred to, and for denying the writ asked for in the bill to enforce the order of the Interstate Commerce Commission. It is therefore considered, ordered, and decreed that the prayers of the bill numbered 5, 6, and 7, as follows:

“(5) That upon the final hearing hereof a decree may be entered granting to complainant a writ of injunction, or other proper process, mandatory or otherwise, to restrain the said defendants, and each of them, and their respective officers, servants, agents, from further continuing in their violation of and disobedience of the said order of commission.

“(6) That a decree may be entered requiring the said defendants, and each of them, to pay such sum of money, not exceeding the sum \$500 for each day after a day to be named in such decree, that they shall respectively fail to obey the said injunction or other proper process.

“(7) That a decree may be entered requiring the said defendants to pay the costs of this proceeding and reasonable counsel fees,”

—Be, and the same are hereby, denied, and the bill herein be, and the same is, dismissed, with cost.

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#### THE WILDCROFT.

(District Court, E. D. Pennsylvania. July 15, 1903.)

No. 32.

#### 1. SHIPPING—DAMAGE TO CARGO—FAULT IN MANAGEMENT OF VESSEL.

Where a ship was at the commencement of a voyage in all respects seaworthy, and properly manned, equipped, and supplied, damage to a sugar cargo from fresh water, which escaped into the hold where the sugar was stowed, while the cargo was being discharged, by reason of a valve having been improperly left open while water from the river was being pumped into the engine tank, was due to a fault in the management of the vessel, for which she is exempted from liability by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

In Admiralty. Action to recover for damage to cargo.

Horace L. Cheyney and John F. Lewis, for libellant.

Convers & Kirlin, for respondent.

J. B. McPHERSON, District Judge. This action is brought to recover for damage done by water to a cargo of sugar, consigned to the libellant at the port of Philadelphia, and carried by the British steamship Wildcroft from the ports of Matanzas and Cardenas. The facts, which are not in dispute, save at one or two points, will be found in the following statement, which is condensed from the brief of the claimant's counsel:

In April, 1901, the Wildcroft, having discharged a cargo of coal in Havana, proceeded to Cardenas and Matanzas, where she loaded

¶ 1. Statutory exemption of shipowners from liability, see note to *Nord-Deutscher Lloyd v. Insurance Co. of North America*, 49 C. C. A. 11.

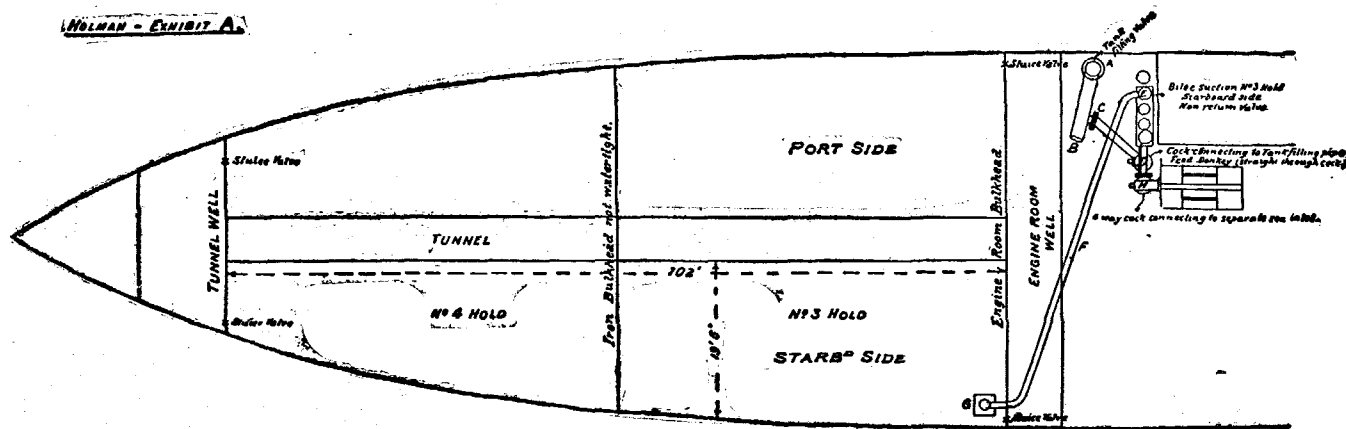
sugar in bags, consigned to the libellant. The sugar in controversy was stowed in No. 3 and No. 4 holds, and some of it was found, while being discharged, to have been damaged by water. It does not appear precisely how much of the cargo was damaged. Apparently the bulk of it was sound. But at the top of No. 3 hatch, on the starboard side, the sugar was wet all across the hatchway to a depth of about eight feet. Under the starboard ventilator of the same hold a burrow, caused by water, extended down about eight feet. Under this there was a layer of sound cargo down to a point about three feet from the bottom. On the bottom of No. 4 hold also, as well as of No. 3, there was a layer of damaged cargo about three feet thick. There was no damage elsewhere in No. 4. In each hold the damage at the bottom was on the starboard side of the tunnel.

The damage at the top of No. 3 hold was caused by salt water that found its way into the hold on April 19th in the manner hereafter stated. The damage at the bottom of the holds, however, was caused by fresh water, the marks on the bulkheads showing that both holds had been flooded to a height of two to four feet. In order to determine how water, either salt or fresh, may have found its way into these holds, it is desirable to refer to the construction of the vessel in some respects, and also to the circumstances of the voyage. The Wildcroft has four holds, two on the fore side of the engine-room tank, and two on the after side. No. 3 and No. 4 holds are on the after side of the engine room, and are separated from each other by a grain-tight bulkhead. A water-tight bulkhead separates No. 3 hold from the engine room, and a water-tight bulkhead also separates No. 4 hold from the peak tank aft. The flooring under No. 3 and No. 4 holds is not water-tight, but is better than grain-tight. The average depth of the bilges below the flooring is 2 feet 6 inches. As the bulkhead between No. 3 and No. 4 holds is pierced by limber holes, these two compartments are practically one, so far as the passage of water is concerned. The vessel has five tanks. No. 1 is under No. 1 hold, No. 2 under No. 2 hold, No. 3 under the engine room, No. 4 under No. 3 hold, No. 5 under No. 4 hold; and the after-peak tank is aft of No. 5. All these tanks, excepting the after-peak tank, are built on the double cellular principle. No. 1 and the after-peak tank were empty during all the voyage from Baltimore to Havana, and thence to Cardenas, Matanzas, and Philadelphia. Nos. 2, 3, 4, and 5 tanks were filled with water for ballast at Havana after the discharge of the cargo, but when the vessel arrived at Cardenas they were pumped dry, and remained dry during the rest of the voyage to Philadelphia.

After the discharge of cargo at Havana, the sluices, holds, and bilges on the ship were overhauled and cleaned. At Cardenas part of the cargo was loaded, the rest being taken on board at Matanzas. After leaving this port, each hatch was protected with a wooden cover and with three tarpaulins that were securely battened down with iron bars and wedges. On leaving Matanzas, the vessel drew about 21 feet 6 inches fore and aft, and was then in every respect seaworthy, and properly manned, equipped, and supplied. The hatches were not taken off until after the vessel reached Philadelphia. Dur-

ing the voyage the weather was exceptionally severe, culminating on April 19th in heavy gales, tropical rain, and high seas, the result being that the vessel rolled and pitched heavily, and shipped large quantities of water on deck. About 3 p. m. on that day a heavy sea tore away the three tarpaulins that covered No. 3 hatch and the star-board ventilator cover at the forward part of the hatch. New tarpaulins were lashed temporarily over the hatch as securely as the violent weather would permit, and a spare cover was put over the ventilator, but the weather did not moderate sufficiently until 6 or 7 o'clock the next morning to permit the crew to fix the tarpaulins permanently over the hatch, and thus to make it again as secure as when the vessel left Matanzas. During this interval, the vessel shipped heavy seas, the downpour of rain continued, and a considerable quantity both of sea water and of rain water entered No. 3 hatch through the joints of the hatch and down the ventilator hole. Not much water reached the bottom of either hold at this time. Both holds were sounded night and morning during all the voyage, and no more than the usual amount of water was found—two to four inches. The vessel arrived at Philadelphia on April 22d, and was taken to the libellant's wharf to discharge her cargo. Before the discharge was begun, the sugar directly under the hatch of No. 3 was found to be damaged by water. All the bags across the hatchway were wet. Under the ventilator whose cover had been washed off there was a burrow about eight feet deep between the bags where the water had run down. The discharge began on April 23d, and was continued without further incident until April 29th. At 7 a. m. of that day, in accordance with the standing orders that soundings should be taken night and morning, the pumps connecting with No. 3 and No. 4 holds were started and were worked for 15 minutes, but nothing was pumped out. About 3 p. m., however, the stevedore that was discharging the vessel reported to the chief officer and the chief engineer that there was water in hold No. 4. Soundings were taken immediately, and between five and six feet of water were found. There was no water in the engine-room bilge, however, and the sluices in the tunnel connecting with No. 3 hold and the after-wells of the engine room were then opened, and the water and molasses were pumped out, both holds being dry by midnight. The chief engineer tasted the liquid in the bottom of the hold, and found it to be molasses and fresh water. In order to determine whether any of this water had come into the ship through a leak in the hull, or in any of the ballast tanks, the vessel was thoroughly examined by Lloyd's surveyors in Philadelphia immediately after the cargo had been discharged, and before repairs of any kind had been made. No leak or injury to the hull or tanks was found, and the surveyors thereupon gave the vessel a certificate of seaworthiness.

The fresh water in the holds is accounted for as follows: On the morning of April 29th, No. 3 engine-room tank was filled with fresh water from the Delaware river, for ship's purposes. It began to flow into the tank at 10 o'clock and the flow was uninterrupted for three hours. A drawing showing the arrangement of pipes, connections, and valves involved in this explanation, is annexed to the claim-

HOLMAN - EXHIBIT A.S. S. "WILDCROFT."

ant's testimony. This drawing was prepared by a consulting engineer who examined the vessel in London in June, 1901, before any repair, alteration, or change in arrangement had been made in any of the pipes, cocks, or valves in use on April 29th, when the damage was done. No. 3 tank, just referred to, is under the engine room. It is filled by opening a valve, A, in the ship's side, which admits water from the river into the tank-filling pipe, A, B. This pipe is connected, on its continuation below the point B, with valves in the tank distribution box. From this box another pipe leads to the tank top. (Neither the tank distribution box nor the pipe connecting it with the engine-room tank are shown on the plan, as they have no connection with or relevancy to the present controversy.) There is no direct connection between this tank and No. 3 and No. 4 holds. There is, however, a pipe connection, C, governed by a cock at D, that leads from the tank-filling pipe to the service donkey; and this in turn is connected with another distribution chest, from which a pipe is led to No. 3 hold for the purpose of pumping out the bilges of that hold. This pipe is indicated by the letters, E, F, G. At the head of this suction pipe in the distribution chest is a non-return valve, E. This valve and the seat on which it rests are made of gun metal. The valve apparently works on a hinge, so that it opens when suction is applied to it from the top by the pumps, but when the suction ceases, the valve falls back on its seat, and prevents anything from entering the pipe which it covers. If, therefore, any foreign substance, such as a small piece of wood, had been drawn up the pipe, F, G, when the pumps had been worked last on the limbers of No. 3 hold, and had become caught in the valve, E, so that the valve had been wedged open, and if at the same time the cock, D, in the donkey service or branch pipe were open, it is apparent that water flowing from the river into the tank-filling pipe, A, B, leading to the engine room, would also flow through C, D, to the distribution chest, and down the valve, E, and the suction pipe, F, G, leading to the limbers in No. 3 hold, and thence into No. 4 hold; for, as already stated, No. 3 and No. 4 are practically one hold, so far as water communication is concerned. If these cocks and valves, D and E, or either of them, had been properly closed during the process of filling the engine-room tank, it would not have been possible for any water to find its way into No. 3 and No. 4 holds.

I think, therefore, that the damage to the sugar was caused by the water that went down No. 3 hold during the storms on the voyage, and by the water that flowed into the hold through the pipe line on April 29th in the manner just described. Indeed, it is impossible that the damage could have occurred in any other way, unless some of the water that entered through No. 3 hatch on April 19th passed down the sides of the ship into the holds; and I do not think the testimony justifies such a finding.

It will be observed that nothing is said in the foregoing statement of facts concerning damage to sugar in No. 1 and No. 2 holds, for I agree with the respondent's contention that the libellant should not now be allowed to make any claim therefor. The libel claims in general terms for damage to "a large portion of said cargo of sugar,"

without specifying in which holds the injured portion was to be found. The libellant's testimony was confined, however, to the sugar in No. 3 and No. 4 holds, nothing whatever being said concerning the sugar in No. 1 and No. 2 holds, except one question and answer in the examination of James W. Andrews, who was apparently a general utility man in the libellant's employ; his testimony concerning his duties being: "I don't know just what my place at McCahan's is. I have to look after things generally." The question and answer just referred to are these:

"Q. You have not made any demand for damage outside of Nos. 3 and 4?"

"A. No, sir; there were 209 in No. 1 and 42 in No. 2."

It is now objected that the witness was a mere clerk, without authority to bind the libellant, and that his answer should be disregarded. To this objection I think it is enough to reply that the libellant accepted the answer without apparent demur, and could not, without obvious unfairness, be permitted to repudiate the witness at the argument of the case. Prompt notice should have been given that his answer was not admitted to be correct. Aside from this consideration, however, there is no testimony whatever (save the brief answer just quoted) concerning the damage in No. 1 and No. 2 holds; and the libellant has, therefore, failed to make out its case in this particular. Whether the sugar in these holds was injured by salt water or by fresh water, or by some other cause, does not appear; and it is manifestly out of the question to allow a claim for damages that is founded upon a single short answer that is so vague and indefinite as the few words to which I have already referred.

Turning to the damaged sugar in No. 3 and No. 4 holds, and inquiring concerning the vessel's liability for the injury, it is first to be noted that no claim is made for the harm done by salt water to the bags in the top of No. 3 hold. This damage was concededly caused by a peril of the seas, and this part of the claim was formally withdrawn by the libellant's counsel. Concerning the bags that were damaged at the bottom of the holds by fresh water, the defense to the libellant's claim rests upon certain provisions in the bill of lading and upon the third section of the Harter act. The libellant asks me to say that a presumption of negligence arises from the fact that at the end of a voyage merchandise that has been received by a carrier in good condition for safe conveyance is found to be damaged; and that the burden of proof is upon the carrier to explain the cause of the injury, upon penalty of being held liable if he is unable to clear his skirts of fault. No doubt this proposition is sound, and does not need the support of authority; but it does not establish the libellant's right to a decree in the present case, for the plain reason that the ship accepted the burden of proof, and has satisfactorily shown how the sugar in the bottom of the two holds came to be injured by fresh water. To my mind, as already intimated, the conclusion is irresistible that the water found its way into the holds on April 29th, while the ship was lying at the wharf discharging her cargo, and that the entry of the water could only have been made because the valves were improperly open. I adopt the theory pro-



pounded by the ship to account for the presence of the water; indeed, I cannot conceive of any other theory that is consistent with the facts, while this agrees with them all, and is in conflict with none.

The injury having been thus occasioned, is the defense set up by the ship to be accepted? Each of the bills of lading, under which the cargo was received and carried, contains the following clause:

"It is mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, the act of Congress of the United States approved the thirteenth day of February, 1893."

The third section of the act thus referred to, well known as the "Harter Act" (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), is in part as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor \* \* \* for losses arising from dangers of the sea or other navigable waters."

In my opinion, the application of this provision of the statute to the facts proved relieves the ship from liability. She was in all respects seaworthy, and was properly manned, equipped, and supplied, when the voyage under consideration was begun, and the damage or loss resulted from a fault or error in management. The time at my command does not permit a discussion of the cases to which I have been referred upon this point, but I may say, briefly, that I regard the decisions found upon the claimant's brief as satisfactory. Indeed, without regard to authority, it seems inevitable to conclude that the "management" of a modern steamship must include the inspection, maintenance, and operation of the machinery by which she is moved and is enabled to carry out her contract concerning the safe carriage and delivery of the cargo; and that, where there has been fault in such inspection, maintenance, or operation, and the fault has caused injury to the cargo, the ship is relieved from liability by the express provision of the statute, if the prerequisite concerning seaworthiness has been duly made to appear.

A decree may be entered dismissing the libel.

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In re ELLIS.

In re CHARALAMBIS.

(Circuit Court, S. D. New York. June 25, 1903.)

# 1. ALIENS—DEPORTATION—STATUTES—REPEAL.

Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213, amending and re-enacting the immigration laws pre-existing and providing for the repeal of all other conflicting provisions, re-enumerated all the excluded classes of aliens specified in Act Cong. March 3, 1891, c. 551, § 1, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], with some additions, but specifically omitted the clause in such section relating to contract laborers excluded

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¶ 1. Importation of contract labor, see note to *United States v. Edgar*, 1 C. C. A. 52.

under Act Cong. Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290]. The Congressional Record (page 3205), as to the passage of the act of 1903, showed that the omission was intentional, but that Congress thereby intended to leave intact the contract labor laws as they previously existed. *Held*, that the omission to provide for the deportation of contract laborers in the act of 1903 did not repeal the provisions of Acts Cong. Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], and March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], relative thereto.

2. SAME—LEARNED PROFESSION.

Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213, provides for the deportation of aliens, and declares (section 4), that the inhibition against the importation of aliens to perform labor or service of any kind, skilled or unskilled, shall not apply to persons belonging to any recognized learned profession. *Held*, that aliens imported under contract, who were expert accountants, were not members of a recognized learned profession, within the terms of the exception, and were, therefore, not entitled to entry.

### Application for Habeas Corpus.

These are two applications for discharge from the custody of the immigration authorities, petitioners having obtained writs of habeas corpus and certiorari. These were argued on the same day, and, as the controlling propositions of law involved are the same, may conveniently be disposed of with a single opinion.

The return in the first case shows that Ellis is an alien, who, upon arrival by steamship at the port of New York, was detained, and duly examined by a board of special inquiry. By the unanimous decision of the board he was excluded from admission into the United States, and was ordered to be deported to the country from which he came. He appealed to the Secretary of the Treasury, who dismissed the appeal. Subsequently he applied to the board for a reconsideration of its decision, which application was denied, and an appeal from such application dismissed. It appears from the testimony before the board of special inquiry that Ellis' passage as a second-class passenger to this country was paid by the United Railway & Trading Company, Limited, and that he came here under an agreement to be employed by said company. It appears affirmatively that he does not belong to the classes of aliens excluded under section 2 of the act of March 3, 1903, c. 1012, 32 Stat. 1214, to wit, idiots, insane persons, epileptics, etc. The ground of the exclusion is that he is a contract laborer, and not within any of the classes of persons enumerated in the excepting clause of the contract labor law, to wit, "professional actors, artists, lecturers," etc. The petitioner contends that he is an expert accountant—the undisputed testimony sustains this contention—and insists that for that reason he is within said excepting clause as "a person belonging to a recognized learned profession."

The return in the second case shows that Charalambis is an alien, a subject and citizen of the Kingdom of Greece, who, upon arrival at the port of New York, was detained, and examined by a board of special inquiry. By the unanimous decision of such board he was excluded from admission into the United States as an alien imported or coming to this country under a contract or agreement to perform labor or service in the United States. Subsequently he was re-examined by another board of special inquiry, with the same result. An appeal to the Secretary of the Treasury was duly taken, and was dismissed. The uncontradicted evidence establishes the fact that petitioner is an expert accountant. Upon the hearing counsel for petitioner expressed a wish to traverse the return, but it then appeared that it was not sought to dispute the accuracy of the return so far as it goes, but only to make further facts appear, which petitioner believed to be relevant. It was, therefore, stipulated by the counsel for immigration commissioner that it might be assumed, in disposing of the case, that petitioner had made proof before the board of the additional facts which are set forth in his petition. Briefly stated, these are: That he speaks and writes in Greek, French, German, and English, and speaks Italian; that the Greek Currant Company, a foreign corporation, is

planning to establish an agency in New York for the purchase and sale of Greek currants; that he is a relative of the principal shareholder, and expects to act as chief accountant and assistant manager of such agency; his passage to this country was paid by the company; that it is necessary for the company to have a representative in New York capable of keeping accounts in Greek, and according to Greek methods, and familiar with the details of the currant business in Greece; that to an advertisement calling for an accountant capable of corresponding in Greek, and familiar with the currant business, the company received no response; that petitioner's relations with the company are, and are to be, of a purely personal and confidential nature. It appears affirmatively that Charalambis does not belong to the classes of aliens excluded by section 2 of the act of March 3, 1903, c. 1012, 32 Stat. 1214, to wit, idiots, insane persons, etc.

Anderson, Pendleton & Anderson, for Ellis.  
 Alfred Hayes, Jr., for Charalambis.

LACOMBE, Circuit Judge (after stating the facts as above). It is contended that there is no law now existing under which these aliens, whose passage has been paid by others, and who come here under contract to perform labor or service, can be deported. The theory is that the act of March 3, 1903, c. 1012, 32 Stat. 1213, has repealed by implication all previous laws on the subject, and that it contains no provision for such deportation.

When the act of 1903 was passed, the statute books contained the following provisions: The original act prohibiting the immigration of aliens under contract to perform labor in the United States was passed February 26, 1885 (Act Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290]). It had been amended, and some of its provisions re-enacted, but had not been repealed. Its first section made it unlawful for any person, company, etc., to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien into the United States, "under contract or agreement, parol or special, express or limited, made previous to the importation or migration, \* \* \* to perform labor or service of any kind in the United States." The third section (23 Stat. 333 [U. S. Comp. St. 1901, p. 1291]) imposed a penalty on the person importing an alien contrary to the provisions of section 1. The fourth section imposed a penalty on the master of the vessel which brought him here. The fifth section (23 Stat. 333 [U. S. Comp. St. 1901, p. 1292]) reads as follows:

"Sec. 5. That nothing in this act shall be so construed as to prevent any citizen or subject of any foreign country temporarily residing in the United States, either in private or official capacity, from engaging under contract or otherwise, persons not residents or citizens of the United States to act as private secretaries, servants or domestics for such foreigners temporarily residing in the United States as aforesaid; nor shall this act be so construed as to prevent any person \* \* \* from engaging under contract or agreement, skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: provided that skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants."

It contained another proviso as to the relatives of persons already in this country, which is immaterial to the present discussion. This

original act was amended by the act of February 23, 1887, c. 220, 24 Stat. 415 [U. S. Comp. St. 1901, pp. 1292, 1293], by adding three more sections, numbered 6, 7, and 8. The eighth section provides "That all persons included in the prohibition in this act, upon arrival, shall be sent back to the nations to which they belong and from whence they came," etc. Prior to this legislation as to contract laborers there was passed an act to regulate immigration, approved August 3, 1882 (Act Aug. 3, 1882, c. 376, 22 Stat. 214 [U. S. Comp. St. 1901, p. 1288]), which provided for an examination by the proper officers of immigrants arriving in any ship or vessel, and directed that "if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such person shall not be permitted to land." On March 3, 1891, there was passed "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294]. The first section reads as follows:

"Section 1. That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the act of February 6th, 1885."

Two provisos not material here are omitted from this quotation. The fifth section amended section 5 of the act of February 26, 1885, by adding to the second proviso the words, "nor to ministers of any religious denomination, nor to persons belonging to any recognized profession, nor professors for colleges and seminaries." Act March 3, 1891, c. 551, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1292]. Further provisions as to examination of immigrants and the proceedings to deport them are found in the act of March 3, 1893 (chapter 206, § 6, 27 Stat. 570 [U. S. Comp. St. 1901, p. 1302]), but are not material to any point under discussion here.

On March 3, 1903, there was passed an "Act to regulate the immigration of aliens into the United States." Act March 3, 1903, c. 1012, 32 Stat. 1213. It is largely a re-enactment of prior laws, but contains much new matter, and provides that "all acts and parts of acts inconsistent with this act are hereby repealed." The second section (32 Stat. 1214) reads as follows:

"Sec. 2. That the following classes of aliens, shall be excluded from admission into the United States: All idiots, insane persons, epileptics, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of a felony or other crime or misdemeanor involving moral turpi-

tude; polygamists, anarchists, or persons who believe or advocate the overthrow by force or violence of the government of the United States, or of all government or all forms of law, or the assassination of public officials; prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution; those who have been, within one year from the date of the application for admission to the United States, deported as being under offers, solicitations, promises or agreements to perform labor or service of some kind therein; and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes; but this section shall not be held to prevent persons living in the United States from sending for a relative or friend who is not of the foregoing excluded classes: \* \* \* provided, that skilled labor may be imported, if labor of like kind cannot be found in this country: and provided further, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

This section is the only one in the act which expressly excludes aliens from admission to the United States. It contains a careful and exhaustive enumeration of excluded classes. It re-enumerates all the classes referred to in section 1 of the act of 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294] (with some additions), but specifically omits the clause in that section relating to "contract laborers excluded under the act of February 26, 1885." As between two statutory enumerations of classes, both apparently exhaustive, the first may fairly be said to be inconsistent with the second as to all items wherein they differ. Had we only these two sections to deal with, there would be much force in the argument that contract laborers are no longer "excluded from admission into the United States." But, as was pointed out in *Holy Trinity Church v. United States*, 143 U. S. 459, 12 Sup. Ct. 511, 36 L. Ed. 226, in construing these statutes we are to get at the spirit of the statute and the intention of its makers, however inconsistent that may be with the words used. An examination of the act itself indicates that Congress did not suppose that by eliding the words last above quoted from the enumeration of excluded classes it was removing the barrier to the ingress of contract laborers. This very second section (Act March 3, 1903, c. 1012, 32 Stat. 1214) provides that skilled labor may be imported if labor of the like kind unemployed cannot be found in this country. The natural implication is that, if such cannot be found here, the skilled labor is to be kept out. The clause excluding persons who have once been deported as being under contract to perform labor evidently contemplates that the existence of such a contract is ground for deportation. Section 4 re-enacts section 1 of the act of 1885, and enlarges its provisions making it "unlawful" to assist or encourage the importation of any alien not only under any contract or agreement, but also under any offer, solicitation, or promise to perform labor here; and the penalties imposed in the act of 1885 for violating that section are re-enacted in sections 6 and 7 of this act (32 Stat. 1214, 1215). Section 19 (page 1218) provides that "all aliens brought into this country in violation of law shall, if practicable, be immediately sent back to the countries whence they respec-

tively came on the vessels bringing them." Section 20 provides that any alien who shall come into the United States in violation of law shall be deported at any time within two years after arrival. A close construction might dispose of these last two sections by confining them to aliens who come into this country in violation of the exclusion clauses found in the second section. But we are not confined to the text of the statute in determining what was the intention of the Congress which passed it. As was said in *Holy Trinity Church v. United States*, *supra*, the history of the act, the petitions and testimony presented to Congress, and the reports of the committees of each house may all be referred to as illuminative of that intention, even when, as in that case, the language used in the statute conveyed no intimation thereof.

The act now under construction originated in the House of Representatives. When it came to the Senate there was in the second section (immediately after the clause "persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution") the following: "Persons whose migration has been induced by offers, solicitations, promises, or agreements, parol or special, express or implied, of labor or work or service of any kind, skilled or unskilled, in the United States." The Senate amended the house bill by striking out the clause last above quoted, and in several other respects. The House nonconcurred in the Senate amendments, and the bill went to a conference committee. The committee came into accord as to which amendments should be accepted and which should be withdrawn. This particular amendment was accepted. The House conferees reported to the House that they "have concurred in the Senate amendment [in line 19, p. 3, § 2] striking out the part of the bill relating particularly to the contract labor law, leaving intact the contract labor laws heretofore enacted and now on the statute books; the only variation being that the words 'offers, solicitations, or promises' were substituted for the word 'contracts.'" Congressional Record, p. 3205. Thereupon the House passed the bill as amended. The reference to "variation" refers to section 4.

There seems to be no doubt that Congress did not intend to abrogate the existing provisions of law touching the exclusion of contract labor, and the immigration officers therefore had jurisdiction to exclude the relators in both these cases, unless they come within the exceptions, as "persons belonging to any recognized learned profession." Does an expert accountant belong to such a profession within the meaning of the statute? When the original act of 1885 first came before this court in the *Holy Trinity Case*, the words "labor or service" were given a broad construction. The words themselves are broad. They were broadened by having affixed to them the clause "of any kind." The provision that skilled workmen might be imported to perform labor or any new industry not established here seemed to imply that the general language of the exclusion clause affected skilled as well as unskilled labor. The express exception of actors, artists, lecturers, and singers appeared to indicate that Congress understood it had used language competent to exclude them, and therefore sought to save them by an exception. Upon

appeal, however (143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226), it was found that Congress did not use the words "labor or service of any kind" with so broad a meaning, and that its intent was simply to stay the influx of cheap unskilled manual labor. Under such a construction of the act, the exceptions are superfluous. An "expert accountant" certainly is not an unskilled manual laborer. The act came again before the Supreme Court in *United States v. Laws*, 163 U. S. 259, 16 Sup. Ct. 998, 41 L. Ed. 151. Laws was a chemist, who came to this country under a contract of employment as chemist on a sugar plantation. Before his arrival the original act had been amended by adding to the enumeration of excepted classes the following "ministers of the gospel, persons belonging to any recognized profession, professors for colleges and seminaries." It would seem as if a much simpler amendment would have restricted the act to conform to the original intention of its framers, and it might be argued that this additional enumeration might be taken as an intimation that the words "labor and service of any kind" were used with a broad meaning. The Supreme Court, however, again held that the contract labor laws applied "only to unskilled laborers, whose presence simply tended to degrade American labor." It also held that a chemist was a person belonging to a recognized profession. The law, however, as may be seen from the statutes above quoted, has been changed since the decision in *U. S. v. Laws*. Whatever may have been the intention of Congress in 1885 and 1891 as to skilled labor imported from abroad—whether it sought only to keep out "the lowest social stratum who live in hovels on the coarsest food," or sought also to give to skilled labor which uses brains as well as hands somewhat of the protection which it had secured to manufacturing capital—there can be no doubt as to its meaning in 1903, for the inhibition of the fourth section is against the importation of aliens "to perform labor or service of any kind, skilled or unskilled." Moreover, the exception has been amended so that it no longer covers "persons belonging to any recognized profession," but only "persons belonging to any recognized learned profession." The definition of the word "profession" given in the *Century Dictionary* and approved in *U. S. v. Laws* is a broad one, and it seems not unreasonable to assume that Congress qualified it with the adjective "learned" for the express purpose of restricting the scope of the exception. Certainly in the ordinary use of language an "accountant," however expert he may be, would not be included as belonging to one of the learned professions. Apparently counsel for both relators practically concede this, for they make no effort to differentiate between professions. "All professions are learned, because they require special knowledge," says the counsel for Charalambis. "All professions are learned. It is an inherent part of the word 'profession,'" says the counsel for Ellis. But Congress did not so understand it, or it would not have inserted the word "learned," and the courts must give that word a meaning. However broad such meaning may be, it would seem that an accountant would fall without it.

As to the treaty with Greece of 1837, referred to in the Charalambis case, it is sufficient to say that all the legislation under discussion is

of more recent date, and therefore controlling. If such legislation conflicts with the treaty, that is a matter for the consideration of the political branch of the government.

Whether, assuming that Charalambis is a skilled laborer, labor of the like kind unemployed cannot be found in this country, is a question of fact to be decided by the board of special inquiry, and not to be reviewed by the courts.

The writs are both dismissed, but, since both relators intend to prosecute appeals, and the questions presented are novel, they may remain, pending appeal, as they are now, in the custody of their respective counsel.

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### SULLIVAN TIMBER CO. v. CITY OF MOBILE.

(Circuit Court, S. D. Alabama. August 1, 1903.)

No. 227.

#### 1. NAVIGABLE WATERS—MOBILE RIVER—SHORE LAND—CONSTRUCTION OF WHARVES—CUSTOM.

Where the owners of land abutting on the tide waters of the Mobile river, within the city of Mobile, by long usage and immemorial custom had been accorded the right to build wharves, bulkheads, booms, and other structures on the flats and in the river in front of their uplands, which did not impede navigation, an owner of such uplands was entitled to use the shore of the river in connection with the upland, including the right to erect piers, wharves, etc., according to the custom.

#### 2. SAME—IMPLIED LICENSE.

The title to the shore of the Mobile river was vested in the city of Mobile, and thereafter the control thereof was vested in the Mobile river commission, which was authorized to establish bulkheads, wharves, drydocks, and boom lines, and provide for their construction on licenses or permission granted by the commission to owners of upland on payment of certain fees. The commission thereafter authorized complainants to construct certain wharves in the river adjoining their land, and the city made no objection to the structures as erected for several years. *Held*, that the city's failure to object, and regulation of such wharf, etc., after its construction, estopped it to deny complainant's right to continue to occupy and use the same so long as the necessities of its business required.

#### 3. SAME—INJUNCTION.

Where the owner of uplands abutting the Mobile river was authorized by the Mobile river commission to construct certain docks, wharves, etc., in the river opposite its land, in which the city acquiesced for a number of years, such owner is entitled to an injunction to restrain the city from recovering the shores occupied by such wharves.

In Equity.

See 110 Fed. 186.

L. H. & E. W. Faith, for complainant.

Gregory L. & H. T. Smith, for defendant.

TOULMIN, District Judge. The complainant is the owner and in possession of the lands in front of which lies the land for the recovery of which the city of Mobile has sued in ejectment. Complainant's said land on the west side of Mobile river is bounded on the east by said river, and its land on the east side of said river is bounded on the west by the river.



The land in litigation with which we are here concerned is that which was the shore under Mobile river on January 31, 1867. The legal title to this land is in the city of Mobile by virtue of an act of the Legislature of Alabama of January 31, 1867.

Complainant's lands being on tide water, it has no title below high-water mark.

Has the complainant made out a case of estoppel against the city to assert its legal title to the shore land sued for?

More than 35 years ago, to wit, on May 18, 1868, this court adjudicated "that from the establishment of Mobile as a port of entry there has been a custom for the riparian owners to erect wharves in front of their lands and to collect wharfage for the use of the same; that these improvements have been recognized and sanctioned in the laws of the state and the ordinances and administration of the city government." See decree of this court in *Leverich v. City of Mobile* (C. C.) 110 Fed. 170.

I find from the evidence that by long usage and immemorial custom the owners of land abutting on the tide waters of Mobile river within the city of Mobile, have been accorded the right to build wharves, bulkheads, booms, and other structures upon the flats and in the river in front of their uplands, provided they do not impede navigation.

I find that the complainant, and those under whom it claims title and possession to the land abutting on the shore in litigation on the west side of Mobile river, have for 15 or 20 years, from time to time, built bulkheads, wharves, and booms in front of their uplands, and out to the channel or navigable part of the river; that the complainant has erected, during the past 15 years, extensive and valuable improvements on its said land, which are devoted to the manufacture and exporting of lumber; and that the bulkheads, wharves, booms, and other like structures built by it in front of its land and over the shore in question are used in connection with its said lumber business, and are essential thereto, at least to its successful operation; and that complainant has expended large sums of money in the construction and maintenance of such bulkheads, wharves, booms, and other structures.

By act of the Legislature of December 10, 1886 (Acts 1886-87, p. 238, § 22), it was provided that the city of Mobile shall have the power to designate and regulate wharf and boom lines along the river front, within the city of Mobile, unless the Legislature shall create a commission clothed with that power, in which case the power of the city in the premises should be suspended. Prior to this act the city had exercised that power to some extent, but not so fully as subsequently done by the Mobile river commission, which was created by an act of the Legislature of February 28, 1887 (Acts 1886-87, p. 647). By the latter act it was made the duty of said commission to establish bulkhead, wharf, drydock, and boom lines, and lines for similar structures. The act also provided that any one proposing to erect or place any bulkhead, wharf, boom, or similar structure in said waters shall make application to said commission, describing the nature and exact location of such proposed structure, and shall at the same time

deposit with the city clerk 15 cents per foot for each lineal foot of the proposed boom, and 25 cents per foot for each lineal foot of wharf, bulkhead, or similar structure. Said commission has since its organization exercised jurisdiction over the water and shore of Mobile river, under the provisions of said act.

I find that complainant applied to said commission, from time to time, for the designation of the lines for the wharves and booms proposed to be constructed by it in front of its lands on both sides of the river, and deposited the fees prescribed by law therefor; that the application was granted, and such structures were built in accordance with the license or permission from said commission, and approved by the city engineer, acting under the direction of the commission, perhaps with this exception: I do not find from the evidence that the wharves proposed to be built on the east side of the river in front of Pinto's Island were ever built, but the evidence shows that a structure, called a "lumber bed," and also a boom on said east side of the river, were built. It does not clearly appear from any direct evidence on the subject that any specific application was made to the commission for permission to erect said lumber bed, or that there was any express permission given therefor, but it does appear that the ordinary fees were paid for the same, and that the city engineer designated the line on which it was erected. Said lumber bed was built about 8 years ago on the shore under the water, and from 50 to 100 feet in front of complainant's land, in water from 2 to 5 feet deep. It does not connect with the upland, but is used in connection with the mill on the opposite side of the river, as a depository of lumber manufactured at the mill, and from which the lumber is loaded on vessels and shipped.

I find that neither the city of Mobile nor the said river commission ever made any objection to, or protest against, the filling in of the low lands, or the construction of the bulkheads, wharves, booms, and other structures erected over the shore and water in front of their uplands, by complainant and those under whom it claims, which from time to time was being done at large expense, during a period of 15 or more years, but, on the contrary, that since the creation of said commission said structures have been erected or placed with the express permission or license from the commission, and for a consideration, in the shape of the fees required by law to be paid. As to the erection of the lumber bed before mentioned, it does not clearly appear that there was any express permission or license therefor, but from the facts and circumstance shown a license may be justly implied.

By the act creating the Mobile river commission the powers theretofore vested in and exercised by the city of Mobile devolved upon said commission, somewhat enlarged. By that act the mayor of the city was made a member of the commission, the clerk of the city its clerk, and the engineer of the city required, under the direction of the commission, to perform certain services in connection with the designation of the lines therefor, and the construction of wharves, booms, and other similar structures.

I find that the city of Mobile, with full knowledge that the complainant, and those under whom it claims title and possession of its said uplands, were making improvements in their front at large ex-

pense, by filling in low lands, building bulkheads, wharves, booms, and other structures in and over the shore and river (including the lumber bed in front of Pinto's Island), stood silently by and permitted it to be done without objection, and without challenge of the occupation and use being made by them during a long series of years. On the contrary, the city of Mobile, prior to the creation and organization of the Mobile river commission, designated by ordinance the lines to which structures, such as bulkheads, wharves, etc., should extend, and short of which they should not stop, if built, and provided for supervising the character of the work and the manner in which it should be done.

There is no evidence that said structures have in any way impeded or interfered with navigation, and none of a notification by the city of Mobile or the river commission of revocation of any license given by said river commission to complainant, or of any claim of a right of revocation prior to the bringing of the suit in ejectment by the city of Mobile. The usage and custom referred to has been recognized, and apparently sanctioned by the legislation of the state and city, and the principles on which rights were exercised thereunder recognized and upheld by the judicial decisions of the state. *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 132, and citations therein of the laws of the state and city; *Sullivan v. Spotswood*, 82 Ala. 163, 2 South. 716; *Compton v. Hankins*, 90 Ala. 414, 8 South. 75, 9 L. R. A. 387, 24 Am. St. Rep. 823; *Sullivan Timber Co. v. City of Mobile (C. C.)* 110 Fed. 186.

The Supreme Court of Alabama in *Turner v. City of Mobile*, supra, said:

"If the complainants have no rights in the shore referable to their ownership of the upland, or the uses they may have made or may be making of the shore in connection with the upland, they, of course, have presented no case of equitable cognizance, nor would they have any standing at law against an action of ejectment prosecuted by the city, the owner of the shore."

The converse proposition must also be true. If the complainant has rights in the shore referable to its ownership of the upland, or the uses it may have made or may be making of the shore in connection with the upland, it has presented a case of equitable cognizance, or would have a standing at law against an action of ejectment prosecuted by the city, the owner of the shore.

The Supreme Court, proceeding in said *Turner Case*, said:

"Assuming that complainants owned upland abutting on the shore lot for the recovery of which the city has sued, and by reason of such littoral proprietorship they had or have the right to wharf out across the shore lot, that right must rest or must have rested upon one of two conditions: It must be or must have been either a mere parol license to erect their wharves on and across the shore, or it must be or must have been something more than a mere parol license from the owner of land to another, having no interest or right in it, to do something upon it—something in the nature of a right appurtenant to the upland, conveying \* \* \* a qualified right under immemorial custom and usage to extend their occupation over the shore by erection thereon and thereacross of wharves, piers, and the like as means of commerce and aids to navigation."

"If they had a mere parol license in the premises from the shore owner, and were without other warrant than his mere permission to occupy the shore with their structures, they had neither legal nor equitable claim thereto, even

though and after they had actually taken possession of the shore lot and erected their marine structures upon it under such parol permission. Such license is always revocable at the pleasure of the licensor, and it neither imports title of any sort in them, nor, even when acted upon, involves any matter of estoppel in pais against him. *Hicks et al. v. Swift Creek Hill Co.*, 133 Ala. 411 [31 South. 947, 57 L. R. A. 720]."

The case of *Hicks v. Swift Creek Mill Co.* it seems to me draws a distinction between cases where no consideration was paid to the licensor and cases in which a valuable consideration was paid for the license, and cites *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439. In that case it is held that a parol license, obtained for a valuable consideration, cannot be revoked by the grantor, when the grantee, having acted under it, would be injured by the revocation. The doctrine of estoppel in pais applies to such case. *Rhodes v. Otis*, supra, and authorities therein cited.

I think it is well settled that an executed license on a consideration is irrevocable, and the licensor will be estopped from revoking the license. 18 Am. & Eng. Encyc. of Law (2d. Ed.) pp. 1144, 1145; *Motes v. Bates*, 80 Ala. 386. And I think that, according to the weight of authority outside of Alabama, an executed license, where the licensee has gone to expense, is irrevocable, and the licensor will be estopped from revoking the license. 18 Am. & Eng. Encyc., supra, and authorities cited in notes.

In the case of *National Waterworks Company v. Kansas City (C. C.)* 65 Fed. 694, Mr. Justice Brewer of the Supreme Court, United States, sitting as Circuit Justice, used the following language:

"The rule is recognized in this state, as elsewhere, that where one party enters upon the real estate of another under a parol license from the latter, and at large expense constructs an improvement which is necessary for the successful carrying on of the business of the licensee, the licensor is estopped to deny the right of the licensee to continue such occupancy and use so long as the necessities of his business require."

In this opinion Mr. Justice Brewer cites quite a number of decisions in support of the above rule. In that case the facts established a parol license so far executed as to vest in the water company a right of occupancy and use.

My opinion is:

(1) That the complainant had and has rights in the shore referable to its ownership of the upland, and to the uses it is making of the shore in connection with the upland, and these rights include that of erecting piers, wharves, booms, and other like structures in front of its upland accorded to it by the custom and usage shown in this case.

(2) That, irrespective of the custom and usage referred to, the complainant had the right to erect the wharves, booms, and the lumber bed constructed by it in front of its uplands, under permission or license from the Mobile river commission, which action of the commission is, under the facts and circumstances shown, binding on the city of Mobile, and that the city of Mobile is estopped to deny the right of the complainant to continue the occupancy and use of the same so long as the necessities of its business require.

(3) That if I regard the license or permission given to complainant by the river commission as not binding on the city of Mobile,

it has, by its acts and conduct in the premises, equitably estopped itself from asserting any claim to the property in question which would annul complainant's rights therein or impair its free use and enjoyment of the same. Mr. Justice Clifford, speaking for the Supreme Court of the United States, states the rule thus: "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adverse claim." *Swain v. Seamens*, 9 Wall. 254, 19 L. Ed. 554; vol. 7, *Rose's Notes*, p. 174; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; 18 A. & E. Enc. of Law (2d Ed.) p. 1145, and notes; also pages 1146-1147; *Sullivan Timber Co. v. City of Mobile* (C. C.) 110 Fed. 197, and authorities therein cited.

(4) That the case presented is one of equitable cognizance, and that the rights of the complainant may be protected by injunction. 18 Am. & Eng. Encyc. of Law (2d Ed.) p. 1146; *Sullivan Timber Co. v. City of Mobile*, supra; *Leverich v. City of Mobile* (C. C.) 110 Fed. 170.

A decree in accordance with the views herein expressed will be entered.

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THE THOMAS WILSON.

(District Court, N. D. New York. August 19, 1903.)

1. TUG AND TOW—LIABILITY OF TUG FOR INJURY OF TOW.

There is no presumption that an injury to a tow was due to the fault of the tug, but her negligence must be proved as a fact, and the proof must be such as to justify the inference, at least, that such negligence caused, or at least contributed to, the injury, before she can be held liable for the consequent damage.

2. SAME—TOW IN CHARGE OF CREW—DUTY TO FOLLOW TUG.

Where a tow is in charge of her own officers and crew, the tug has the right to demand and expect the exercise by them of ordinary care and skill, and that the tow will follow the course of the tug, and conform to her movements, as is its duty, unless such course would manifestly lead it into danger.

3. SAME.

When a tug with three barges in tow, in line, rounded a curve in Galop's Canal, on the St. Lawrence river, the second barge, which was on a single line, 150 feet behind the first, failed to turn, and ran into a bank on the side of the canal, where there had been recent dredging, and over which the water was shallow, and was injured. The first barge, which was on a line of similar length, followed the tug in safety. The line of the bank was marked by stakes. *Held*, under the evidence, that there was no fault on the part of the tug, either in making up the tow or in navigation, but that the injury was due to the fault of the master of the barge, in failing to be in a position where he could give proper attention to his surroundings and to follow the tug.

In Admiralty. Suit to charge tug with liability for an injury to a tow.

The libel in this case was filed January 15, 1900, against the tug *Thomas Wilson*, her engines, boilers, etc., owned by the George Hall Coal Company; and the claim is that the said tug is responsible for injuries to the barge

Henry W. Sage, which injuries were received on or about the 9th day of May, 1899, while being towed, in connection with two other barges, the Ewen and Shawnee, by the said Thomas Wilson, through Galop's Canal, on the St. Lawrence river, whereby, it is alleged, the said barge Sage sustained damage to her fixtures, in loss of time, and for expenses of her master and crew, and otherwise, to the amount of \$2,000. It is claimed that the said injuries and damage were caused solely by the negligence and want of skill and the improper and unseamanlike conduct of and on the part of the persons navigating and in control of and on board the said tug Thomas Wilson, and not by or through any fault, omission, or neglect on the part of the libelants, or the persons on board the said barge Sage. The owners of the tug deny any negligence on their part, or on the part of those in charge of the Thomas Wilson, and allege that the damage to the said barge Sage was occasioned through the fault and negligence of those in charge of the Sage.

Potter & Wright, for libelants.

Goulder, Holding & Masten and George E. Van Kennen, for respondent.

RAY, District Judge (after stating the facts). On the 9th day of May, 1899, the barges Ewen, Sage, and Shawnee had been locked into Galop's Canal from the St. Lawrence river for the purpose of being towed through said canal, and onward to their destination. On that day they were taken in tow, pursuant to the ordinary contract and agreement, by the Wilson, in the order named; and it is claimed that in picking up the tows the tug Wilson was careless and negligent, in not properly attaching the tows to the tug. The owners of the tug did not have charge of the Sage, which was in possession of and under the control of its own crew, except, of course, as it was drawn by the tug. The canal was being deepened and widened at the time of this accident. This deepening and widening had been completed for a distance of about 2,400 feet from the lower lock toward Ogdensburg. Beyond the point where the new channel had been completed, 2,400 feet above the lock, the work of deepening and widening the canal was still going on. A cut about 10 feet wide had been made by dredging along the north or starboard side of the canal for a distance of about 600 feet. This cut gave the channel a depth of about 17½ feet, with a width of 90 feet at the bottom, but the north bank of the canal made by this cut had not been made smooth or sloped. This left a rocky wall, some 11 or 12 feet high, with water above it only 5 or 6 feet deep, and this bank continued or extended for a distance of some 400 or 500 feet along the north bank of the canal. It formed the limit of the channel on that side, and was marked by red stakes. As the Wilson, with her tow, came up the canal, a dredge 80 feet long lay moored on the south or port bank, about opposite the red stake which the Wilson would first pass in coming from the lock. The first red stake was some 20 or 25 feet nearer the lock than the lower end of the dredge. This left about 70 feet between the side of the dredge nearest the north bank and the line of red stakes. The master of the Wilson did not know the exact distance, but he could see the dredge and the stakes. This dredge had been placed in the channel on the south side either that morning or recently. Beyond the dredge lay a scow 70 feet long on the south

side of the channel, and the starboard side of that scow was about even with or a little inside the starboard side of the dredge. About 50 feet beyond the scow, and on the south or port bank, lay the Curlew, 77 feet long, with her starboard side on an even line with the starboard or north side of the dredge. These obstructions placed there by those engaged in widening the canal, of course, reduced the channel to a width of about 70 feet. The bow of the Sage drew about seven feet of water, and would necessarily run into the bank if towed or swung to the north or starboard of the line of those red stakes. This condition of things, narrowing the channel, of course, interfered with the ability of the vessels in tow to maneuver or swing in passing through the canal, and, of course, made the place somewhat dangerous. The day was bright and clear, and the condition of things described could be seen by those on board the tug Wilson as well as by those on board the tow. It is said, and is probably true, that the master of the Wilson did not know the exact length or the exact draft of the barges in tow. It is probably true that he did not know of the condition of the wall bank mentioned, as it had been made recently, and was being extended. However, it was his duty to have all these conditions in mind, to a certain extent, and guard against hidden or unknown dangers.

The Ewen was attached to the Wilson, and the Sage was attached to the Ewen, on long single lines, and the Shawnee was attached to the Sage by short double lines. It is claimed that a tow made up and attached in this way could not be taken through the canal safely. Before reaching the canal or attempting to enter it or entering it, those in charge of the Sage knew this condition of things, if it existed as described and as claimed, as well as the master of the Wilson. It is claimed that the Ewen was about 150 feet aft the tug, the Sage 150 feet aft the Ewen, and the Shawnee only about 15 or 25 feet aft the Sage. The evidence as to the make-up of the tow is somewhat contradictory, and some of it is unreliable, but, assuming it to be true as claimed by the libelants, the question is, did this make-up of the tow cause or contribute to the accident and damage in question? The captain and mate of the tug admit that the Ewen was fast to the tug on a single line, but say she was only 15 or 20 feet aft the stern of the tug. The captain of the Ewen says there was 150 feet of clear water.

There is also a dispute as to the speed of the tug. Some of the witnesses claim that the speed was five or six miles an hour, while others say it was not over two miles per hour. Considering all the evidence, this court is of the opinion that neither estimate is correct, and that the tug was probably proceeding at from three to four miles per hour—less rather than more.

It is claimed that the tug did not give sufficient time to properly make up the tow. There is a dispute in the evidence in regard to this. This court is unable to find, considering all the evidence and all the circumstances, that sufficient time was not given to properly make up the tow. There is evidence that those in charge of the tows willfully neglected to obey the instructions of the master of the tug in this respect, but, however this may be, the court is of the

opinion that the mode and manner of attaching the barges in tow to the tug had nothing whatever to do with the accident and consequent injury.

From the map in evidence it appears that while the canal is straight at the points opposite the dredge, scow, and Curlew, and for some little distance easterly thereof, there is a curve in the canal before reaching the point where the dredge was located, and opposite the easterly end of which is found the first red buoy. It is perfectly apparent that, in approaching the point where the dredge is located, the tug Wilson must have been headed in a direction which, if persisted in, would have carried tug and tows into the north or starboard bank of the canal before reaching the dredge, or when somewhat near it. It was therefore necessary for the tug Wilson to change her direction more to the south, and it was incumbent on those on board the tows to keep a strict watch, and change direction so as to follow in the wake of the tug. It is also apparent that when the tug Wilson, with her tow, rounded the curve in the canal, had she kept straight ahead, she inevitably would have gone into the dredge, or so close thereto as to have endangered the tug and all three barges. It may be, and possibly is, true that the master of the tug made a mistake in judgment in changing direction, and may not have changed his direction soon enough, or he may have changed too soon. The evidence convinces the court that the tug Wilson entered the channel between the dredge and the first red buoy, headed in a proper direction, straight ahead to the westward, and was followed by the Ewen. Had the captain of the Sage been where he ought to have been, in some elevated position, where he could see not only the tug, but ahead of it—the buoys, the dredge, scow, and Curlew—and had he been carefully watching, and had he had a competent man at the wheel, and had proper directions been given by him as to a change of course, the accident would not have happened. The evidence is that at some point near the dredge and first red buoy the captain of the Sage, who was at the wheel, where he was unable to see the whole situation, left the wheel in charge of another person, and went to the side of the barge, and then back. The court is unable to ascertain or determine just how long he was absent from the wheel, but it is evident that he was absent long enough to allow the barge Sage to either sheer to the north, or continue northerly, when it should have changed its course more to the south, so as to follow the tug Wilson, and that, by reason of this carelessness and negligence on the part of the captain of the Sage, that vessel ran into the bank or wall of stone near the first red buoy, and received the injuries and sustained the damages mentioned. When the tug Wilson changed direction after passing the curve in the canal, wherever that change was made, it was necessary for the captains of the barges in tow, respectively, to be on the watch, and promptly change the direction of the barges to some extent before reaching the point where the tug Wilson changed its direction. These barges, being drawn by the tug and under headway, with no means of checking their velocity, whatever it was, were sure to go ahead some distance, on substantially the same line pursued by the tug, after reaching the



point where the tug changed its course, for, whether the lines were long or short, the change of direction made by the tug would not be communicated to the tow immediately, but only after the connecting lines were drawn taut on the new course. It is evident from the evidence that no one was expecting particular trouble at this point. The master of the tug was not in fault for not knowing the location of the dredge, scow, and Curlew, for they had been placed where they were too recently, and it was not incumbent on the master of the tug to go ahead of his tug in another vessel of some description and make a survey of the canal. It was, of course, incumbent on him to keep a proper lookout, and to change direction so as to avoid the shallow water and rocky bank on the north side, while also avoiding the dredge and scow placed in the channel on the south or port side. This the tug did, and the Ewen followed, and sustained no damage. The Ewen was drawn by the tug, and its course and velocity were shaped by that of the tug. How is it, if the tug pursued the erratic course some of the witnesses claim, that the Ewen did not run into the shallow water and upon the rocky bank? It is perfectly evident that those in charge of that barge attended to their duty, and met with no difficulty in following the tug in the channel proper, and in deep water. It is also perfectly evident that the injured barge sustained its damage by want of attention on the part of those in charge, by reason of which, and improper or negligent steering, she ran into the rocky bank and received the injuries complained of. It was incumbent upon the master of the tug to use ordinary care and diligence, and greater diligence when he approached and reached the point where the dredge was located, on account of its being found there. The greater the apparent danger, the greater the care required on the part of the master of the tug. But the same rule applies to those in charge of the injured barge, and this care, and even ordinary care, is not shown to have been exercised by those in charge of the Sage.

This court therefore finds and holds as a fact in the case that the tug Wilson exercised due care at the points mentioned, that those in charge of the Sage failed to exercise due or ordinary care in the management of the barge, and that because of this negligence the accident occurred and the injuries were sustained. This court finds and holds that the length of the lines attaching the barges to the tug had nothing whatever to do with the accident; that, had the lines been shorter, and double lines in place of single lines, and had the management of the barge Sage been the same, quite likely and probably the damage and injuries would have been greater than they were.

There is no presumption that the tug was negligent. Her negligence must be proved as a fact, and the proof must be such as to warrant the inference, at least, that such negligence caused, or at least contributed to, the injury and damage. *The W. H. Simpson*, 80 Fed. 153, 25 C. C. A. 318; *The Lady Wimet* (D. C.) 92 Fed. 399, affirmed 99 Fed. 1004, 40 C. C. A. 212; *The L. P. Dayton*, 120 U. S. 337, 7 Sup. Ct. 568, 30 L. Ed. 669. Negligence which did not cause or contribute to the injury is of no account in this case. When

a tow is in charge of her own officers and crew, as in this case, the tug has the right to demand and expect the exercise by them of ordinary care and skill. *Pederson v. Spreckles*, 87 Fed. 938, 31 C. C. A. 308. The tow must follow the course of the tug, and conform to her movements. *The Stranger*, 1 Brown, Adm. 281, Fed. Cas. No. 13,525; 1 Asp. M. L. C. 19; *The Ciampa Emilia* (D. C.) 46 Fed. 866; *The Jacob Brandow* (D. C.) 39 Fed. 831, 832. Of course, such a rule would not apply if those in charge of the tow saw the tug running into danger, and dragging it there also. In such case it would be the duty of the tow to use all means to avoid the danger, and even cut loose if necessary.

In this case the evidence shows that the *Sage* did not follow the *Ewen*, having an equally long line, but went on to starboard, the north side of the canal, until she struck and was run into by the *Shawnee*. There is evidence that she sheered to the north, but it is not necessary to find that she sheered from her course in following the tug and *Ewen* as they were going before the course was changed more to the westward, as her fault lay in not changing her course so as to follow the preceding vessels. She could not in that narrow canal at that point rely on the line and tug to change her course in time. Any person of good sense, in the exercise of ordinary care, would have seen this. The master of the *Sage* was at the wheel, where he could not see what he ought to have seen, and that which had he seen he would have avoided. This court does not credit the evidence to the effect that when opposite the scow the tug sheered to starboard and then to port (north and then south). There was no reason for such action. Had she done so at that point, the *Sage* would not have been run into the north bank by such erratic movements—movements made as quickly as these are alleged to have been made. It is claimed by the libelants that the swing of the stern of the *Ewen* carried the *Sage* to starboard, and into the rocky bank covered by shallow water. This is hardly possible. It is not probable. It is a theory, not a fact, in the judgment of this court. With over 100 feet of line connecting the *Ewen* and *Sage*, the swing of the stern of the *Ewen* to starboard in changing her course to follow the tug would have been hardly perceptible in affecting the course of the *Sage*. Ordinary care and watchfulness on the part of the captain of the *Sage* would have avoided all evil consequences, in any event. The burden of proof is on the libelants. This has not been sustained.

It follows that the libel must be dismissed, with costs. So ordered.

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In re LE CLAIRE.

(District Court, N. D. Iowa, W. D. September 2, 1903.,

1. **BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.**

A claim for alimony, made by a married woman in a suit for divorce which was pending at the time of her bankruptcy, was not property which she could have disposed of, such as would vest in her trustee, and her failure to schedule the same was not a concealment of property which defeats her right to a discharge, nor was her refusal to convey

to the trustee property subsequently awarded her as alimony, and which she claimed under the statute as her homestead.

**2. SAME—PROPERTY VESTING IN TRUSTEE—ALIMONY AWARDED WIFE AFTER BANKRUPTCY.**

A claim of a wife for alimony is not a property right, and property awarded her as alimony after her bankruptcy does not become a part of her estate in bankruptcy.

**3. SAME—HOMESTEAD EXEMPTION—IOWA STATUTE.**

Under Code Iowa 1897, § 2973, which provides that the right of homestead exemption shall continue to the party to whom the property is adjudged in a decree of divorce, during continued personal occupancy, where a married woman, after her adjudication as a bankrupt, was granted a divorce, and awarded the custody of a child and the homestead of the family, title to which was in the husband, as alimony, such property cannot be subjected to the payment of her debts in the bankruptcy proceedings.

In Bankruptcy. On petition for discharge and objections thereto. Harlan & Buck and G. H. Martin, for creditors.

SHIRAS, District Judge. From the record in this case it appears that the petition in bankruptcy was filed on the 8th day of April, 1903, and the adjudication thereon was entered on the day following, to wit, April 9th. It further appears that on the 23d day of March, 1903, the bankrupt had brought an action in the district court of Clay county, Iowa, for a divorce from her husband, Joseph Le Claire, and had in her petition asked that alimony should be granted to her out of the estate of her husband. On the 13th day of April, 1903, the court entered a decree of divorce, granting to the bankrupt a judgment for \$100 against her husband, and setting aside to the bankrupt, as alimony, certain realty in Spencer, Clay county, Iowa, of the estimated value of \$3,500, but subject to a mortgage of \$2,000, and also granting to the bankrupt the care and custody of a minor child. On the 4th of May, 1903, the bankrupt was examined at length by the creditors, and she testified that her former husband, Joseph Le Claire, in 1899, bought a portion of lots 16, 17, and 18 in the town of Spencer, and built a house thereon, which he, with his wife and family, occupied as a home in September, 1899; that she, the bankrupt, now lives therein, it being the realty set apart to her as alimony; that she claims the same as her home, and refused to deed the same to the trustee in bankruptcy. It further appears from the record that the debts to the contesting creditors were created against her before she married Joseph Le Claire.

Upon the filing of the petition for discharge, a specification in opposition thereto was filed on behalf of two of her creditors, averring that within four months next preceding the filing of her petition in bankruptcy the bankrupt, with intent to hinder, defraud, and delay her creditors, had concealed her property, in that she had not listed as part of her assets her claim for alimony, and that she refused to list the same after it had been granted by the state district court.

Under these circumstances, would the court be justified in finding that the bankrupt had concealed the property from her creditors, within the meaning of the bankrupt act? When the petition in bankruptcy was filed, this property had not been assigned to her, and

there was no certainty that a divorce would be granted, or that any specific property would be set apart to her as alimony. She was not required to set forth in the schedules attached to her petition the fact that after the adjudication in bankruptcy she might become vested with the title to some property by way of alimony. According to the provisions of section 70 of the act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], the trustee is vested with the title of the bankrupt as of the date of the adjudication in all "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Certainly, at the date of the adjudication in this case, the mere claim or possible right to alimony asserted by the bankrupt in the divorce proceedings could not have been levied on and sold under judicial process, nor was it a property right which could be made the subject of barter and sale with third parties by the bankrupt herself. Prior to the entering of the decree of divorce in the district court of Clay county, which was not done until some days after the date of adjudication, it could not be known whether a divorce would be granted to the bankrupt, or whether any alimony would be allowed her; and, if allowed, it could not be known whether it would be in the form of stated amounts of money to be paid by the husband, or by setting apart specific property to her, both of which methods are permissible under the statute of Iowa. In view of these considerations, and of the further fact that the Code of Iowa of 1897, § 3180, enacts, that: "When a divorce is decreed, the court may make such order in relation to the children, property, parties and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects, when circumstances render them expedient"—it seems clear that a claim for alimony asserted in a suit for divorce is not a property right that can be sold and transferred by the claimant, or that can be levied on by judicial process. If this be true, then the failure to list the claim in the schedules attached to the petition in bankruptcy cannot be held to be a concealment of property of such a nature as to defeat the right to a discharge.

But it is claimed that, after the decree of the court had been entered awarding the alimony, the fact that the bankrupt refused to list the property or to convey it to the trustee would support the charge of concealment, and so defeat the discharge. There certainly was not actual effort on part of the bankrupt to conceal the facts of the situation from the creditors or the trustee. The whole proceedings in the divorce case are on record in the state court, and are open to all interested. Upon the examination of the bankrupt she stated the facts fully. It is true she refused to convey the property to the trustee, claiming that the same was her homestead; but this was not a concealment of the property, but only the assertion of her claim thereto. If the property is assets of the estate, it is vested, by operation of the act, in the trustee, and it cannot be fairly claimed, therefore, that the bankrupt is concealing the same from the trustee or the creditors. The assertion of her claim that the property is not part of the assets of her estate is only the assertion of a claim which she has the right to make; and, even if it should be finally ruled that the property

passes to the trustee as part of the assets of the estate, that would not sustain the charge that the bankrupt had concealed the property with intent to defraud.

But is it true that this property is part of the assets of the estate, which can be rightfully claimed by the trustee as part of the estate to be administered by him for the benefit of the creditors? The property in question belonged originally to the husband. He built a house on the lots, and with his wife and family occupied the same as a homestead. When the decree of divorce was granted, the court awarded the custody of the minor child to the mother, and set apart the homestead as alimony, the title thereto being conveyed to the bankrupt. Treating it as property then acquired by the bankrupt, it would not pass to the trustee, as the creditors have no interest in or claim to property acquired after the date of the adjudication, unless it represents property rights held by the bankrupt before the adjudication. *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467. But the claim for alimony was not a property right held by the bankrupt. Thus, in *Martin v. Martin*, 65 Iowa, 255, 21 N. W. 595, it is said:

"But we are of the opinion that her right to alimony does not create in her an interest in his property. Alimony is an allowance out of the estate of the husband for the maintenance of the wife after the dissolution of the marriage relation."

In *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. 735, 48 L. Ed. 1009, it was ruled that alimony awarded to the wife was not a debt provable in bankruptcy, nor was it affected by a discharge granted the husband; it being said in the opinion:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances may require. \* \* \* Permanent alimony is regarded rather as a portion of the husband's estate, to which the wife is equitably entitled, than as strictly a debt. Alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction."

By section 2973 of the Code of Iowa of 1897 it is enacted that:

"A widow or widower, though without children, shall be deemed a family within the meaning of this chapter, while continuing to occupy the real estate used as a homestead at the death of the husband or wife, and such right shall continue to the party to whom it is adjudged in a decree of divorce, during continued personal occupancy."

In the case now before the court the property in question was the homestead of the family at the time when the proceedings for divorce were begun and when the decree of divorce was granted. By that decree the homestead property was awarded to the wife, who, with her child, has ever since occupied it; and under the section of the Code just cited the family, consisting of the wife and her child, are entitled to the same homestead rights therein that would have existed in case no decree of divorce had been granted. It is not claimed that the property, being that of the husband, could have been subjected

to the payment of the debts of the wife created before she became his wife, and the homestead exemption which existed in favor of the family before the decree of divorce is continued for the benefit of the wife and child by the provisions of section 2973 just quoted. By the setting apart of the homestead in the divorce decree provision was made for the child as well as for the wife, but, if the property can be taken by the trustee for the payment of the debts of the wife, the child is deprived of its interest in the family home. In *Byers v. Byers*, 21 Iowa, 268, wherein it was sought to subject the homestead, which remained in the occupancy of the husband, to liability for a money judgment awarded the divorced wife as alimony, Judge Dillon, speaking for the court, said:

"The plaintiff is the head of a family, and did not cease to be such by reason of the divorce. Defendant, by the divorce, ceased to be a member of his family. The homestead law is intended for the benefit of the family, children as well as wife. \* \* \* The wife, it is true, should be paid her support. But it does not follow that her right of support is greater than the right of the children to shelter. Suppose, in this case, that there is a family of children, and that the property in question is all that is left, should this be sold to pay the wife, and the children be left without a home? This is put by way of illustration, and to show that all such questions should be adjudged in the divorce suit, where the court of equity, with a delicacy of tact all its own, can adapt its relief to the peculiarities of the situation."

The setting apart of alimony for the benefit of the wife and children is the enforcement of the duty resting upon the husband and father to make provision for them, and in the statute of Iowa express provision is made for changes in the original allotment of alimony when the circumstances render such change expedient or necessary. Property set aside as a provision for the wife and family may be destroyed by the elements, and this would justify the court in requiring the husband and father to make further provision for them, if of ability so to do. If, in this case, the homestead is applied to the payment of the debts due from the wife, she and her child will be as effectually deprived of the provision made for them out of the property of the husband as though the home had been destroyed by fire, and the need for further provision for them would be equally pressing; yet it would certainly be most inequitable to hold that the husband must make further provision for them to meet the necessity created by the appropriation of the property to the payment of the debts of the wife. Furthermore, the interests of the child are involved in the disposition made of the property, and certainly the creditors of the wife have no right to subject the interests of the child to the payment of the debts due them. These considerations demonstrate the correctness of the views expressed by the Supreme Court of Iowa in *Byers v. Byers*, supra, and by the United States Supreme Court in *Audubon v. Shufeldt*, supra, that the control of alimony must be left to the court having jurisdiction of the divorce proceedings, and that it is not within the jurisdiction of the court in bankruptcy to take the property set apart as alimony, and distribute it among the creditors of the wife.

It cannot, therefore, be held that the creditors have sustained their objections to the petition for discharge, and, the same being overruled, the bankrupt is entitled to her discharge.

## THE EREZA.

(District Court, E. D. Pennsylvania. July 29, 1903.)

No. 19.

## 1. SALVAGE—COMPENSATION—ELEMENTS OF AWARD.

The delay and injury to a vessel by grounding while on her way to another port for a supply of coal made necessary by her going out of her course on her voyage to tow a disabled ship to port are too remote to be considered as elements in making a salvage award, even if the grounding was not due to her fault.

## 2. SAME—VALUE OF SALVOR'S CARGO—EFFECT OF HARTER ACT.

In awarding compensation to a ship for salvage services rendered while she was on a voyage to or from a port of the United States, under section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), the value of her cargo and freight are to be excluded from consideration.

## 3. SAME—TOWING DISABLED STEAMSHIP TO PORT—AMOUNT OF COMPENSATION.

The English steamship Yeoman, valued at \$500,000, while on a voyage from Galveston to Liverpool, in February, with a cargo of cotton worth \$900,000, sighted the Spanish steamship Ereza, 415 miles southeast of the Delaware capes, with a broken rudder and disabled, and at her request towed the Ereza to the Delaware breakwater on her way to Philadelphia. The weather was stormy and the sea rough, and the delay caused the Yeoman by the service, including the time for recoaling, was some eight or nine days. The Yeoman was a large and new ship of 7,379 tons gross register, and the service was well performed, without delay or injury to the Ereza or her cargo. The latter, on her arrival with cargo and freight, was of the value of \$269,000. *Held* that, including compensation for expenses, delay, and the service itself, the Yeoman was entitled to an award of \$20,000.

In Admiralty. Suit to recover for salvage services.

J. Rodman Paul and Howard H. Yocum, for libellant.

Harrington L. Putnam, for respondent.

J. B. McPHERSON, District Judge. This is a case of salvage, which presents the usual dispute concerning the sum to be awarded to the salvor in payment for expenses, delay, and meritorious service. The principal facts, which are for the most part not in controversy, are as follows:

The Ereza is a Spanish steamship of 4,838 tons gross, and 2,599 tons net, register, and was built of steel, in 1894. On January 18, 1902, she left the Austrian port of Fiume, bound for Philadelphia, carrying a cargo of 44,000 bags, or about 4,400 tons, of raw beet sugar, worth \$124,520.12, upon which the amount of the marine freight was \$9,737.30. When the ship arrived at the port of Philadelphia she was worth about \$135,000, so that the total value of the vessel, cargo, and freight was something over \$269,250. The British steamship Yeoman was built of steel in 1901, and is of 7,379 tons gross, and 4,784 tons net, register. At the time under consideration she was worth say \$500,000, and was laden with a cargo of cotton valued at \$900,000, upon which the freight at risk was about

† 3. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

\$40,000; the total value of the vessel, cargo, and freight being, therefore, about \$1,440,000. She carried a crew of 45 men, and was bound upon a voyage from Galveston to Liverpool. Neither vessel carried passengers or mails. The Ereza coaled at Gibraltar on January 25th and 26th, taking in 500 tons at that port, this being sufficient, with the quantity already on board, to last for 27 days. About the 1st of February she began to encounter severe weather, and from that day, for a period of three weeks, she was exposed to continuous and heavy storms. The seas were unusually large, breaking frequently over her deck, and she rolled and pitched with great violence. She was often obliged to slow down her engines, and at times was compelled to stop them for 8 or 12 hours at a time, in order to avoid damage from racing and to ease the plunging of the ship. Her progress was so moderate that upon February 18th, when she was 23 days out from Gibraltar, she was still more than 400 miles distant from the capes of the Delaware. Upon that day she broke the four blades of her propeller, and was thereby deprived of her steam motive power. She had an inferior set of sails—five in all—and these were set the next day, in order to steady the vessel, and perhaps to enable her to make some progress; but the violence of the wind was such that three of the sails were blown away in a few hours. For two days she drifted at the mercy of the wind and waves, and was carried to the southeastward from 90 to 100 miles out of her course. She was, however, still in the usual track of west-bound steamers from the Mediterranean, and was also near the track of north-bound steamers from the West Indies, as well as of some Gulf steamers bound eastward towards Europe. She had suffered damage from the severity of the weather—part of her bulwarks was broken down, the boiler feed-pump was injured, and she was taking in some water through the stern tube—but her hull was practically staunch and unimpaired, and she had provisions on board for four or five months. She saw no vessels during the two days between February 18th and February 20th, but on the afternoon of the 20th she sighted the Yeoman in latitude 36.15 N., longitude 67.25 W., about 415 miles from the capes. As the Yeoman approached the Ereza signaled, "Will you take me in tow?" to which the Yeoman replied by a request that the Spanish captain should come on board. In compliance with this request the captain of the Ereza, his chief officer, and his chief engineer, were taken to the Yeoman by one of their own boats. Neither the Spanish captain nor the chief officer could speak English, and the engineer, who acted as interpreter, was not very proficient in that language. Some misunderstanding may have occurred by reason of the difficulty of communication, but I attach no importance to this circumstance. An examination of the chart will show that the point at which the steamships met was west of north of the island of Bermuda, and nearer to Bermuda than either to Norfolk or Philadelphia. The Yeoman having signified her willingness to take the Ereza in tow, there was some discussion about the port to which the vessels should now be directed. Bermuda was considered—it is at this point that the misunderstanding may have taken place—but was finally rejected be-



cause neither captain had ever been to the island, and the captain of the Yeoman was afraid that the entrance to the harbor was not safe for a vessel as large as his. Moreover, no one on either ship knew whether the Ereza could be repaired upon the island; and manifestly, if such repairs as she needed were impossible there, another vessel must be found to take her to Norfolk or Philadelphia. It was decided, therefore—wisely, as I think—to proceed to the Delaware breakwater, and preparations for the tow were accordingly begun. Each vessel had a  $4\frac{1}{2}$  inch steel hawser, and these were both made fast to the anchor chains of the Ereza, one upon the port, and the other upon the starboard, bow. The tow began about 9 o'clock on the evening of February 20th, the Yeoman proceeding slowly at first, and afterwards increasing her speed. The weather was still tempestuous, but there was no particular difficulty during the first day of the voyage, 120 miles being made by noon of February 21st. In the afternoon of that day the weather became more violent, and toward evening it blew a hard gale, with heavy squalls and continuous rain. The Yeoman was obliged to slow down, and finally to lie to, in order to ease the strain on the hawsers. Very little progress was made during that night, and as the gale continued during the morning of February 22d not many miles were made by noon of that day. Toward noon of February 23d the wind and sea moderated somewhat, although the waves were still so high and towage so difficult that the progress made by noon on February 23d was not more than about 94 miles. The next day the weather cleared, with a light wind and a mild swell, and good speed was made, so that by 6 o'clock in the afternoon Henlopen light was sighted, and pilots were taken on board about 9 o'clock. Shortly afterwards the Yeoman took in her own hawser, and the tow continued with the aid of the Ereza's hawser alone. This snapped very soon, and was not reattached, for the breakwater was not far distant, and as there were many ships in that shelter, rendering it unsafe, in the judgment of the pilot, for these two large vessels to enter at night, the pilot boat Philadelphia was engaged by the Yeoman, at a cost of \$200, to tow the Ereza to a place of safety. This was accordingly done, and the Ereza came to anchor shortly after midnight. Upon the next day her captain telegraphed to the ship's agents in Philadelphia for a tug, which was sent down promptly, and she began her voyage up the Delaware river about 10 o'clock in the evening of February 26th. The Yeoman remained at the breakwater until February 27th, and the captain explains the delay by declaring that, owing to a severe storm that prevailed along the coast and for some distance inland, he could not communicate with his owners in London in order to receive instructions. On February 26th, in reply to his telegram stating that he had towed the Ereza into port and needed a fresh supply of coal, his owners directed him to consult their agents at Philadelphia, and it was thereupon determined that the Yeoman should replenish her bunkers at Norfolk. She started for that port upon February 27th, and during a fog, about 1 o'clock on the morning of the next day, ran aground upon a sand bank near Cape Henry, where she was obliged to remain for 8 or 9 hours, until she was

floated off by the rising tide. She was apparently uninjured by the grounding, and proceeded at once to Norfolk, where she coaled on the afternoon of February 28th. On March 1st she took up her interrupted voyage to Liverpool, and on March 3d she reached a point corresponding substantially with the point where the tow began. This is a period of 10 days, and the delay of her voyage is put forward by the libellant as one element in the claim for salvage. No doubt a proper allowance for delay is always to be taken into account, but I do not think the full 10 days should be considered. I am not satisfied that all of the delay at the breakwater was unavoidable. The Spanish captain was able to telegraph at once to Philadelphia without difficulty, so far as appears, and no reason is disclosed by the testimony why the captain of the Yeoman could not have been equally successful. Moreover, the detention at Cape Henry caused by the vessel's grounding is too remote to be considered, even if the grounding was not due to the fault of the Yeoman in attempting to enter the Chesapeake at night in a fog, without taking a pilot on board. In this connection I may also say that the charge for docking, repairs, and painting done at Liverpool after the arrival of the Yeoman is not a proper subject for allowance. As I have already said, the grounding was an incident too remote to be considered, and even if the vessel was not in fault, and was injured to some extent by reason of that accident, the charge cannot properly be allowed.

I do not think it necessary to itemize the award that is to be made. I have taken into account the expenses of the vessel during the delay that is properly to be attributed to salvage service, the cost of the coal that was thereby made necessary, the sum paid the pilot boat Philadelphia, and other proper expenses at the breakwater, and the value of the time lost. The principal difficulty concerns the value of the service, and it is a difficulty that always confronts a court in the attempt to settle upon the amount of a salvage award. In coming to a conclusion, the value of each vessel should certainly be considered, and also the value of the cargo and freight that were saved. With regard to the value of the cargo and freight of the salvor, it is argued, and I think correctly argued, that the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) requires such value to be excluded. The third section of that statute provides that, if a vessel plying to or from a port of the United States shall be seaworthy, and properly manned, equipped, and supplied, at the beginning of the voyage, she shall not be liable to the cargo for losses arising from saving or attempting to save life or property at sea, or from any deviation in rendering such service. This being so, the value of the cargo at risk is no longer an element in determining what perils the salving vessel was obliged to encounter. The point has already been decided in the federal courts, and it is only necessary, I think, to refer to these decisions: *The Chinese Prince* (D. C.) 61 Fed. 699; *The Florence* (D. C.) 65 Fed. 248; *The Alaska* (D. C.) 75 Fed. 430.

Taking into consideration, therefore, the expenses to which I have already alluded, the value of the ships, and the value of the *Ereza's*

cargo and freight, the difficulty of the service, the length of time occupied, the dangers to which both vessels were exposed, the capacity of the Yeoman to do such service well, the admirable manner in which it was accomplished, and the success of the enterprise; and also taking into consideration, what is by no means to be neglected—the public policy that favors a fair and liberal award, in order that other ships may be induced to extend like aid to those in distress—I am of opinion that the meritorious service of the Yeoman, including the allowance for expenses and all other items of charge, should be compensated by an award of \$20,000.

When the agreement to tow was entered into, the amount to be paid was left undetermined. The sum was to be settled by arbitration in London, but, so far as appears, no effort was made by either party to carry this agreement into effect. No demand for a specific sum is made in the libel, and none is tendered by the answer; the libellant's counsel suggesting \$30,000 in his brief, while the counsel for the respondent admits that \$4,565.63 should be allowed for disbursements and as recompense for time and service, and concedes that a sum should be added as a reward, "based upon the gallantry, courage, zeal, and intrepidity shown, also having regard to the value saved," apparently suggesting a small percentage, say  $2\frac{1}{2}$  per cent., on such value. There is sufficient range between these two suggestions to allow some freedom of movement, and I have exercised my best judgment to reach a fair and just result.

A decree may be entered in favor of the libellant for \$20,000, with costs of suit.

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GIUSEPPE et al. v. MANUFACTURERS' EXPORT CO.

(District Court, S. D. Alabama. June 19, 1903.)

No. 983.

1. SHIPPING—BREACH OF CHARTER PARTY—DELAY OF SHIP IN PROCEEDING TO PORT OF LOADING.

Defendants chartered from the owners' agent in Mobile an Italian ship, to be loaded in Mobile. The charter party stated that she was then on passage from Sydney to Genoa, Italy, and stipulated that she should "proceed with all possible dispatch to port of loading to enter upon this charter." Defendants required the ship, not later than November, to carry a cargo they had sold, and relied on the agent's representation that she could reach there by that time. Nothing was said as to whether she was then carrying a cargo. She arrived in Genoa September 27th with a cargo of coal, and sailed from there for Mobile December 7th, not arriving until in the following March, when defendants refused to load her, having previously procured another vessel. The weight of evidence was that there were good facilities in Genoa for discharging coal, and that the ship in the usual course there should have discharged in from 10 to 14 days, and should have been ready to sail in from 10 to 12 days more. *Held*, that the provision that she should "proceed with all possible dispatch" was a warranty, and that her remaining in Genoa for 70 days was unusual and unnecessary, and, in view of the circumstances under which the charter was made, relieved defendants from the obligation to accept her when tendered.

In Admiralty. Action against charterer for breach of charter party.

Gregory L. & H. T. Smith, for libelants.  
Pillans, Hanaw & Pillans, for defendant.

TOULMIN, District Judge. This is a suit by the owners of the Italian ship Caldera to recover damages for an alleged breach of a charter party. The charter party was made in Mobile, Ala., June 11, 1901, between G. Ivulich, the agent of the vessel, and the defendant. The location of the vessel at the time was stated to be "now on a passage from Sydney to Genoa, Italy." The charter party also contained this stipulation: "Vessel to proceed with all possible dispatch to port of loading, to enter upon this charter."

The facts of the case, as I find them from a preponderance of the evidence, are that in June, 1901, the defendant having made a sale of lumber to Montevideo, to be shipped in October or November of that year, and wanting a vessel for the shipment, G. Ivulich, as agent for the ship Caldera, offered them that ship as a suitable one for the cargo and for loading in November. The negotiations for the ship were between said Ivulich on the one part, and J. T. McKeon, president of the defendant company, and H. G. G. Donald, who was then an officer of the company, on the other part, the result of which was the charter party in question. Donald principally attended to the details of the charter party. In their negotiations the parties figured on the length of time it would probably take the ship to reach Mobile, calculating on her having then been about 10 or 12 days on the passage from Sydney to Genoa. Her exact location was not known to them at the time. Donald and McKeon understood from Ivulich's representations that the ship was sailing from Sydney, Cape Breton, in the Dominion of Canada. Donald and Ivulich in their negotiations figured on that basis, and estimated that she would get to Mobile by November, and for November loading. Nothing was said, during the negotiations or at the time the charter party was executed, about the ship having a cargo for Genoa. If Ivulich then knew that she had a cargo, he did not know what kind of cargo it was, and he did not mention the matter of cargo to either Donald or McKeon. Under these circumstances the charter party was made.

It is true that Ivulich testified that he did not represent the ship as sailing from Sydney, Cape Breton, and that he did not figure on the time it would take her to get to Mobile on any such basis, nor did he calculate on her reaching Mobile in November, or so represent; that he figured on her sailing from Sydney, New South Wales, to Genoa, and his estimate was that she would not reach Mobile under eight or nine months. He also testified that he knew the ship had cargo, and his recollection was that he at some time had told Donald and McKeon that she perhaps had a cargo of jarra wood. But the weight of the evidence is in conflict with the testimony of Ivulich on all these points, except as to any express representation by him that the ship sailed from Sydney, Cape Breton. I am not satisfied, from the evidence, that he made any express representation as to that; but his conduct implied it, and Donald and McKeon so understood it, and I do not find that Ivulich at any time represented that the ship sailed from Sydney, New South Wales. Donald, McKeon,

and Yonge (who was also an officer of the defendant company and who had some knowledge of the negotiations for the ship) testified to the effect that they had never heard that the ship was on a passage from Sydney, New South Wales, until in September, 1901, some three months or more after the charter party was made, and that they then learned it through the Maritime Register or some like source. They at once sought an interview with Ivulich and told him of what they had learned. While neither affirming nor denying the correctness of the information, he assured them that the ship would be at Mobile in November, and in time for the November loading. They further testified that they never heard, at that or at any other time, anything about a cargo of jarra wood, and that Ivulich made no such suggestion to them or in their hearing.

The evidence was that the ship did not arrive in Mobile until March, 1902, when the defendant notified the master of the ship that they would not load her under the charter party, because of the great delay in her arrival, owing to which the purposes for which she was chartered had lapsed. The defendant had taken another ship in the meantime to fill their contract. The evidence showed that an average trip for such vessel from Sydney, Cape Breton, to Genoa, and thence to Mobile, would be about 5 or 6 months, and that an average trip from Sydney, New South Wales, to Genoa is about 5½ months, and from Genoa to Mobile from 2½ to 3 months; that at the time this charter party was made the ship *Caldera* was running around Cape Horn with a cargo of 2,737 tons of coal, and that she reached Genoa on September 27, 1901, and sailed for Mobile on December 7, 1901; that for a vessel the size of the *Caldera* the time necessary to take ballast and to attend to ship's business at Genoa is usually 10 or 12 days.

The master of the ship testified that the usual time for discharging a cargo of coal at Genoa from a vessel like the *Caldera*, and to attend to her business, is not less than 2½ months; that there were no hoists or other machinery for discharging a cargo of coal there, and that such cargo had to be discharged by hand. It, however, appeared from the testimony of the master that in discharging the *Caldera's* cargo of coal at Genoa he sometimes discharged from one hatch and sometimes from two, and that she had three hatches, but that he did not discharge from more hatches because he had to discharge under his charter party, and he knew that the charterers would not receive more than he did discharge. The charter party called for discharging the cargo at 50 tons per day. The ship was at Genoa 2 months and 10 days. There was evidence on the part of the defendant that in the port of Genoa the facilities for discharging cargoes of coal are excellent and ample. There are hydraulic cranes and other equipments there as fine as any in the world; that cargoes of coal are usually discharged by these cranes, which are capable of discharging as much as 1,000 tons a day; and that 200 or 300 tons a day is the usual rate of discharging such cargoes.

"Time and situation of a vessel are materially essential parts of the contract of a charter party or affreightment." *Gray v. Moore* (C. C.) 37 Fed. 266; *Lowber v. Bangs*, 2 Wall. 732, 17 L. Ed. 768; *Davison v. VonLingen*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885. "The

place where a ship is, is a material point in making the charter party, for two reasons: The charterer learns what sort of a voyage the ship is about to make, and also how long it will probably be before the ship arrives. \* \* \* The statement of the place of the ship is a substantive part of the contract. \* \* \* This statement is a condition precedent." *Benton v. Taylor*, 7 Asp. 385. If there is a breach of this condition, the charterer has a right to treat the contract as at an end. *Benton v. Taylor*, supra.

It appears there are two well-known ports named Sydney—one in the Dominion of Canada, and the other in Australia. The charter party does not specify which one is referred to as the place from which the *Caldera* was on a passage to Genoa. It is well settled that a contract, where its meaning is not clear, is to be construed in the light of the circumstances surrounding the parties when it was made. It is always allowable to adduce oral or other extrinsic evidence of the surrounding circumstances under which a contract was made, so as to enable the court to place itself in the position of the parties thereto, to identify the persons and things to which it refers, and to see clearly what has been expressed in the instrument. From the view I take of this case, it is unnecessary to determine whether Sydney mentioned in the charter party referred to Sydney in Cape Breton, or to Sydney in New South Wales. Assuming that it referred to the former, and that there was a breach of that condition of the contract, because of the fact that the ship was on a passage from Sydney, New South Wales, and because of such breach the defendant had the right to treat the contract as at an end, yet when it learned that fact, and did not then choose to treat the contract as at an end, and so notify *Ivulich*, but led him to believe that it chose to treat it as still subsisting, relying on his assurances that the ship would nevertheless be at Mobile in November, I think it should be considered as having waived the breach.

The charter party stipulated the "vessel to proceed with all possible dispatch to port of loading, to enter upon this charter." "With all possible dispatch" is a warranty that she will so proceed. It is not a representation simply that she will so proceed, but a condition precedent to a right of recovery. *Lowber v. Bangs*, supra; *Davison v. Von Lingen*, supra. Where there is no express stipulation in a charter party as to time, the law implies a stipulation that there shall be no unreasonable or unusual delay in commencing the voyage, or, if it has been commenced, in the performance of it; and if the purposes of the charter party were altogether frustrated by the delay it is a defense to an action for nonperformance by the charterers. *Olsen v. Hunter-Benn Co.* (D. C.) 54 Fed. 530. In view of the circumstances under which the ship was chartered, and of the assurances of her agent, *Ivulich*, after it was known by the charterers that she was on a voyage from New South Wales, that she would arrive in Mobile in time for November loading, as originally contemplated, her delay at Genoa was not only unreasonable, but, upon the evidence in the case, I think unusual and unnecessary. Even if the charterers could be charged with notice that the ship was burdened with cargo to be discharged at Genoa, yet I am satisfied, from the evi-

dence, that her delay of 70 days there was unreasonable and unnecessary, and that she ought not to have consumed one-third of that time. *Antola v. Gill* (C. C.) 7 Fed. 487.

While my opinion is that the charterers were not bound by the undisclosed knowledge that the ship had cargo to be discharged at Genoa, the conclusion I have reached in the case renders it useless to discuss that proposition or give the reasons for my opinion on it. My judgment is that the charterers had the right to refuse to load the ship when tendered, and that the libelants are not entitled to recover.

The libel is therefore dismissed.

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### THE NETTIE QUILL.

(District Court, S. D. Alabama. July 10, 1903.)

No. 1,017.

#### 1. SHIPPING—CONTRACT OF AFFREIGHTMENT—CARRIAGE OF GOODS ON BARGE.

The owner and master of a steamer engaged in making regular trips between river ports contracted to transport from one of such ports to another, for a stated charge, a locomotive engine. The barge owned and used by him on such trips not being suitable, it was agreed that the owner of the engine should furnish a barge on which to load the same, which was to be returned by the steamer. The steamer issued a bill of lading in the usual form for the barge and engine, and lashed the barge to her side for the voyage. *Held*, that the contract was one of affreightment, and not of towage.

#### 2. SAME—LOSS OR DAMAGE TO CARGO—HARTER ACT.

Under the Harter Act of February 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], a steamer which was seaworthy and properly manned, equipped, and supplied, carrying goods between two ports of the United States, is not liable for loss or injury to such goods by reason of the barge on which they were loaded striking an obstruction in the river; the loss in such case resulting either from a danger of the river or from a fault or error in navigation or in the management of the vessel.

#### 3. TOWAGE—INJURY OF TOW—NEGLIGENCE OF TUG.

Under the settled rule that a vessel engaged in a towage service is bound to the exercise of only ordinary care and skill, a steamer engaged in towing a barge is not liable for an injury thereto by reason of its striking a log which formed an obstruction in the channel of the river, but was not shown to have been there for any length of time, and its presence was unknown to any officer of the steamer, and where at the time of the injury, which was at night, the mate, then in charge of the vessel, was properly stationed, and acting as lookout, and after he saw the obstruction all reasonable and proper measures were taken to prevent the injury.

In Admiralty. Suit in rem to recover for injury to property in shipment.

Stevens & Lyons, for libellant.

Gregory L. & H. T. Smith, for claimant.

¶ 3. Statutory exemption of shipowners from liability, see note to *Nord-Duetscher Lloyd v. Ins. Co. of North America*, 49 C. C. A. 11.

**TOULMIN, District Judge.** The libel in substance alleges that the steamboat *Nettie Quill* was a river steamboat, plying on the Mobile and Alabama rivers between Mobile, Ala., and points above Blacksher's Landing on the Alabama river, and was engaged in carrying passengers and cargo for hire as a common carrier; that on the 13th day of May, 1902, the master of the said steamboat, for the boat, agreed to carry from Mobile to Blacksher's Landing a certain steam locomotive belonging to libelant for a stated amount of freight, if libelant would furnish a barge on which to transport the same, said master also agreeing to bring said barge back to Mobile on the return trip of the steamboat. The barge was procured, the locomotive loaded thereon, and both delivered to said steamboat, which received the same, lashed the barge to her side, and thus proceeded up the river on the evening of said 13th day of May, 1902. The clerk of the steamboat delivered to libelant a bill of lading for said barge and locomotive, which bill of lading is annexed to the libel as a part thereof, and is in the following words and figures, to wit:

Shipped, as per margin, in good order, (bagging, rope, ties and old damage excepted) on board the Steamboat *Nettie Quill* and Barges, whereof John Quill is Master, bound for to be delivered in like good order, (the damages of the River and Fire excepted) to Blacksher Co or Assigns, on paying freight and charges specified below. In witness whereof, I, the Clerk of said Boat, sign this Bill of Lading, in duplicate, the 13th day of May 1902.

|                            |                            |                   |
|----------------------------|----------------------------|-------------------|
| Landing.                   | Marks.                     | On Whose Account. |
| From Mobile to Blackshers. | One barge with locomotive. | Blacksher Co.     |
| [I. R. Stamp One Cent.]    |                            | H. C. King.       |

The libel further alleges that prior to the delivery of said bill of lading there had been no agreement as to the terms of said carriage, except that said steamboat was to carry said locomotive to Blacksher's Landing for an agreed amount of freight, libelant to furnish a barge for that purpose, and said steamboat to bring the barge back to Mobile on her return voyage; that shortly after dark on the evening of said 13th day of May, as the steamboat and barge proceeded up the river, the barge ran against what is known as a "deadhead," which is a log, one end of which sinks and the other end floats: that it was a pine saw log about 40 feet long and 24 inches in diameter at the small end, which end floated so that at least a foot thereof was above the water; that the said log was well out in the channel of the river; and that at the time it was struck by the barge the moon was shining very brightly, and the water was calm, so that such an object as this log, with the exercise of proper care, could have been seen and distinguished at a long distance, and at a much greater distance than was necessary for said steamboat to change her course and steer clear of the obstruction, or, if necessary, to stop entirely. By the impact with the log the barge was badly damaged, soon filled with water, careened, and sunk, at the same time dumping the locomotive into the river, and which was also greatly damaged. This suit is brought to recover the damages sustained by libelant by reason of said accident. The allegations of the libel are substantially sustained by the evidence, which is without conflict, except on one or two points, which it is not necessary to notice in the aspect of the case now to be considered.



The first question presented is whether, from the allegations of the libel and on the evidence, the contract between the libellant and the steamboat was or not a contract of affreightment? I find from the allegations of the libel and from the evidence that the contract was one of affreightment. A contract of affreightment is a contract with a shipowner to hire his ship, or part of it, for the carriage of goods or other property. Such a contract generally takes the form of a charter-party or of a bill of lading. *Mande & P. Merc. Shipp.* 227; *Smith's Merc. Law*, 295; *The Delaware*, 14 Wall. 600, 20 L. Ed. 779. In this case the contract took the form of a bill of lading. The contract is evidenced by a bill of lading, which is a receipt for the property shipped, and a promise or undertaking to transport and deliver the same as therein stipulated. The Delaware, and other authorities supra. In this case the libellant made a contract with the steamboat, through her master and owner, for the carriage of the locomotive; and it appears from the evidence that her barge, which she usually carried with her to aid in the transportation of her cargo, was not suitable, for reasons stated, for the carriage of the locomotive, and it was suggested by the master of the steamboat that libellant furnish him with a suitable barge for the purpose. The barge was furnished. It was lashed to the steamboat, and became thereby as much a part of her as her own barge was, for the purposes of the particular voyage. A stated amount of freight was agreed to be paid by the libellant, and the master of the steamboat undertook and agreed to carry the locomotive to Blacksher's Landing, and there deliver it as shown by the bill of lading. The contract was one of affreightment. The contract being a contract of affreightment, if the loss arose from dangers of the river, or resulted from faults or errors in navigation or in the management of the steamboat, then, under the act of Congress known as the "Harter Act," the steamboat and her owners would not be responsible for the damage or loss. 3 U. S. Comp. St. 1901, p. 2946 (Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445):

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make his vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel her owner or owners \* \* \* shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners \* \* \* be held liable for losses arising from dangers of these or other navigable waters," etc.

This act materially modifies the law relating to the carriage of goods. That the act applies to vessels transporting property between ports in the United States, see *The E. A. Shores, Jr.* (D. C.) 73 Fed. 342, and authorities therein cited. From the argument of libellant's counsel it would appear that he considers the contract to have been a towage contract. He does not say so directly, but such is the effect of his argument. His contention is that the steamboat was negligent in failing to have a proper lookout; and that it failed to exercise proper care in her navigation, by the exercise of which she could have seen and distinguished the log in time to have avoided the collision with it, either by steering clear of it or by stopping entirely. If I am in error in my finding on the evidence, and the

contention of the learned counsel is sustained by the evidence in the case, still the libelant cannot recover under this libel. It would have to be amended to correspond with the evidence. It should show by its allegations of fact a contract of towage and the negligence complained of. If I was persuaded that the contract was one of towage, and was satisfied by a preponderance of the evidence that it was negligently performed on the part of the steamboat, I would consider a proposition to amend the libel for the purpose of a decision of the case now, or would dismiss this libel without prejudice. If the contract was one of towage, the steamboat was bound to exercise ordinary care and skill in its performance, and would be liable if she failed to do so. Such failure would be negligence. The burden is on the libelant to establish the negligence, at least by a preponderance of evidence. A towage service is aid rendered in the propulsion of a vessel. It is the employment of one vessel to expedite the voyage of another vessel. 1 W. Robinson, 177; 3 W. Robinson 68; *McConnochie v. Kerr* (D. C.) 9 Fed. 53. Where is the evidence that establishes a contract for any such service? But a contract of towage requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. The towing vessel only undertakes to exercise ordinary care and skill in performing the service, but it is bound to use ordinary care and skill for the safety of the tow. *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The Webb*, 14 Wall. 406, 20 L. Ed. 774; *The A. R. Robinson* (D. C.) 57 Fed. 667. If the towing vessel negligently strikes an obstruction, the presence of which is well known, or may reasonably be expected, the towed vessel may recover for damages sustained. *Pettie v. Boston Towboat Co.*, 49 Fed. 464, 1 C. C. A. 314. But it is well settled that a towing vessel is not negligent when the tow strikes an unknown obstruction in a regular channel. *The Pierrepont* (D. C.) 42 Fed. 687. "The towing vessel is liable for striking upon obstructions which ought to be known to men experienced in its navigation, but not for those which are unknown." *Hughes on Adm.* p. 123. The evidence showed that the "deadhead" in question was not well or generally known to navigators of the river, and that it had been but a short time in the channel. The evidence was uncertain as to whether it had been there several days, or even one day, before the accident, not being harmonious on this subject; and there was also conflict in the evidence as to how high the log stood out and above the water and was visible, and at what distance visible on that night, when seen before the collision. However this may have been, it is without dispute that neither the master, mate, nor pilot of the steamboat had any knowledge or notice of this "deadhead" until immediately before the collision, and within a short distance of it, when such means as were reasonable and proper were used by the steamboat to avert the collision.

The evidence further showed that Campbell, the mate of the steamboat, was on watch at the time of the collision, and that he was stationed at the forward end of the hurricane deck. He was acting master at the particular time, the master having gone below

to supper; but no duties as such master devolved on him during the time to divert him from his duties as lookout. As soon as he saw the log, he gave due notice of it to the pilot. I do not find as a fact that the absence of a lookout other than Campbell, the acting master at the time, contributed to the collision; nor do I find, that he did not properly perform his duties; nor that he could have performed the duties of a lookout better than he did; nor that any different manner of performing those duties either by him or by an additional lookout could or would have made any difference in the result; nor that the log could or would have been seen by the steamboat any sooner that it was seen. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision. *The Titan* (C. C.) 23 Fed. 413; *The Fannie*, 11 Wall. 238, 20 L. Ed. 114; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; *The Blue Jacket*, 144 U. S. 390, 12 Sup. Ct. 711, 36 L. Ed. 469; *The Farragut*, 10 Wall. 337, 19 L. Ed. 946.

The learned counsel for libelant has cited several authorities on this point, which, in my judgment, do not apply, because the facts and circumstances of those cases are unlike those in this case. In the case of *W. H. Simpson*, 80 Fed. 153, 25 C. C. A. 318, the court said:

"The law which governs this case is well settled. The difficulty arises not in the law, but in the ascertainment of the facts from the evidence, which, in cases like the present, is usually conflicting. There is here no negligence arising from the facts of the disaster, and the burden of proof is upon the libelant to satisfy the court upon the evidence presented and upon the reasonable probabilities of the case that the tug [steamboat] was guilty of the fault charged through failure to exercise ordinary skill and care."

I am not satisfied, upon a careful consideration of all the evidence in this case, that there was a want of ordinary skill and care upon the steamboat. My conclusion, therefore, is that the libel must be dismissed.

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### THE MAUCH CHUNK.

(District Court, E. D. New York. July 30, 1903.)

#### 1. COLLISION—STEAM VESSELS CROSSING—APPROACHING WITH CROSS-SIGNALS.

A tug and ferryboat on crossing courses, which continued to approach each other, each attempting to cross the other's bows, and crossing the other's signals, until they were so close that a collision could not be avoided, both *held* in fault therefor.

In Admiralty. Suit for collision.

Carpenter & Park and James E. Carpenter, for libelant.

James J. Macklin, for claimant.

THOMAS, District Judge. On the 5th day of February, 1900, at 10 a. m., the libelant's tugboat *R. J. Moran* was injured by collision with the steam ferryboat *Mauch Chunk* in the vicinity of the latter's slip, near South Ferry. The wind was fresh from the northwest, the tide strong flood, and the weather clear. The *Mauch Chunk* was about 162 feet in length, of the propeller type, and plied between *Communipau* and her slip, which was between the slips of the *Hamil-*

ton Avenue Ferry and Staten Island Ferry. As the Mauch Chunk came out of the North river, she rounded-to in the East river, about six or seven hundred feet out from her slip, for the purpose of entering the same, being at the time slightly below it. Below her upon her port hand, and nearer to the dock of the Barge Office, was the tug Garfield, bound into the East river, while a steam lighter was coming down in the vicinity, and passed the Mauch Chunk shortly before the accident. The Moran was lying outside of two other tugs off the face of Pier 4, headed downstream, bound for Bayonne, N. J. She started out at or shortly before the time the Mauch Chunk was making her turn from the North river for the purpose of entering her slip, and at the same time the Garfield was approaching in the neighborhood of the Barge Office. There were other vessels passing up and down and out in the general locality of the Battery near the time of the accident. Nevins, 29 years old, was the Moran's mate and pilot, and was in the pilot house; but Cutler, her captain, was also there, and took immediate charge of the wheel. Nevins states that as they started out the Mauch Chunk was lying still six or seven hundred feet out from the Battery, and that several tows passed her—among others, the lighter Freeman, with a barge, going into the North river—and that the Moran, lapped on the barge, also followed, and that the signals were given as hereinafter stated. Cutler, the captain of the Moran, Chenler, the steward, whose evidence is useless, and Howe, captain of the Garfield, gave evidence in behalf of the Moran, and stated the order of signals as given below. In behalf of the Mauch Chunk, Burns, the pilot, and Van Wart, testified.

The following tables epitomize the evidence of the witnesses on both sides in the matter of signals, and show the signals in order of priority as stated by them:

**Burns, Pilot Mauch Chunk.**

| Number.              | Whistles.         |
|----------------------|-------------------|
| 1. Moran .....       | 2 to Mauch Chunk. |
| 2. Mauch Chunk ..... | 2 " Moran.        |
| 3. Moran .....       | 1 " Mauch Chunk.  |
| 4. Mauch Chunk ..... | 2 " Moran.        |
| 5. Moran .....       | 1 " Mauch Chunk.  |
| 6. Mauch Chunk ..... | alarm.            |

**Van Wart, Quartermaster Mauch Chunk.**

| Number.              | Whistles.                 |
|----------------------|---------------------------|
| 1. Moran .....       | 2                         |
| 2. Mauch Chunk ..... | 2                         |
| 3. Moran .....       | 1                         |
| 4. Mauch Chunk ..... | 2                         |
| 5. Moran .....       | 1                         |
| 6. Mauch Chunk ..... | 2 and alarm and reversed. |
| 7. Moran .....       | 1 " " " "                 |

**Cutler, Captain Moran.**

| Number.              | Whistles.                   |
|----------------------|-----------------------------|
| 1. Moran .....       | 2 to Garfield.              |
| 2. Garfield .....    | 2 " Moran.                  |
| 3. Moran .....       | 1 " Mauch Chunk, no answer. |
| 4. Moran .....       | 1 " Mauch Chunk, " "        |
| 5. Moran .....       | alarm.                      |
| 6. Mauch Chunk ..... | "                           |

## Nevins, Pilot Moran.

| Number.              | Whistles.                    |
|----------------------|------------------------------|
| 1. Moran .....       | 1 to Mauch Chunk, no answer. |
| 2. Moran .....       | 2 " Garfield.                |
| 3. Garfield .....    | 2 " Moran.                   |
| 4. Moran .....       | 1 " Mauch Chunk.             |
| 5. Mauch Chunk ..... | 1 " Moran.                   |
| 6. Moran .....       | alarm and reversed.          |
| 7. Mauch Chunk ..... | " "                          |

## Chenler, Steward of Moran.

| Number.           | Whistles.       |
|-------------------|-----------------|
| 1. Moran .....    | 1               |
| 2. Moran .....    | 2               |
| 3. Garfield ..... | 2               |
| 4. ....           | danger signals. |

## Howe, Captain Garfield.

| Number.              | Whistles.   |
|----------------------|---|
| 1. Moran .....       | 2 to Garfield.  |
| 2. Garfield .....    | 2 " Moran.  |
| 3. Moran .....       | 1 " Mauch Chunk.  |
| 4. Moran .....       | 1 " Mauch Chunk.  |
| 5. Mauch Chunk ..... | 1 " Moran (thinks Mauch Chunk was lying still outside a barge). |
| 6. Moran .....       | alarm.  |

(He heard no alarm whistles from Mauch Chunk. An attempt has been made to state the order of signals as given by Howe, although his evidence was very imperfect as to the sequence of events, and he disagrees with all the principal witnesses. His whole evidence shows little orderly recollection of events.)

The foregoing tabulation justifies the following conclusions:

(1) Cutler, captain of the Moran, Howe, captain of the Garfield, Burns and Van Wart, of the Mauch Chunk, state that the first signal was two whistles from the Moran. This is better evidence than Nevins' statement that the first signal was one whistle from the Moran to the Mauch Chunk.

(2) Cutler and Nevins, of the Moran, and Howe, of the Garfield, state that the next signal was two whistles from the Garfield. This is better evidence than that of Burns and Van Wart that they heard no signals from the Garfield. Hence the second event was two whistles from the Garfield.

(3) The third signal in order was two whistles from the Mauch Chunk, and this signal was given before the Moran gave the Mauch Chunk one whistle. This conclusion is reached for the following reasons: Burns and Van Wart state that the Mauch Chunk blew two whistles, although they did not hear the Garfield's signal as above. Cutler heard no whistles from the Mauch Chunk. Hence his evidence is negative, and is disputed by the other witnesses. Howe is "almost sure" that he heard one from the Mauch Chunk next before the Moran's alarm. This helps the conclusion that the Mauch Chunk gave some signal. Nevins states that he heard one whistle from the Mauch Chunk, but not in answer to the Moran's first one whistle to the Mauch Chunk, which he incorrectly states as the first signal given, but in answer to the Moran's second signal of one whistle. It is probable that as the first two signals, to wit, those interchanged

between the Moran and Garfield, were port signals, the Mauch Chunk also gave two whistles, her signal being the third in order. It is probable, also, that the Mauch Chunk's two whistles were given before the Moran's first whistle. As already stated, Cutler did not hear any signal from the Mauch Chunk. Therefore he does not know whether the Mauch Chunk's signal came before or after the Moran's one whistle. Nevins says that the Moran's single whistle was given twice (with the Moran's and Garfield's two whistles intervening) before the Mauch Chunk's signal. This has been shown to be erroneous. So it is a question of believing Burns and Van Wart, or Nevins, for Howe's testimony as to the order of signals is very indistinct and untrustworthy. Burns and Van Wart testify that the Mauch Chunk repeated her two whistles after the Moran gave her single whistle, and it may be that Nevins is mistaken as to the order, as he is shown to be as to when the Moran gave the first single whistle.

(4) The next signal was one whistle by the Moran. This is undoubted.

(5) The fifth signal was two whistles from the Mauch Chunk. The Mauch Chunk admits that she crossed the single whistle given by the Moran with two.

(6) The next whistle was one by the Moran. Burns and Van Wart both admit that the Moran blew a single whistle after the Mauch Chunk repeated her two whistles.

(7) After the above signals the Mauch Chunk and Moran each blew alarm whistles and reversed, each party claiming that his vessel did this before the other. In any case when the alarm whistles were blown the vessels were only about 25 feet apart.

The findings as above have established the order of signals as follows:

| Number.   | Whistles. |
|---|-----------|
| 1. Moran .....                                      | 2         |
| 2. Garfield .....                                   | 2         |
| 3. Mauch Chunk .....                                | 2         |
| 4. Moran .....                                      | 1         |
| 5. Mauch Chunk .....                                | 2         |
| 6. Moran .....                                      | 1         |
| 7. Alarms and reversals of engines by both vessels. |           |

It is evident that the Moran and Mauch Chunk were, during the above events, moving ahead and towards each other, with perhaps some momentary rest of the Mauch Chunk's engines. Cutler states that the Mauch Chunk was always moving. If so, she would not give one whistle. Nevins states that the Mauch Chunk was lying still when the first whistle was given by the Moran (which he erroneously makes the initial signal); that she was lying still when the Garfield answered the Moran's two whistles, and moving when the Mauch Chunk answered the Moran's two single whistles. Howe had no reliable information about the Mauch Chunk's motion or rest. It is clear enough that the Mauch Chunk kept coming in, and it is improbable that she kept in forward motion, sounding a signal that should keep her at rest, and compel her to let the Moran cross her bows. But the Moran, almost to the instant of the collision, was moving across the Mauch Chunk's bow, and, if so, she would not give the

Mauch Chunk a signal that indicated her intention to go under the Mauch Chunk's stern. The Mauch Chunk admits that after the Moran's first signal all her signals were starboard signals, and it has been found that the Moran's first signal was given to the Garfield. But why did these vessels, each sounding contrary signals, after the first two, keep moving towards each other within the narrow space? The Garfield, before the collision, at least, was nearer the piers, and tended to interrupt both the other vessels; the piers were near by on the Moran's starboard hand; the Mauch Chunk was aiming to pass between the Moran and the Garfield, and the Moran to pass between the Garfield and Mauch Chunk; and all the vessels, except when the Garfield stopped, were approaching each other, with a strong flood tide carrying the Mauch Chunk up and retarding the Moran, while the fresh northwest wind tended to set the latter out. And yet the Mauch Chunk and Moran kept approaching each other, sounding contrary signals, and neither reversed or went back until the vessels were beyond escape of collision. It may be conjectured that the Garfield and Mauch Chunk first exchanged single whistles, although the navigators of neither vessel remembered any interchange. It is probable that the Garfield and the Moran exchanged two whistles, that the Mauch Chunk appropriated the Moran's two whistles to the Garfield and answered, and that the Moran then gave a single whistle, which the Mauch Chunk crossed, whereupon the Moran repeated her single whistle, and meanwhile both the Moran and Mauch Chunk were coming towards each other with unabated speed. The whole transaction shows gross negligence on the part of both vessels in a dangerous locality. The Mauch Chunk should have known that the Moran would give the Garfield two whistles, and should have appreciated that the signals might not be for her. The captain of the Moran was not alert enough to catch any signals from the Mauch Chunk, but even this did not stop him. So the Mauch Chunk went forward, knowing, or bound to know, of the interchange of signals by the Moran and Garfield, knowing that her own signal was crossed, knowing that she finally crossed the Moran's single whistle; and the Moran went forward, knowing, as her master testified, that her signals were not answered, but in fact twice crossing the Mauch Chunk's signals. In short, the vessels were trying, with repeated cross-signals, to pass each other's bow.

The damages will be divided.

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JONES v. BUNKER HILL & S. MINING & CONCENTRATING CO.

(Circuit Court, D. Oregon. July 30, 1903.)

No. 2,725.

1. MASTER AND SERVANT—ACTION FOR INJURY OF MINER—QUESTIONS FOR JURY.  
Where the questions whether the injury of a plaintiff while working in defendant's mine was due to his own negligence, or to a condition of the mine resulting from the progress of the work, and if the latter, whether it was the duty of defendant to take reasonable precautions against the danger, for the protection of its miners, were both open to doubt, under the evidence, the finding of the jury thereon is conclusive.

**2. DAMAGES—PERSONAL INJURY—AMOUNT OF AWARD.**

A verdict awarding \$9,000 damages for a serious and permanent personal injury to a miner, a man in middle life, whereby he is incapacitated from pursuing his vocation, and his sexual power destroyed, is not excessive.

At Law. On motion for new trial.

O'Day & Tarpley and Robertson, Miller & Rosenhaupt, for plaintiff.  
J. C. Moreland, for defendant.

BELLINGER, District Judge. Motion for new trial is requested on the ground that the accident complained of was the result of the negligence of the plaintiff himself, or of his fellow servants, or that it was an accident that resulted unavoidably from the prosecution of the work in which he was engaged, and that the verdict is excessive and appears to have been given under the influence of passion or prejudice.

The plaintiff was employed as a machineman in a stope in the Stem Winder Mine, one of the properties of the defendant company. He was on the second floor from the top, working in a breast of ore, when he was injured. It is contended by the defendant that there was a crack or fissure in the breast of the rock in which plaintiff was working, and that it was his duty to pry down this rock with a crowbar and avoid the danger which was threatened, but as to this there is serious question. While the preponderance of the evidence tends to support the contention of the defendant, yet there is evidence—reasonable evidence—tending to show that the accident was not the result of plaintiff's negligence, but that it occurred by a caving in from the roof of the stope. This being a question which, upon the testimony from both sides, was fairly submitted to the jury, its finding is conclusive. It must be presumed that the accident did not occur in the way claimed by the defendant. It is said that if it did not occur in this way, and if it did occur as testified to by the plaintiff, still it was due to a condition resulting from the progress of the work; that this dangerous condition was due to the progress of the work, in the sense that the work itself was of this dangerous character. But this is a question open to dispute. It does not appear that this dangerous condition was the immediate result of what was being done there. If in the progress of work dangerous conditions arise, and the employer can, by the exercise of reasonable diligence, guard against these conditions, it is his duty to do so. The plaintiff was not working where the cave occurred. Work where this cave occurred had been done some time before, and it is a question whether, under all the circumstances, it was the duty of the defendant to take reasonable precautions to guard its employes from accidents of that kind. There is testimony tending to show that it was such duty of the defendant—testimony of facts and circumstances which would justify the conclusion that it was the duty of the defendant company to take such precautions—and, that being the state of the case, the findings and verdict of the jury are conclusive.

As to the question of the amount of damages—\$9,000. I do not think that is excessive. The plaintiff is seriously injured; how se-



riously injured is in question, but, from his statement of the case, his injuries are very serious. He is a man in middle life, injured, so far as appears to the jury, so as to incapacitate him from doing the work by which he lives; injured in his manhood, his sexual powers destroyed—an injury for which there can be no adequate compensation in damages. All these circumstances taken into consideration, under the evidence, I have no right to say the jury erred in the amount of their finding; and upon the whole case the verdict does not appear to me to be against justice.

Motion for a new trial denied.

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AMERICAN SUGAR REFINING CO. v. BIDWELL, Collector.

(Circuit Court, S. D. New York. August 7, 1903.)

No. 19,068.

**1. CUSTOMS DUTIES—DATE OF IMPORTATION.**

An article is not imported from a foreign country, within the meaning of the tariff laws, until it actually arrives at a port of entry of the United States, and the importation is governed by the law in force at the time of such arrival.

**2. SAME—GOODS ARRIVING FROM PHILIPPINES AFTER CESSION TO UNITED STATES.**

The effect of the treaty of Paris, by which Spain ceded the Philippine Islands to the United States, and which took effect by the exchange of ratifications, and by the President's proclamation on April 11, 1899, was to repeal the existing tariff duties, so far as related to goods brought from such islands; and goods arriving at a port of entry of the United States from Philippine ports after its taking effect were not subject to duty, although they were shipped prior to said April 11th.

**On Demurrer to Complaint.**

This is an action commenced in the Supreme Court of the state of New York, and removed to this court, brought by the plaintiff against the defendant, to recover the sum of \$58,027.49, with interest thereon from the 11th day of October, 1899, and which sum, it is claimed was illegally exacted and collected from the plaintiff by George R. Bidwell, as collector of the port of New York, through duress of goods, etc., as duties upon certain sugars brought from the port of Iloilo, situated in the island of Panay, in the Philippine Islands. The defendant demurs to the complaint upon the grounds that the same does not state facts sufficient to constitute a cause of action against the defendant, and that at the date when the merchandise mentioned in the complaint was shipped the Philippine Islands was a foreign country, within the meaning of the tariff laws of the United States.

Parsons, Closson & McIlvaine, for plaintiff.

Henry L. Burnett, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

RAY, District Judge. At all the times mentioned in the complaint and now the plaintiff was and is a corporation organized and existing under the laws of the state of New Jersey, but duly carrying on and transacting a part of its business in the city and state of

¶ 1. See Customs Duties, vol. 15, Cent. Dig. § 7.

New York. The defendant at such times was the duly appointed, acting, and commissioned collector of customs of the United States of America at the port of New York, in the actual and unrestricted exercise of his functions as such, and was fully vested with all the powers and authority of his office. On the 14th day of March, 1899, the plaintiff caused to be shipped from the port of Iloilo, situated in the island of Panay, in the Philippine Islands, on the sailing vessel *Strathern*, 68,518 packages of sugars, being those described in consumption entry No. 164,820, all of which sugars were the product of the Philippine Islands, and these sugars were brought into the port of New York on the 13th day of October, 1899. On their arrival at the port of New York, the defendant, as such collector, and under color of his said office, and through the exercise of the power and authority in him vested for the purposes of the performance of his duties as such collector, and by duress of the said goods, demanded and collected from the plaintiff, as duties upon the said sugars, the sum of \$58,027.49. The plaintiff, at the time the said goods were held, and the said sum of money was demanded and collected, formally and duly protested against the action of the said collector; but in order to obtain said goods the plaintiff was compelled by the defendant to pay, and did pay, on the 16th of October, 1899, the said sum of money.

The question is whether or not the said sugars were subject to the payment of any duty on their arrival at the port of New York, October 13, 1899, they having been shipped in the Philippine Islands on the 14th day of March, 1899, and, incidentally, was the Philippine Islands a foreign country, within the meaning of the tariff laws of the United States, at the time of the importation of said sugar?

The complaint describes with particularity the acts alleged to be illegal, and, if the acts described were not illegal, then all the allegations of the complaint characterizing them as such are of no avail, and the demurrer must be sustained.

The tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], provides:

"There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs, respectively prescribed."

In section 1, Schedule E, par. 209, of said act (30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]), certain rates of duty are prescribed on sugar; and it is not claimed that the rates of duty imposed or collected are greater than warranted by the act, if the sugars were dutiable at all.

It is insisted by the defendant that at the time of the shipment of these sugars from Iloilo they were imported from a foreign country, within the meaning of the law, since the Philippine Islands did not cease to be a foreign country until April 11, 1899; and the defendant cites in support of this contention the case of *Dooley v. U. S.*, 182 U. S. 222-230, 21 Sup. Ct. 762, 45 L. Ed. 1074; also *Haver v. Yaker*, 9 Wall. 32, 19 L. Ed. 571; *Ex parte Ortiz* (C. C.) 100 Fed. 962; *Davis v. Parish of Concordia*, 9 How. 280, 13 L. Ed. 138; *Hylton v.*

Brown, 1 Wash. C. C. 343, Fed. Cas. No. 6,982. The defendant also contends that when these goods were shipped from Iloilo to the United States they started as dutiable goods, and that the exportation ended when the steamer left the shores of Iloilo, March 14, 1899, and the importation then began, and was completed on the arrival of the goods at the port of New York, and that they were then subject to the duties with which they were burdened March 14, 1899, when the exportation ended and the importation commenced. The contention of the defendant rests upon the expression of Mr. Justice Brown in his opinion in *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, where, at page 180, 182 U. S., page 746, 21 Sup. Ct., 45 L. Ed. 1041, the learned justice said:

"Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a 'foreign country' at the time the sugars were shipped, since the tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], commonly known as the 'Dingley Act,' declares that 'there shall be levied, collected and paid upon all articles imported from foreign countries' certain duties therein specified."

It is contended by the plaintiff that as these sugars were imported into the United States after the ratification of the treaty of Paris, and therefore after the Philippine Islands had ceased to be a foreign country, they were not subject to duty, and that the importation took place on their arrival in the United States, and not at the time they left the port of Iloilo. The plaintiff contends that the effect of the treaty of Paris was to repeal so much of the tariff act of July 24, 1897, as authorized the levy or collection of duty on these goods; and he contends that on October 13, 1899, when the merchandise in question reached the port of New York, the situation of the tariff laws with regard to these sugars was the same as if an act of Congress had then been in force by which all goods imported from the Philippines were on the free list. The plaintiff also contends that no article is imported from a foreign country until it has actually arrived within the limits of a port of entry, and cites *U. S. v. Vowell*, 5 Cranch, 368, 3 L. Ed. 128; *Arnold v. U. S.*, 9 Cranch, 104, 3 L. Ed. 671. The plaintiff also contends that, in a case where the government of the United States is a party, a treaty is considered concluded and binding from the date of its signature, and that the exchange of ratifications has a retroactive effect, confirming the treaty from its date. In this case the treaty was signed at Paris December 10, 1898; ratification was advised by the Senate February 6, 1899; same was ratified by the President February 6, 1889, and by the Queen Regent of Spain March 19, 1899. The ratification was exchanged at Washington and there proclaimed on the 11th day of April, 1899. March 2, 1899, an act of Congress (Act March 2, 1899, c. 376, 30 Stat. 993), was approved by the President making an appropriation of \$20,000,000 for the purpose of carrying out the obligations of the treaty between the United States and Spain; same to become immediately available on the exchange of the ratifications of said treaty. The Senate ratified the treaty, as did the President, prior to the shipment of the sugars in question, which occurred on the 14th of March, 1899, although the treaty was not ratified by the

Queen Regent of Spain until March 19, 1899, four days after the shipment of these sugars.

It is quite clear that the Philippine Islands was a foreign country at the time the sugars were shipped—at the time the exportation from the Philippine Islands ended and the importation into the United States commenced—but it is equally clear that the Philippine Islands had ceased to be a foreign country when these sugars arrived at the port of New York.

In *United States v. Vowell* and another, 5 Cranch, 368, 3 L. Ed. 128, it was held that duties upon goods imported do not accrue until their arrival at the port of entry, and that therefore the duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808. Marshall, C. J., delivered the opinion of the court, and said:

"The duties did not accrue, in the fiscal sense of the term, until the vessel arrived at the port of entry. \* \* \* It is understood that in case of an increase of duty the United States have always demanded and received the additional duty if the goods have not arrived at the port of entry before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty."

Following the decision in this case, the logical conclusion is that where duties cease altogether, for any reason, before the arrival of the goods at the port of entry, no duty can be collected.

In *Arnold et al. v. The U. S.*, 9 Cranch, 104, 3 L. Ed. 671, it was held that "to constitute an importation, so as to attach the right to duties, an arrival within the limits of some port of entry is necessary." The question in that case arose under the act of July 1, 1812, c. 112, 2 Stat. 768. That act provided "that an additional duty of 100 per cent. upon the permanent duties now imposed by law, etc.," shall be levied and collected upon all goods, wares and merchandises which shall, from and after the passing of this act, be imported into the United States from any foreign port or place." Story, J., in delivering the opinion of the court, said:

"It is further contended that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation, so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States, and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States v. Vowell*, 5 Cranch, 368, 3 L. Ed. 128."

The expression of Mr. Justice Brown in *De Lima v. Bidwell*, 182 U. S. 180, 21 Sup. Ct. 746, 45 L. Ed. 1041, "whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a foreign country at the time the sugars were shipped," etc., can hardly be regarded as overruling *U. S. v. Vowell* and *Arnold v. U. S.*, supra. It was not necessary to the determination of the case in *De Lima v. Bidwell* to hold that the car-

goes of sugar there in question were imported into the United States, within the meaning of the tariff law, at the date when such sugars were shipped.

In *Keck v. United States*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, Keck was indicted under section 2865 of the Revised Statutes [U. S. Comp. St. 1901, p. 1905], which is as follows:

"If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty,  
\* \* \* such person \* \* \* shall be deemed guilty," etc.

The court held:

"The offense described in Revised Statutes, § 2865 [U. S. Comp. St. 1901, p. 1905], is not committed by an act done before the obligation to pay or account for the duties arises."

It was held that although when within the limits of the custom district the diamonds were concealed, etc., inasmuch as they were actually delivered to the customs authorities on arrival at the port of entry, no offense was committed. In that case, in the dissenting opinion by Mr. Justice Brown (Harlan and Brewer, JJ., concurring), we find this approval of the definition of "importation," or of the word "import" or "imported," viz.:

"In at least two cases in this court (*United States v. Vowell*, 5 Cranch, 368 [3 L. Ed. 128]; *Arnold v. United States*, 9 Cranch, 104 [3 L. Ed. 671]), an 'importation' to which the government's right to duty attaches was defined to be an arrival within the limits of some port of entry, or, as stated by Mr. Justice Curtis in *United States v. Ten Thousand Cigars*, 2 Curt. 436 [Fed. Cas. No. 16,450], 'an importation is complete when the goods are brought within the limits of a port of entry with the intention of unloading them there.' A similar definition of an importation is given in the following cases: *Harrison v. Vose*, 9 How. 372, 381 [13 L. Ed. 179]; *United States v. Lyman*, 1 Mason, 499 [Fed. Cas. No. 15,647]; *McLean v. Hager* (C. C.) 31 Fed. 602, 606; *The Schooner Mary*, 1 Gall. 206 [Fed. Cas. No. 9,183], wherein it was said by Mr. Justice Story that 'an importation is a voluntary arrival within some port with intent to unlade the cargo.'"

This language and the decisions in the cases cited seem to constitute a distinct approval of the doctrine enunciated in *United States v. Vowell*, supra.

In *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, 31 L. Ed. 813, Mr. Justice Field, in giving the opinion of the court, said:

"As the vessel in which they were brought arrived at the port of Philadelphia and was entered at the customhouse on the 30th of June, 1883, they would be deemed imported on that day, so as to be subject to the duties thus prescribed, were it not for provisions in the act of March 3, 1883 [22 Stat. 489, c. 121], and the custody taken of the vessel and goods by an officer of the customhouse on the day of its arrival in port, and kept by him until after the 1st of July following. That act declared that on and after the 1st day of July, 1883, certain designated sections should be a substitute for title 33 of the Revised Statutes. \* \* \* One of these sections provides that the duties on all preparations known as 'expressed oils,' not specifically enumerated or provided for in the act, shall be 25 per cent. ad valorem. \* \* \* The plain meaning of this section is that, though goods are imported before the act takes effect, yet, if they are kept until after that period in a public store or bonded warehouse (that is, in the custody and under the

control of officers of the customs), they shall be subjected only to the duties thereafter leviable when they are entered for consumption."

It would seem from the opinion in this case that merchandise is to be deemed imported on the day when it arrives at the port of entry, and not before.

In *Lawder v. Stone*, 187 U. S., at page 283, 23 Sup. Ct. 80, 47 L. Ed. 178, this doctrine that "imported" means when the imported merchandise comes within the port is restated and approved. The opinion says:

"In *Marriott v. Brune* (1850) 9 How. 619 [13 L. Ed. 282], it was held that under the eleventh section of the tariff act of July 30, 1846 [Schedule B, c. 74, 9 Stat. 44], where a portion of a cargo of sugar and molasses was lost by leakage on the voyage to this country, duty should be exacted only upon the quantity of sugar and molasses which arrived here, and not upon the quantity which appeared to have been shipped. In the course of the opinion the court said (page 632 [9 How., page 288, 13 L. Ed.]): 'The general principle applicable to such a case would seem to be that revenue should be collected only from the quantity or weight which arrives here; that is, what is imported, for nothing is imported till it comes within the limits of a port. See cases cited in *Harrison v. Vose*, 9 How. 372 [13 L. Ed. 179]. And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries, or the importation from them, or what is imported. 5 Stat. 548, 558, c. 270. The very act of 1846 under consideration imposes the duty on what is "imported from foreign countries." \* \* \* The Constitution uses like language on this subject. Article 1, §§ 8, 9. Indeed, the general definition of customs confirms this view, for, says McCulloch (vol. 1, p. 548), "Customs are duties charged upon commodities on their being imported into or exported from a country."'"

Is there any reason why it should be held that the goods, wares, and merchandise in question are to be deemed imported into the United States at the date of shipment, when they would not be deemed imported into the United States at that date, had the islands remained a foreign country, and had the tariff laws in force when the sugars were shipped been changed by either increasing or reducing the duties? Clearly not. The treaty-making power, the legislative branches of the government, and the executive all concurred in acts which ripened into a law, in effect, putting these sugars on the free list before they arrived at the port of New York. These acts of these various departments of the government, so far as the sugars in question were concerned, operated to repeal the Dingley tariff act imposing a duty thereon, or, rather, made that act inoperative as to such sugars; and, in the judgment of this court, no duty could lawfully be assessed or collected on their arrival at the port of entry.

The complaint states facts sufficient to constitute a cause of action against the defendant.

When the merchandise, mentioned in the complaint was shipped from Iloilo, in the island of Panay, in the Philippine Islands, said islands was a foreign country, within the meaning of the tariff laws of the United States, but the said merchandise was not imported into the United States at the time when shipped, but at the time when such merchandise arrived at the port of New York, and at that time the Philippine Islands had ceased to be a foreign country, and had become property belonging to the United States; and, as Congress had not then acted and passed a law imposing a duty on merchandise

brought into the United States from the Philippine Islands, such sugars were not subject to any duty, and the collection of the duties in question was illegal.

The demurrer of the defendant must be overruled, with costs. So ordered.

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AMERICAN SUGAR REFINING CO. v. BIDWELL, Collector.

(Circuit Court, S. D. New York. August 7, 1903.)

No. 19,009.

**1. CUSTOMS DUTIES—DATE OF IMPORTATION—ARTICLES ARRIVING FROM PORTO RICO AFTER CESSION TO UNITED STATES.**

An article is not imported from a foreign country, within the meaning of the tariff laws, until it actually arrives at a port of entry of the United States; and sugar shipped from Porto Rican ports on April 8, 1899, when Porto Rico was a foreign country, but which did not arrive at the port of New York until April 17th, after Porto Rico had passed by treaty to the United States, was not subject to duty.

Action to Recover Customs Duties Paid. On demurrer to complaint.

The action was commenced in the Supreme Court of the State of New York, and removed to this court. It was brought to recover of the defendant the sum of \$21,716.32, with interest from April 18, 1899, alleged to have been wrongfully and unlawfully collected from the plaintiff as duties upon a cargo of sugar brought from the island of Porto Rico to the port of New York in 1899.

Parsons, Closson & McIlvaine, for plaintiff.

Henry L. Burnett, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

RAY, District Judge. The complaint alleges that on the 17th day of April, 1899, the plaintiff caused to be brought into the port of New York by the steam vessel San Marcos from the ports of Aguadilla, Ponce, Fa Jardo, and San Juan, all situated in the island of Porto Rico, 1,073 packages of sugars, being those described in consumption entry No. 61,649, all of which were the product of the said island of Porto Rico, and was shipped from that island to the said port of New York on the said vessel on the 8th day of April, 1899. The complaint then alleges that upon the arrival at the port of New York of said sugars the defendant, who was then collector of said port, by duress of goods, demanded and collected from the plaintiff, as alleged duties upon the said sugars the sum of \$21,716.32, which was paid on the 18th day of April, 1899, under due protest, and in order to obtain said sugars, and alleges that the said sum of money was wrongfully exacted, etc., and that no part of same has been repaid. The defendant demurs to this complaint upon the ground that the same does not state facts sufficient to constitute a cause of action, and that at the date when the merchandise therein mentioned was shipped from Porto Rico, to wit, April 8, 1899, Porto Rico was

¶ 1. See Customs Duties, vol. 15, Cent. Dig. § 7.

a foreign country, within the meaning of the tariff laws of the United States.

It is conceded by both the plaintiff and the defendant that at the time these sugars were shipped from Porto Rico on the steamer San Marcos, on April 8, 1899, Porto Rico was a foreign country. It is also conceded by both parties that Porto Rico ceased to be a foreign country on the 11th day of April, 1899. *Dooley v. U. S.*, 182 U. S. 222-230, 21 Sup. Ct. 762, 45 L. Ed. 1074. See, also, *Haver v. Yaker*, 9 Wall. 32, 19 L. Ed. 571; *Ex parte Ortiz* (C. C.) 100 Fed. 962; *Davis v. Parish of Concordia*, 9 How. 280, 13 L. Ed. 138; *Lessee of Hylton v. Brown*, 1 Wash. C. C. 343, Fed. Cas. No. 6,982. The defendant contends that when these goods were shipped from Porto Rico, on the 8th day of April, 1899, they started as dutiable goods, and that the exportation from Porto Rico ended when the steamer left the shores of Porto Rico on that day, and that the importation into the United States then began, and was completed on their arrival at the port of New York on the 17th day of April, 1899, and that this importation was one continuous act or transaction, and that the importation is to be deemed to have taken place when it commenced, and not when it ended by the arrival of the goods at the port of entry. The defendant relies upon the expression of Mr. Justice Brown in giving the opinion of the court in *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, in which case, at page 180, 182 U. S., page 746, 21 Sup. Ct., 45 L. Ed. 1041, the learned justice said:

"Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a 'foreign country' at the time the sugars were shipped, since the tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], commonly known as the 'Dingley Act,' declares that 'there shall be levied, collected and paid upon all articles imported from foreign countries' certain duties therein specified."

The tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], provides:

"There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs, respectively prescribed."

In Act July 24, 1897, c. 11, § 1, Schedule E, par. 209, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], certain rates of duty are prescribed on sugars.

At the time these sugars arrived in the United States and at the port of New York, Porto Rico had ceased to be a foreign country, and had become property of the United States; and no law had then been enacted by Congress imposing a duty on merchandise brought into the United States proper from territory belonging to the United States, and acquired, as was Porto Rico, under treaty with a foreign nation. In other words, there was no law imposing a duty on merchandise brought from Porto Rico to the ports of entry in the United States on the 17th day of April, 1899, and at the time these duties were levied, assessed, and collected. *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041. The tariff act of July 24, 1897, was not applicable to merchandise brought from Porto Rico into the



United States on the 17th day of April, 1899; that is, imported from Porto Rico to the United States on that date. This has been settled by the Supreme Court of the United States. The government is therefore compelled to take the position that these sugars were imported into the United States on the 8th day of April, 1899, when the exportation from the port in Porto Rico ended, as is said, and the importation into the United States commenced. It is not necessary to determine whether or not the importation of these goods into the United States commenced on the date they left Porto Rico. This court is of the opinion that the transportation of these goods on the high seas was an act preliminary to importation into the United States, and not any part of the importation. Had the vessel, with its cargo, been lost at sea, it is clear that the sugars would not have been imported into the United States. Nor would they have been imported into the United States, had they been thrown overboard during stress of weather. Goods shipped in good order in a foreign country, and which become utterly worthless during the voyage, are not imported into the United States, even though the decayed remnants are not thrown overboard, but are brought into the port of entry with the remainder of the cargo. *Lawder v. Stone*, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178. It is there held that merchandise which has become utterly worthless by reason of casualty, decay, or other natural causes, and which the importer might rightfully abandon and refuse to receive or enter for consumption, is not within the category of goods, wares, and merchandise imported into the United States, within the meaning of the tariff laws. In that case the court cites and approves *Marriott v. Brune*, 9 How. 619, 13 L. Ed. 282, and says:

"In *Marriott v. Brune* (1850) 9 How. 619, 13 L. Ed. 282, it was held that under the eleventh section of the tariff act of July 30, 1846 [c. 74, 9 Stat. 46], where a portion of a cargo of sugar and molasses was lost by leakage on the voyage to this country, duty should be exacted only upon the quantity of sugar and molasses which arrived here, and not upon the quantity which appeared to have been shipped. In the course of the opinion the court said (page 632, 9 How., 13 L. Ed. 282): 'The general principle applicable to such a case would seem to be that revenue should be collected only from the quantity or weight which arrives here; that is, what is imported, for nothing is imported till it comes within the limits of a port.' See cases cited in *Harrison v. Vose*, 9 How. 372 [13 L. Ed. 179]. And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries, or the importation from them, or what is imported. [Act Feb. 26, 1845] 5 Stat. 548, 558. The very act of [July 30] 1846, under consideration, imposes the duty on what is 'imported from foreign countries.' Page 68. The Constitution uses like language on this subject. Article 1, §§ 8, 9. Indeed, the general definition of customs confirms this view, for, says McCulloch (volume 1, p. 548), 'Customs are duties charged upon commodities on their being imported into or exported from a country.' As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more."

Until the contrary is expressly held, this court will adhere to the doctrine laid down in *U. S. v. Vowell*, 5 Cranch, 368, 3 L. Ed. 128,

and *Arnold v. U. S.*, 9 Cranch, 104, 3 L. Ed. 671, in which cases it was expressly held that no article is imported from a foreign country until it has actually arrived within the limits of a port of entry.

In *United States v. Vowell* and another, 5 Cranch, 368, 3 L. Ed. 128, it was held that duties upon goods imported do not accrue until their arrival at the port of entry, and that therefore the duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808. Marshall, C. J., delivered the opinion of the court, and said:

"The duties did not accrue, in the fiscal sense of the term, until the vessel arrived at the port of entry. \* \* \* It is understood that in case of an increase of duty the United States have always demanded and received the additional duty if the goods have not arrived at the port of entry before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty."

Following the decision in this case, the logical conclusion is that where duties cease altogether, for any reason, before the arrival of the goods at the port of entry, no duty can be collected.

In *Arnold et al. v. U. S.*, 9 Cranch, 104, 3 L. Ed. 671, it was held that "to constitute an importation, so as to attach the right to duties, an arrival within the limits of some port of entry is necessary." The question in that case arose under the act of July 1, 1812, c. 112, 2 Stat. 768. That act provided "that an additional duty of 100 per cent. upon the permanent duties now imposed by law," etc., "shall be levied and collected upon all goods, wares and merchandise which shall, from and after the passing of this act, be imported into the United States from any foreign port or place." Story, J., in delivering the opinion of the court, said:

"It is further contended that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation, so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States, and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States v. Vowell*, 5 Cranch, 368 [3 L. Ed. 128]."

These cases have been frequently cited and approved since that time, and never overruled, unless it can be said that the expression of Mr. Justice Brown in *De Lima v. Bidwell*, 182 U. S. 180, 21 Sup. Ct. 746, 45 L. Ed. 1041, above quoted, has that effect. It is impossible to hold that such was the intention of the court, for we find the Supreme Court of the United States quoting, approving, and restating the doctrine of these cases, that nothing is imported into the United States, within the meaning of the tariff laws, until it actually arrives at the port of entry, in *Lawder v. Stone*, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178.

There is no reason why goods, wares, and merchandise brought from Porto Rico into the port of New York, and arriving at that

port after Porto Rico had ceased to be a foreign country, and before Congress had enacted and passed a law imposing a duty on merchandise brought from Porto Rico into the United States, should be held to have been imported from a foreign country at the time they were shipped or left the foreign port, when they would not have been held to be so imported, had Porto Rico remained a foreign country, and had the tariff laws in force when the sugars were shipped been changed by either increasing or reducing the duties before the arrival of the vessel at the port of New York. When these sugars left Porto Rico, Porto Rico was a foreign country, within the meaning of the tariff laws of the United States; but, within the decisions referred to, the fact that the vessel left Porto Rico for the purpose of bringing the sugars to the port of New York did not constitute importation into the United States, within the meaning of the tariff laws. When these sugars reached the port of New York, Porto Rico had ceased to be a foreign country, and it was at that time that these sugars were imported into the United States. At that time the Dingley tariff act of July 24, 1897, did not operate on and could not operate on these sugars, for, if they were imported at that date, they were not imported from a foreign country, as Porto Rico had ceased to be a foreign country. The Foraker act was not then a law, and hence there was no law for the imposition of a duty upon the sugars in question. The situation described was not in the mind of Congress when the tariff act of July 24, 1897, was enacted. When that act was made a law, Congress had in mind importations from foreign countries, and not importations into the United States from territories belonging to the United States, such as Porto Rico and the Philippine Islands. The act of July 24, 1897, was not intended to cover such a situation, and we are not justified in giving a meaning to the words "imported from foreign countries" at war with the natural import of the language, and at war with the established decisions of the Supreme Court of the United States defining the words imported from foreign countries or imported into the United States. It may be a matter of regret to the government, and of congratulation to certain importers benefited by the situation, that no legislation had been provided for such a contingency; but courts are not justified in construing statutes to meet contingencies not within the intent of the lawmaking body, and not within the language employed or the decisions of the court, in order to cover a condition unthought of, and in fact unprovided for.

In the opinion of this court, following its decision in *American Sugar Refining Company v. George R. Bidwell* (No. 19,068, just handed down) 124 Fed. 677, the imposition and collection of these duties were illegal, and the complaint states a good cause of action. The demurrer must be overruled, with costs, and it is so ordered.

## HOWELL et al. v. BIDWELL, Collector.

(Circuit Court, S. D. New York. August 8, 1903.)

## 1. CUSTOMS DUTIES—DATE WHEN PORTO RICO CEASED TO BE A FOREIGN COUNTRY—TAKING EFFECT OF TREATY.

The treaty with Spain by which Porto Rico was ceded to the United States became effective for tariff purposes at the beginning of April 11, 1899, on which day the ratifications were exchanged and the president's proclamation was issued, and merchandise arriving from Porto Rico at a port of entry of the United States at any time during that day was not subject to duty.

This is a demurrer to the complaint of the plaintiffs, who sue to recover \$15,931.48 paid as duties on a cargo of sugar cleared from Porto Rico March 10, 1899, and entered at the port of New York, United States of America, at a quarter past 11 o'clock in the forenoon of April 11, 1899, and \$19,493.51 paid as duties on another cargo of sugar cleared from Porto Rico April 4, 1899, and entered at the port of New York April 21, 1899. It is alleged these duties were illegally exacted by duress of goods, etc.

Henry M. Ward (F. R. Coudert, Jr., and Paul Fuller, of counsel), for plaintiffs.

Henry L. Burnett, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

RAY, District Judge. The demurrer is based on the grounds that as the sugars in question were cleared from Porto Rico while that island was still a foreign country, and subsequently actually entered at the port of New York, the importation commenced at the time when such cargoes cleared, and that the sugars were then charged with duty under the Dingley tariff act, although that act ceased to be operative on sugars imported after Porto Rico ceased to be a foreign country, and that as Porto Rico ceased to be a foreign country April 11, 1899, and both cargoes were cleared at Porto Rico prior to that date, the sugars were charged and remained charged with the duties exacted and paid, notwithstanding the fact that the importation was not concluded by arrival at the port of entry until after Porto Rico had ceased to be a foreign country. In short, the government claims that the importation commenced prior to April 11, 1899, and ended April 11th, and April 21st, as to each cargo, respectively, and that, within the meaning of the tariff law (Dingley Tariff Act, Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]) the importation is deemed to have taken place when commenced, and not when completed.

As to the first cargo, the question is presented whether or not the treaty between the United States and Spain is, for tariff purposes, and in the absence of proof to the contrary, deemed to have been in force during the entire day of April 11, 1899, or only from the hour of the exchange of the ratifications of the treaty of peace between the United States and Spain. This court has already held (*Armstrong v. Bidwell*, 124 Fed. 690, and *American Sugar Refining Co. v. Bidwell*, Id. 677, 683) that Porto Rico ceased to be a foreign

country, within the meaning of the tariff laws, on the 11th day of April, 1899, when the ratifications of the treaty of peace between Spain and the United States were exchanged at Washington, and such ratification was proclaimed, and that goods, wares, and merchandise are to be deemed imported, within the meaning and intent of such laws, on their arrival at the port of entry, and not before. This, so far as this court is concerned, disposes of the demurrer to the second cause of action set forth in the complaint. Facts sufficient to constitute a cause of action are there stated, and the demurrer as to that cause of action must be overruled.

The allegations of the first cause of action present an additional question. The ratifications were exchanged April 11, 1899, and on that day Porto Rico ceased to be a foreign country. The exchange of such ratifications was duly proclaimed by the President. For tariff purposes, did that island cease to be a foreign country at the beginning of that day, or at the hour and minute of that day when the ratifications were actually exchanged? If the first be true, then a good cause of action is stated, as Porto Rico in such case had ceased to be a foreign country when these sugars were imported; but, if the second be the truth, in law, then arises the next question, which is, must the complaint allege that the entry at New York was after the hour when the ratifications were exchanged?

When a new tariff law is enacted by the Congress of the United States, to take effect immediately, the court will inquire as to the exact hour when the new act became a law; and, if the goods were entered before that hour, duties will be assessed at the old rates, and not the new. *United States v. Stoddard, Haserick, Richards & Co.* (C. C.) 89 Fed. 699, affirmed 91 Fed. 1005, 34 C. C. A. 175; *United States v. Iselin*, 95 Fed. 1007, 36 C. C. A. 681. But the rule seems to be firmly established that, in the case of proclamations by the President, it covers the whole of the day on which it is made. *United States v. Norton*, 97 U. S. 164, 24 L. Ed. 907. In that case, held:

"(1) The proclamation of the President of June 13, 1865 (13 Stat. 763), annulling in the territory of the United States east of the Mississippi all restrictions previously imposed upon internal, domestic, and coastwise intercourse and trade, and upon the removal of products of states theretofore declared in insurrection, took effect as of the beginning of that day.

"(2) There was therefore on that day no authority, under the act of July 2, 1864 (13 Stat. 375), and the Treasury regulations of May 9, 1865, for retaining from the owner of cotton shipped to New Orleans from Vicksburg, Miss., one-fourth thereof, nor for exacting from him a payment equal in value to such one-fourth.

"(3) *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606, reaffirmed."

Mr. Chief Justice Waite, in giving the opinion of the court, said:

"In our opinion this case is governed by the decision in *Lapeyre v. United States*, 17 Wall. 191 [21 L. Ed. 606], which, although not concurred in by all the justices then composing the court, is accepted as conclusive upon the questions involved. Under the ruling in that case, the proclamation took effect as of the beginning of June 13, 1865, and therefore covers all the transactions of that day to which it is applicable. We do not think this is a case in which fractions of a day should be taken into account."

The rule that courts disregard fractions of a day is not inflexible. The justice of the case is to be looked to. Porto Rico had passed

under the control of and was in the possession of the United States. The treaty of peace, etc., had been signed and ratified by both the contracting parties. The ratifications were ready for delivery on the 11th day of April, and were actually exchanged. The President thereupon issued his proclamation announcing the facts. It would seem inequitable to hold that this exchange of ratifications did not cover the whole day. This court, after a consideration of all the authorities, is constrained to hold that Porto Rico ceased to be a foreign country at the beginning of the day, April 11, 1899. In point of fact, that island had passed from the sovereignty of Spain to that of the United States long before, and it would seem unnecessary to divide the day on which the transfer in law was actually completed. This is probably the rule in this case. *Lapeyre v. United States*, 17 Wall. 198, 21 L. Ed. 606. It is there said:

"There is no statute fixing the time when acts of Congress shall take effect, but it is settled that, where no other time is prescribed, they take effect from their date. Where the language employed is 'from and after the passing of this act,' the same result follows. The act becomes effectual upon the day of its date. In such cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible. See *Welman's Case* [20 Vt. 653, Fed. Cas. No. 17,407], where the subject is examined with learning and ability."

It follows that when these sugars were entered at the port of New York they were not subject to the imposition of any duty, and that the first alleged cause of action is sufficient.

The demurrer must be overruled, with costs, and it is so ordered.

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#### ARMSTRONG et al. v. BIDWELL, Collector.

(Circuit Court, S. D. New York. August 7, 1903.)

##### 1. TREATIES—TIME OF TAKING EFFECT—EXCHANGE OF RATIFICATIONS.

The exchange of ratifications of a treaty with a foreign government is an essential part of the transaction to render the treaty effective, since, until such exchange, which operates as a delivery, the treaty is inchoate and subject to be defeated by the action of either contracting party.

##### 2. CUSTOMS DUTIES—DATE WHEN PORTO RICO CEASED TO BE FOREIGN COUNTRY—TAKING EFFECT OF TREATY.

The treaty with Spain by which Porto Rico was ceded to the United States, although signed December 10, 1898, and ratified by Spain (which was the last to ratify) on March 19, 1899, did not become effective for the purposes of the tariff laws until the exchange of ratifications, April 11, 1899, and all importations of merchandise arriving from Porto Rico at a port of entry of the United States prior to that date were subject to duty. The doctrine of relation has no application to the taking effect of a treaty, so far as relates to its effect on individual rights.

Action to Recover Customs Duties Paid. On demurrer to complaint.

The defendant demurs to the complaint of the plaintiffs, which seeks to recover from the defendant, collector of the port of New York, the sum of \$3,796.99, with interest from March 20, 1899, alleged to have been illegally exacted by the imposition of tariff duties upon 20 packages of sugar brought by the plaintiffs into the port of New York from the port of San Juan, island of Porto Rico, during the month of March, 1899, and which duties were im-

posed and collected on the 20th day of March, 1899. The grounds of the demurrer alleged are that the court has no jurisdiction of the alleged cause of action against the defendant, and that the complaint does not state facts sufficient to constitute a cause of action against said defendant.

Henry M. Ward (F. R. Coudert, Jr., and Paul Fuller, of counsel), for plaintiffs.

Henry L. Burnett, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for defendant.

RAY, District Judge. The question raised by the demurrer in this case is, did Porto Rico cease to be a foreign country, within the meaning of the Dingley tariff act—the tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]—which provides, "There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed" at the time when the treaty of peace between the United States and Spain was ratified by the respective parties thereto, or April 11, 1899, when the ratifications of said treaty were exchanged and said treaty was proclaimed.

The sugar in question was imported from Porto Rico and entered at the custom house in the port of New York on the 20th day of March, 1899. The plaintiffs duly protested against the payment of any duties, but the payment of \$3,796.99 duties imposed under the said tariff act was enforced. Previous to August 12, 1898, the United States of America and the Kingdom of Spain were at war. A protocol was signed August 12, 1898. Spain evacuated the island from August 12 to December 10, 1898. A treaty of peace between the two powers was signed by their respective commissioners at Paris December 10, 1898. This treaty was ratified by the Senate of the United States and by the President February 6, 1899, and by the Queen Regent of Spain and Spanish Cortes March 19, 1899. The ratifications were exchanged and the treaty proclaimed April 11, 1899. As stated, the importation of these sugars was made March 20, 1899, the day after the Spanish government ratified the treaty, but about 20 days before the ratifications were exchanged and the treaty proclaimed.

The tariff law above referred to, known as the "Dingley Tariff Act," was in force, and duties on all merchandise imported into the United States from Porto Rico were legally collected, so long as Porto Rico remained a foreign country. Article 2, § 2, of the Constitution of the United States, provides that the President "shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the senators present concur." Article 6 provides, "This Constitution and the laws of the United States \* \* \* and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land."

The signing of this treaty between the United States and Spain, its ratification by the Senate and President, by the Queen Regent of Spain and Spanish Cortes, and the exchange of the ratifications on the 11th day of April, 1899, completed the peace between the two

governments, and operated to transfer the island of Porto Rico to the United States. The exchange of the ratifications was like the delivery of a deed, and until that was done the transaction was not complete, and Porto Rico did not cease to be a foreign country, within the meaning of the tariff laws. Until the ratifications were exchanged, it was competent for either power, or both, to recede and rescind its action. These acts—the signing, the ratification, and the exchange of the ratifications—operated as a repeal of the Dingley tariff act, so far as it applied to Porto Rico, or, more properly speaking, on the exchange of the ratifications that law ceased to be operative as to importations of merchandise into the United States from Porto Rico. Until that was done that law was in full force and effect, for the transaction was not complete which made Porto Rico property of the United States, and took that island from the jurisdiction of the Kingdom of Spain.

Assuming that a treaty is a contract between nations, and is subject to the same general rules of construction as are contracts between individuals, and that with respect to private rights it has the force of a law, and with respect to the rights of the nations, who are parties to it, it has the force of, and is to be construed as, a contract (*U. S. v. D'Auerville*, 10 How. 609-623, 13 L. Ed. 560, and *U. S. v. Reynes*, 9 How. 127-148, 13 L. Ed. 74), still no contract takes effect until delivery, and no law takes effect until it is finally signed and approved; and when a law is made by the action of two nations, whose action must concur to make it valid, it cannot be said that the law goes into full force and effect while anything remains to be done by the parties in order to make the action binding and final. Here the exchange of the ratifications was an essential part of the transaction. It is quite true that after the signing of a treaty of peace, in certain cases, and under the terms thereof, the officers of the respective governments may not have power to do many acts they would have power to do, had the treaty not been signed. During the pendency of action by the two governments matters are to remain in statu quo so far as possible.

It is said by the plaintiffs that, "after the treaty had been ratified by the Senate and by the President, it had been made. It was beyond recall. It had become an accomplished fact, as far as this government is concerned." With this contention this court does not agree. It was within the power of the Senate to rescind its action ratifying the treaty, and, had such action been taken by that body, it was within the power of the President to approve it. Again, Spain did not ratify the treaty until March 19, 1899, and who will contend that the treaty was binding or conclusive upon any one until that was done? And again, it was within the power of Spain to recede from her ratification of the treaty and refuse to exchange ratifications, in which case it will hardly be contended that the treaty took effect or bound either party.

It is contended that the ratification of this treaty related back to the date of its signing, so that with respect to all public rights the treaty took effect from its date. With this contention the court does not agree, in so far as it is sought to apply the proposition to this



case. While this treaty was ratified by the Senate and the President of the United States February 6, 1899, and by the Queen Regent of Spain and Spanish Cortes March 19, 1899, so that in some senses the treaty may be said to have been ratified March 19, 1899, still what is meant by ratification of the treaty, within the language of the Supreme Court of the United States in passing upon these questions, is shown by the language of that court in *Dooley v. U. S.*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074, page 230, 182 U. S., page 765, 21 Sup. Ct., 45 L. Ed. 1074, where Mr. Justice Brown, in giving the opinion of the court, says:

"In their legal aspect, the duties exacted in this case were of three classes: (1) The duties prescribed by General Miles under order of July 26, 1898, which merely extended the existing regulations; (2) the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President, as Commander in Chief, which continued in effect until April 11, 1899, the date of the ratification of the treaty and the cession of the island to the United States; (3) from the ratification of the treaty to May 1, 1900, when the Foraker act took effect."

After reading this decision, and having this declaration of the Supreme Court in mind, we are not left in doubt as to the date of the ratification of the treaty and the cession of the island of Porto Rico to the United States. It is the duty of this court to follow that decision, or, more properly speaking, that declaration of that court as to the date of the ratification and cession of the island. On that day (April 11, 1899) Porto Rico passed from the Kingdom of Spain to the United States of America, and ceased to be a foreign country, or part of a foreign country. Until that date Porto Rico was a foreign country, and it was legal for the collector of the port of New York to impose duties on all merchandise brought into that port up to midnight April 10, 1899.

The plaintiffs in this case are not in a position to say that the treaty was fully ratified, complete, and operative, as to them, prior to the exchange of the ratifications by the two governments, whatever may be the rights of the two governments, as between themselves, prior to that date. It would seem to be well settled that a treaty is to be considered as concluded on the exchange of ratifications. *Davis v. Parish of Concordia*, 9 How. 280, 13 L. Ed. 138; *Hylton v. Brown*, 1 Wash. C. C. 343, Fed. Cas. No. 6,982; *Haver v. Yaker*, 9 Wall. 32, 19 L. Ed. 571; *U. S. v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *Holbrook v. U. S.*, 22 Law Rep. 226; *Ex parte Ortiz (C. C.)* 100 Fed. 962; *Dooley v. U. S.*, 182 U. S. 222-234, 21 Sup. Ct. 762, 45 L. Ed. 1074; 2 *Butler on Treaty-Making Power of U. S.*, §§ 382-383. Article 7 of the treaty provided in terms for the exchange of ratifications at Washington, and article 8 of the treaty provided that the exchange of ratifications was to be the time when each power, respectively, relinquished all claims for indemnity of every kind. It is impossible to give this treaty any retroactive effect, so far as the imposition and collection of duties upon merchandise imported from Porto Rico into the United States is concerned.

Attention has been called to an opinion by Somerville, General Appraiser, April 1, 1902, in *Re Protest of J. Mendy* (23,638 G. A. 5116), in which he holds that the Philippine Islands ceased to be a "foreign

country," within the meaning of the tariff laws, so soon as the treaty of peace between the United States and Spain was signed, and that all merchandise brought into the United States subsequent to such signing, December 10, 1898, were entitled to entry free of duty. As between Spain and the United States, the treaty was ratified on the exchange of ratifications, and, when such exchange had taken place, related back to the time of signing, for as between them the stipulations then made had reference to the then existing conditions. But this doctrine of relation does not apply to the importation of merchandise by private persons. The authority cited by General Appraiser Somerville says:

"A treaty is a written contract between sovereigns. Its terms are agreed upon, and it is signed by plenipotentiaries or commissioners who are the authorized agents of the contracting powers. But after such agreement and signature it must be ratified by the governments, and the exchange of ratifications constitutes the delivery. Up to that time it is inchoate, and may never take effect."

This being the law, how can it be said that the treaty between the United States and Spain had become a law, transferring the Philippine Islands and Porto Rico to the absolute sovereignty of the United States, prior to the exchange of the ratifications, the treaty itself stipulating that such an exchange should be made at the city of Washington? It was inchoate (an inchoate law), and might never take effect. So far as such a treaty affects private rights (and is not the importation of merchandise and the payment or nonpayment of duties thereon a private right), the treaty does not take effect until the exchange of ratifications. *Haver v. Yaker*, 9 Wall. 32, 19 L. Ed. 571. A long time may elapse before such exchange is made. In the meantime affairs go on irrespective of the terms of the treaty, and (as to private rights and interests) will not be disturbed by any application of the doctrine of relation. *Ex parte Ortiz* (C. C.) 100 Fed. 962.

It is difficult to comprehend how, reasonably, it can be contended that the importation of merchandise from either Porto Rico or the Philippine Islands into the United States by these plaintiffs was an affair or transaction between Spain and the United States. Such importation is strictly a private matter regulated by law, and carried on by the individual subject to the payment of import duties, if any, imposed by the government at the port of entry. This suit is based upon and directly affects the private rights of individuals. The suit is by private parties against Bidwell individually for alleged wrongful acts done by him. The very foundation of the alleged cause of action is that he failed to confine himself to a proper discharge of his duties, as collector, but exceeded his authority and committed a wrong for which he is personally liable. If a recovery is had, he is personally liable, and has no recourse against the United States until a certificate of probable cause is granted by the court, under section 989 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 708], and when such certificate is obtained the government assumes a certain liability. *White v. Arthur* (C. C.) 10 Fed. 80. That section reads as follows:

"Sec. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

Under the decisions of the courts of the United States, which are uniform, it must be held that private rights are involved, and that the doctrine of relation does not apply. *Dooley v. U. S.*, 182 U. S. 222-230, 21 Sup. Ct. 762, 45 L. Ed. 1074. The court said (page 230, 182 U. S., page 765, 21 Sup. Ct., 45 L. Ed. 1074):

"While it is true the treaty of peace was signed December 10, 1898, it did not take effect upon individual rights until there was an exchange of ratifications."

At pages 233, 234, 182 U. S., page 767, 21 Sup. Ct., 45 L. Ed. 1074, the court further said:

"Different considerations apply with respect to duties levied after the ratification of the treaty and the cession of the island to the United States. Porto Rico then ceased to be a foreign country, and we have just held, in *De Lima v. Bidwell* [21 Sup. Ct. 743, 45 L. Ed. 1041], the right of the collector to exact duties from that island ceased with the exchange of ratifications."

If the decision in that case is to be adhered to—and it ought to be—we have a date fixed by judicial decision of the Supreme Court when Porto Rico and the Philippine Islands legally ceased to be a foreign country, within the meaning of the tariff laws, and for duty purposes.

It is perhaps worthy of remark that the entry in this case was a consumption entry. The goods were not placed in bonded warehouse, but delivered, and the duties paid.

The complaint in this action does not state facts sufficient to constitute a cause of action, and the demurrer must be sustained, with costs. So ordered.

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#### DAHLGREN v. WHITAKER.

(District Court, E. D. Pennsylvania. July 15, 1903.)

No. 14.

##### 1. CHARTER PARTY—CONSTRUCTION—"LAID UP FOR REPAIRS."

A yacht is "laid up for repairs," within the provision of a charter party, in such case allowing a rebate from the charter money, where it is at rest, having some damage made good that in a material degree impaired its ability to pursue the voyage as a yacht, though the charterer may continue to eat and sleep and entertain friends on board.

##### 2. SAME—REBATE FROM CHARTER MONEY.

Under a charter party providing that if the yacht meets with an accident, and in consequence is laid up for repairs for a period exceeding seven days, there shall be a rebate from the charter money for the number of days it is so laid up for repairs, the rebate is not for the time in excess of seven days, but for the whole period it is laid up.

In Admiralty.

Morgan & Lewis, for libelant.

Ira J. Williams and Simpson & Brown, for respondent.

J. B. McPHERSON, District Judge. The respondent, who was the owner of the schooner yacht Iroquois, chartered her to the libelant for the three months from June 15 to September 15, 1901. The charter money was \$4,150, and the agreement between the parties contained the following clause:

"It is further agreed that in case the said yacht Iroquois should during the time of this charter meet with an accident and in consequence thereof be laid up for repairs for a period exceeding 7 days, the owner shall return to the hirer a pro rata amount of the charter money for the number of days the said yacht is so laid up for repairs."

On August 25th, in the harbor of Newport, the schooner collided with the steam yacht Nourmahal, and suffered a good deal of injury, which need not be described in detail. She was not fully repaired until September 5th, and for this period of 11 days the libelant claims the stipulated rate of demurrage. The defenses are that there was undue delay in making the repairs; that there were errors of judgment in deciding what was best to be done; and, in any event, that the respondent is only liable for the number of days in excess of seven. It is true that a fourth defense was put forward in the testimony and at the argument, but I am not sure whether it was intended to be taken seriously. It appeared that while the repairs were being made the libelant slept on board three or four nights, and entertained his friends on several occasions at dinner or supper. This, it is argued, was one of the uses to which a yacht is intended to be put, and therefore, as long as she could be used as a hotel or a restaurant, she could not be said to be laid up for repairs "within the meaning of the provision of the charter party." I am unable to assent to this construction of the agreement. To be "laid up for repairs" means, as I think, no more than this: the boat must be at rest, having some damage made good that in a material degree impairs her ability to pursue the voyage as a yacht; and it does not seem to me to make any difference that while such injuries are being repaired the libelant may continue to eat and sleep and to entertain his friends on board.

The defenses of undue delay and erroneous judgment are, in my opinion, probably born of the respondent's subsequent reflection. Apparently they were not thought of at the time, for he was at Newport for several days while the boat was laid up, and found little, if anything, then to criticise in the efforts that the libelant was making. The testimony satisfies me that the libelant was anxious to get away as soon as possible, and hastened the work as much as he could, and that the hiring of a mainsail in New York was the best, if not the only, expedient that could have been adopted in order to proceed with the voyage quickly and with due regard to safety.

Concerning the defense that the respondent is liable at most for the days in excess of seven, I can only say that, as it seems to me, nothing but much subtlety of construction can extract such a mean-

ing out of the clause in controversy. The ordinary, natural sense of the words I take to be this: The possibility of accident, and consequent delay for repairs, were considered when the boat was hired; thereupon the libellant took the risk of all delays less than a period arbitrarily chosen—seven days—and the respondent took the risk of all delays beyond that period. I see nothing remarkable, still less absurd, in this agreement; on the contrary, if the risk was to be shared at all, it was inevitable that some period must be named, and seven days seemed reasonable to the contracting parties.

A decree may be entered for 11 days' demurrage at the stipulated rate.

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AUDENRIED v. EAST COAST MILLING CO.

(Circuit Court, E. D. Pennsylvania. July 15, 1903.)

No. 11.

1. FOREIGN CORPORATIONS—VALIDITY OF SERVICE—WHEN QUESTION FOR JURY.

Whether a foreign corporation was maintaining an office and doing business within a state, when it was there served with summons, where it depends on questions of fact, is for the jury.

2. ABATEMENT—EFFECT OF FILING PLEA TO JURISDICTION.

The filing of a plea in abatement attacking the jurisdiction of the court operates as an abandonment of any defense on the merits, at least in the discretion of the court; and where such plea was interposed after the same question had been determined adversely on a motion to quash the service, and apparently for delay only, the court will not exercise its discretion to relieve the defendant from its effect.

At Law. On motion for new trial.

Burr, Brown & Lloyd and John G. Johnson, for plaintiff.

James B. Kinley, H. S. P. Nichols, and Joseph de F. Junkin, for defendant.

J. B. McPHERSON, District Judge. Upon all the questions that are raised by this motion (save one) I am content to stand upon the instructions given to the jury at the trial. Whether the defendant was maintaining an office and doing business in Pennsylvania on October 2d, the day when the summons was served, was, under all the evidence, a question of fact that could only be determined by a jury. The weight to be given to the testimony of defendant's officers was for that tribunal, and not for the court, and I think it not improbable that the verdict may have been somewhat, but not improperly, influenced by the fact that the defendant made evident haste to leave the jurisdiction unmistakably on October 3d, the day after the service was made, apparently not relishing the possibility, at least, that suitors resident in this district might be able to seek their remedy here, and might not be obliged to follow the defendant into the courts of another jurisdiction, where a formal corporate domicile was main-

¶ 1. Foreign corporations "doing business" in state, see note to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585.

¶ 2. See Pleading, vol. 39, Cent. Dig. § 236.

tained, although the real corporate business was to be transacted elsewhere.

Upon the remaining question—the effect of the plea in abatement attacking the jurisdiction of the court—I need only repeat that the authorities cited in behalf of the plaintiff satisfied me at the trial, and satisfy me now, that such a plea abandons any defense on the merits, either absolutely (that is to say, at the option of the plaintiff, who may, of course, waive his right to insist upon the abandonment) or, at the best, within the discretion of the court. In the present case there was no such waiver by the plaintiff, and the court was not and is not disposed to exercise its discretion in favor of the defendant. The question of jurisdiction raised by the plea in abatement had already been brought forward by the defendant's motion to set aside the service of the summons, and had been decided against the motion. It is true that this ruling, being interlocutory, could not be immediately reviewed, but in due season it could have been presented to the Court of Appeals, and have been finally determined. Deliberately to raise the question again at the very next step in the cause was, therefore, *prima facie* dilatory procedure, and no satisfactory effort was made to remove the presumption that the plea had been interposed for no other purpose than that of delay. A vague, general statement was made at the trial, and is now repeated, that important reasons led the defendant to prefer a trial elsewhere; but what these reasons are, so that the court also might be in a position to weigh their importance, has not been stated, and the *prima facie* just referred to has, therefore, not been removed. Under such circumstances the court can hardly be expected to regard the plea with favor.

A new trial is refused.

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McQUILKIN et al. v DELAWARE RIVER IRON STEAMSHIP &  
ENGINE WORKS.

(District Court, E. D. Pennsylvania. July 25, 1903.)

No. 80.

1. WHARVES—HIDDEN OBSTRUCTION CAUSING SINKING OF BARGE—EVIDENCE  
CONSIDERED.

Evidence held not to sustain libelants' claim that a hidden obstruction existed at respondent's wharf, which caused the sinking of libelants' barge.

In Admiralty. Action for injury to barge at respondent's wharf. On final hearing.

Willard M. Harris, for libellant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. The owners of the steam barge Walston complain in this proceeding that, after the barge had tied up with a cargo of sand at the respondent's wharf on the Delaware river, she was injured by coming in contact with a submerged piling connected with the wharf, which pierced her bottom, and there-

by caused her to sink in a short time, thus inflicting the various losses that are referred to in the testimony. The gravamen of the libel is the respondent's negligence in permitting a dangerous obstruction to exist under water without giving warning or notice of any kind to vessels that were permitted to unload at a public wharf. Obviously, therefore, the first question to be answered is, was there in fact such an obstruction? And with this inquiry a good deal of the testimony is naturally and properly concerned. I have read it all with care, and my conclusion is that it fails to establish the existence of the submerged piling, which the libelants charge to have been the efficient cause of the damage. Indeed, I think it is no more than fair to the respondent to go a step farther, and to say that the weight of the testimony justifies the affirmative finding that there was no such obstruction as is complained of in the libel.

What may have injured the barge, or when the damage was done, the testimony does not disclose, and it is not material to inquire further. Perhaps some help might have been afforded if the libelants had called some witness from the yard where the repairs were made. As the cost of restoration was only \$32, details of the injury from such a source might have thrown some satisfactory light on the force that produced it; but no such person was called, and the interested witnesses that were examined concerning the appearance of the break in the bottom differ a good deal upon this point, one witness saying, "It was not an open hole; it was a puncture—shoved open;" and two others apparently saying that there was a hole driven through, 7 inches by 12. But I lay no stress on this discrepancy. As already stated, I think the testimony as a whole warrants the conclusion, not only that the libelants have failed to sustain the burden of proving the existence of the obstruction, but that in fact no such obstruction was there.

The libel must be dismissed, with costs.

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UNITED STATES v. HEATON et al.

(Circuit Court, E. D. Pennsylvania. July 20, 1903.)

No. 49.

1. DEBTS DUE UNITED STATES—PRIORITY—SURETIES.

Rev. St. §§ 3466-3468 [U. S. Comp. St. 1901, p. 2314], which provide that debts due the United States shall have priority in the administration of the estates of insolvents, does not give such priority against sureties of debtors, and, in the absence of statutory provision, the right to such priority does not exist.

On Exceptions to Auditor's Report.

John E. Gensemer, W. S. Furst, David Lavis, and Francis G. Taylor, for claimants.

J. Whitaker Thompson and James B. Holland, for the United States.

F. B. Bracken, for Surety Co.

J. B. McPHERSON, District Judge. I do not think it necessary to add anything to the carefully considered and very satisfactory report of the auditor, except to reply briefly to one of the arguments advanced by the government in support of its claim to priority. The contention is, to use the language of the brief, that "the conclusion appears to be irresistible, in reading the three sections together (3466, 3467, 3468, Rev. St. [U. S. Comp. St. 1901, p. 2314]), that the intention of Congress was that the United States should be entitled to the same priority against the surety as against the principal. Otherwise section 3468 would be an absurdity. That section subrogates the surety to the rights of the United States in its priority against the principal. If it were held that the United States has no priority against the surety, the surety would, of course, have no priority against the principal," etc. I do not think the conclusion indicated by the phrase "of course" is properly drawn. The United States has no priority against a surety, for the reason that no statute has given it such a privileged position, while it has priority against an insolvent principal for the analogous reason that Congress has seen fit so to enact. The right of a surety, after he has paid the money due upon his bond to the United States, to be preferred in the distribution of his insolvent principal's estate, does not depend at all upon the answer to the question whether the United States has previously had priority against the surety, but rests solely upon the language of section 3468, which expresses the legislative will upon the subject. It is this section that is the source of the surety's right, and I think its true construction gives priority for so much, and no more, of the government's claim as the surety may have been obliged to pay by legal proceedings, or may have paid voluntarily, in discharge of his obligation upon the bond.

The exceptions of the United States are overruled, and the report of the learned auditor is adopted as the opinion of the court. Distribution of the fund is decreed in accordance with the schedule submitted in the report.

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DUPREE et al. v. LEGGETT et al.

(Circuit Court, E. D. North Carolina. July 23, 1903.)

1. EQUITY—DEMURRER—VERIFICATION—CERTIFICATE OF COUNSEL.

Equity Rule 31 provides that no demurrer shall be allowed to be filed to any bill unless on a certificate of counsel that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay. *Held*, that the requirements of such rule could not be waived, and that a demurrer to a bill not supported by the certificate and affidavit required was fatally defective.

In Equity.

Wells & Wells and Rountree & Carr, for complainants.  
Russell & Gore, for defendants.

PURNELL, District Judge. The bill herein was filed December 3, 1902, in the circuit court at Wilmington, and seeks to recover real



estate which purported to have been sold under an order of the probate court of Pitt county, N. C. On May 4, 1903, W. H. Harrington and wife filed what purports to be a demurrer "that the said plaintiffs have not in and by said bill made or stated any such cause as doth or ought to entitle them to any relief as thereby sought, or any relief whatever in this court," which demurrer is accompanied by a certificate of counsel for plaintiffs, but is without verification. Equity Rule 31, which has the force of a statute, is as follows:

"No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and, if a plea that it is true in point of fact."

An answer under oath is waived in the bill, but the rule applicable to a demurrer is not and cannot be waived. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853.

The demurrer is fatally defective in other respects and does not raise the questions argued in the briefs. A decree pro confesso may be entered. This disposes of the demurrer of these defendants.

One defendant—Jas. H. Lang—has interposed an answer, and it appears other defendants have not yet been served; hence the cause is not in a condition to be heard. When it is properly before the court, the bill will be examined as required by the act of Congress of 1888, and, if the jurisdictional facts do not affirmatively appear in the record, the bill will be dismissed. *Bates*, Fed. Eq. Pro. §§ 5-11, inclusive; U. S. Comp. St. 1901, tit. 13, p. 512 (Act March 3, 1887, c. 373, § 6, 24 Stat. 555; Act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436).

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#### WILSON et al. v. GIBERSON.

(Circuit Court, W. D. Arkansas, Harrison Division. March 25, 1903.)

##### 1. REMOVAL OF CAUSES—JURISDICTIONAL FACTS MUST APPEAR FROM RECORD.

To give a federal court jurisdiction of a cause on removal, it must affirmatively appear from the petition for removal, or from the accompanying record, that the suit was duly filed in the state court from which it purports to have been removed, and also, where no other ground of jurisdiction is shown, that the plaintiff and defendant were citizens of different states, both at the time the suit was instituted and when the petition for removal was filed.

Bill in Equity. On motion to remand to state court.

J. C. Floyd and Horton South, for complainants.

W. S. Chastain, for defendant.

ROGERS, District Judge. This case purports to have been brought here by the defendant on removal from the Marion circuit court sitting in chancery. It is essential to the jurisdiction of this court that all facts which are necessary to the exercise of jurisdiction affirmatively appear on the face of the petition for removal or the accompanying record. It does not appear in this case that this suit was ever filed in the Marion circuit court. It may be inferred from facts which appear in the record (and to which I need

not refer) that the case was filed in the Marion circuit court, but this court cannot acquire jurisdiction on removal by inferences. As stated, the facts giving jurisdiction must appear affirmatively, and not inferentially. If this were the only defect in the record, certiorari might be awarded, directed to the clerk of the Marion circuit court, to compel him to perfect the record; time might be granted to the defendant to procure a perfect transcript of the record and file the same. The certiorari, however, in this case could be of no service, because it does not appear that the complainants and the defendant were citizens of different states either at the time the suit was brought or at the time the petition for removal was filed. Both facts should appear affirmatively in order to give this court jurisdiction. *Freeman v. Butler* (C. C.) 39 Fed. 1; *Camprelle v. Balbach* (C. C.) 46 Fed. 81. Any number of cases upon this proposition might be collated. It is unnecessary, however, to do so, because this practice is established, and the case must be remanded to the Marion circuit court for want of jurisdiction in this court.

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In re HINCKEL BREWING CO.

(District Court, N. D. New York. July 16, 1903.)

1. BANKRUPTCY—REFEREE—RECEIVER—COMPENSATION.

Bankr. Act July 1, 1898, c. 541, §§ 40, 48a, 30 Stat. 556, 557 [U. S. Comp. St. 1901, pp. 3436, 3439], prior to its amendment, provided that referees should be entitled, as compensation, to a fee of \$10 and to 1 per cent. commissions on sums to be paid "as dividends and commissions," or one-half of 1 per cent. on the amount to be paid to creditors on confirmation of a composition. Section 40 declared that trustees should be entitled to receive a fee of \$5 and such commissions on sums to be paid as dividends and commissions as should be allowed by the courts, etc. *Held*, that the word "dividends" included only such sums as were paid to creditors who had provable and allowed claims, and did not include sums paid by the trustee to satisfy fixed liens on real estate sold by him, though the property was sold free of all incumbrances, and the trustee paid such liens from the proceeds of the sale.

Appeal from decision of referee allowing commissions to the trustees and referee on the amount of a mortgage and certain tax liens, water rent and assessment liens on real property sold by the trustees pursuant to the order of the court, the sale having been made free and clear of all incumbrances.

James J. Farren, for creditors.

John A. Delehanty, for trustees.

RAY, District Judge. The bankrupt, Hinckel Brewing Company, owned a large brewery plant, which at the time of the bankruptcy was subject to the lien of a mortgage on which was due, when paid, the sum of \$108,850, and also to the lien of taxes, water rents, and assessments due the city of Albany, amounting to the sum of \$13,826.53. An attempted foreclosure of such mortgage was restrained by this court. March 17, 1903, the property was sold pursuant to an

order of this court for the sum of \$280,150. There was no dispute or contention as to the amount or validity of such liens. The order directing the sale contained this provision:

"Fifth. All mortgages, mechanics' liens, taxes, assessments and other incumbrances will be allowed by the said trustees out of the purchase money, provided the purchaser shall, previous to the delivery of the deed, present to the trustees proofs of the existence of such liens at the time of the sale, and duplicate receipts for the payment and satisfaction thereof."

The purchaser did not comply with this provision, but paid the entire purchase money to the trustees, who computed the amounts of such liens, and paid them. These liens were not proved or allowed as claims against the estate.

The sole question is whether or not the referee and trustees are entitled to commissions on the amount of these liens. Sections 40a and 48a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 556, 557 [U. S. Comp. St. 1901, pp. 3436, 3439]) before the amendment of February 5, 1903, c. 487, 32 Stat. 797, read as follows, viz.:

"Sec. 40. Compensation of Referees.—(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

"Sec. 48. Compensation of Trustees.—(a) Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars."

What is the meaning of the words "on sums to be paid as dividends and commissions"? They are evidently used restrictively in the act, otherwise the law would have read "on all moneys belonging to the estate received and paid out," or equivalent words. The act contains no definition of the word "dividends," and hence we must give that word the ordinary meaning when used in a statute having regard to the whole act. Says Abbott's Law Dic. vol. 1, pp. 393, 394:

"Dividend. \* \* \* (2) In bankruptcy or insolvency practice to denote assets as apportioned among creditors. \* \* \* Dividend does not necessarily imply a pro rata distribution. Hall v. Kellogg, 12 N. Y. 325, 335. \* \* \* Dividend is a word of very general and indefinite meaning. It has not, in law, any particular and technical signification."

See *University v. N. C. R. Co.*, 76 N. C. 103 (22 Am. Rep. 671). Says Wharton's Law Dic. p. 306:

"Dividend—A share, the part allotted in division; the interest paid on the public funds; the division of a bankrupt's or insolvent's effects."

Says Century Dictionary:

"Dividend—A sum to be divided into equal parts, or one to be distributed proportionately. \* \* \* A sum out of an insolvent estate to be divided

among its creditors. (2) The share of one of the individuals among whom a sum is to be divided; a share or portion."

And so we might go on with dictionary definitions without being much the wiser as to the exact meaning of the words used in the act.

By sections 56b and 57e of the act, secured creditors can vote at meetings of creditors or have their claims counted when computing the number of creditors or the amount of their claims only when the claims exceed the value of the securities or priorities, and then only for the excess. Section 65a says, "Dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured." It follows that dividends are not allowed or paid on mortgages or fixed tax liens. These are the "dividends," and the only dividends, mentioned or provided for in the bankruptcy act, and hence the only "dividends" on which the trustee or referee is entitled to commissions. It is presumed that when the lawmaking body provided for commissions to these officers on "dividends," it intended commissions on such "dividends" as are provided for and allowed by law. In *Re Utt*, 5 Am. Bankr. R. 387, 105 Fed. 754, 45 C. C. A. 32, the question was decided, and the Circuit Court of Appeals, Seventh Circuit, held that commissions cannot be allowed the referee or trustee on such claims when paid by the trustee. See, also, *In re Ft. Wayne Electric Corp.* (D. C.) 94 Fed. 109; *In re Fielding* (D. C.) 96 Fed. 800; *In re Barber* (D. C.) 97 Fed. 547; *In re Sabine* (D. C.) 1 Am. Bankr. R. 321.

This court is of the opinion that the word "dividends" used in the bankruptcy act of 1898 (before amendment of 1903) means those sums paid to creditors who have provable and allowed claims, and does not include sums paid to satisfy fixed liens on real estate sold by the trustee or trustees, even when sold free and clear of all incumbrances, and the trustee or trustees pay and satisfy such liens from the proceeds of sale. The whole act taken together warrants no other construction. True, the amounts paid to satisfy these liens on this real estate were sums paid to creditors by the trustees from moneys coming lawfully into their hands, but those preferred and secured creditors were not of the class on whose claims "dividends" could be declared or paid unless the security was less than the debt or claim. In the case at bar there was full security for the secured debts and full payment. The sums paid over were charged with the lien of the mortgage, taxes, etc., respectively, and paid for that reason, the lien following the proceeds of sale, not on or because of a provable and allowed claim on which only "dividends" (in the sense of the act) could be declared or paid. There is nothing in the act itself to indicate that the word "dividends" is used in different senses in different sections or clauses of the act. Congress, by amending sections 40 and 48 so as to give commissions to trustees "on all moneys disbursed by them," and commissions to referees "on all moneys disbursed to creditors by the trustee," has settled a disputed question, but in so doing did not necessarily declare a construction of the law as it read prior to such amendment.

Notwithstanding the reasoning of some of the cases in the District Court, this court is decidedly of the opinion, for the reasons stated,

that the referee and trustees are not entitled to commissions on the sums paid in satisfaction of the mortgage, tax, and assessment liens mentioned.

The order of the referee, dated June 23, 1903, fixing the compensation of the trustees, referee, and appraisers herein, is therefore reversed, and set aside, with directions to allow commissions to the trustees and referee on the sums received and disbursed by the trustees, less, or after deducting, the said sums paid in satisfaction of said mortgage, tax, water rent, and assessment liens before mentioned.

So ordered.

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UNITED STATES v. CHARLES G. DUNN CO., Limited.

(Circuit Court, E. D. Pennsylvania. August 8, 1903.)

No. 47.

1. NAVIGABLE WATERS—PIERS—INJURIES—NEGLIGENCE—EVIDENCE.

In an action against the owners of a vessel to recover damages for injuries to plaintiff's pier in a river, caused by a collision in the night-time, evidence reviewed, and *held* insufficient to establish negligence on the part of the branch pilot navigating the vessel in failing to discover the pier, which was unlighted, in time to avoid it.

J. Whitaker Thompson and James B. Holland, for plaintiff.  
Horace L. Cheyney and John F. Lewis, for defendant.

J. B. McPHERSON, District Judge. This action at law, which was tried without a jury, involves the liability of the defendant for injury done to a pier belonging to the government. From the evidence produced, much of which was heard in open court, I find the following facts:

(1) On September 21, 1900, the United States was the owner of a disinfecting pier, built on piles in the channel of the Delaware river, about 1,200 feet eastward of the Reedy Island quarantine station. It was erected by the government several years before the collision, to provide a place and facilities for disinfecting vessels on their way up the river. The pier, which was nearly covered by low buildings, was about 50 feet wide by 250 feet long, and was protected at each end by an ice-break about 75 feet long. The water immediately about the pier was from 24 to 26 feet deep.

(2) The defendant is the owner of the British steamship *Falloden Hall*, of 3,389 gross and 2,206 net registered tonnage. She is 335 feet long, 43.7 feet wide, and 18.6 feet deep in the hold. On the foregoing date she was bound from Java to Philadelphia with a heavy cargo of sugar—about 4,400 tons—and was drawing from 23 to 24 feet of water. She was in charge of a licensed branch pilot, who was taken on board at the Delaware Breakwater by the master of the vessel, in compliance with the pilotage laws of the state of Pennsylvania. As the ship approached the pier, the pilot, the master, and the first officer were on the bridge, a quartermaster was at the wheel, and an able seaman was on lookout upon the forecastle head.

(3) About 8 o'clock in the evening of September 21st the steamship collided with the pier, wrecking the southern ice-break, and

injuring the buildings and machinery. The collision occurred under the following circumstances:

The night was dark and clear, and the tide was three-quarters flood. An ordinary anchor light was hung upon a bracket projecting from the eastern side of the pier, and could have been seen from the channel ranges, but it was not visible from the course taken by the steamship. No other light had been displayed on the pier before the date of the collision, but since that time its position in the channel has been marked by a red light at each end. The channel, or Finn's Point, ranges are about a quarter of a mile eastward of the pier, running N. by E.  $\frac{1}{8}$  E., and the long axis of the pier is about parallel with the ranges. Owing to a deposit at the lower end of the range, which was then being dredged out, deep draught vessels, such as the Falloden Hall, kept to the western side of the channel, where the water was deeper, and passed about 300 feet to the eastward of the pier. On the night in question, the Newcastle, a vessel which was then in quarantine, was anchored about 1,200 feet below, and on a line with, the pier. She had been ordered to this berth by the physician in charge of the station. At the time of the collision at least two, and probably three, dredges were at anchor in the channel nearly on the line of the Finn's Point ranges, one of them lying nearly abreast of the Newcastle to the eastward. After the Falloden Hall had made the turn from the Reedy Island ranges, which are immediately below the Finn's Point ranges, and was proceeding upon a course which would have carried her safely to the eastward of the Newcastle and of the pier, a tug with a large schooner in tow came down the river, and signals of passing to port were exchanged between the tug and the Falloden Hall. At the time these signals were exchanged, in addition to the tow that was approaching between the Newcastle and the dredges at anchor, another small craft—a launch 50 or 60 feet long—was also between the Newcastle and the dredges, and was moving slowly up stream, showing a light upon each end. West of the Newcastle a river steamboat was coming down in the shallower water between the pier and Reedy Island. With the lights of all these vessels in sight, the pilot of the Falloden Hall was compelled to go to the westward, for there was not sufficient distance between the tow and the Newcastle, or between the tow and the dredges, to justify him in attempting to pass at night between either two of these three visible obstacles—to say nothing of the launch; and, even if he could have safely crossed the bows of the moving tug, and have reached the channel east of the dredges, he would have found his ship in dangerously shallow water. After the exchange of passing signals with the tug, the course of the Falloden Hall was changed sufficiently to enable her to pass the tow, and also to pass the Newcastle, which was still further to the westward. After she had passed the Newcastle, the pier was observed for the first time by the Falloden Hall, and appeared to be a dark, indistinguishable object, the exact character of which could not be immediately ascertained. It was discovered by those on the deck of the steamship as early as was possible in the exercise of proper care and diligence. The night was very dark, and the only light that was displayed on the pier could not

be seen from the position to which the vessel had been forced. The pier was probably not more than 200 or 300 yards away when its outlines were seen, and the situation evidently presented nothing but a choice of two evils. To the westward was room enough on the surface of the stream, but the depth was not enough for vessels drawing as much water as the Falloden Hall. Deep-draught steamships never used that part of the channel, and it was certain that, if the helm were put to starboard, the vessel would run aground, and must risk the injury of stranding, and of contact with unknown obstructions. To the eastward there was depth enough, but the tide was approaching the flood, the ship was heavily loaded, and the distance was so short that the pier could scarcely be escaped if the vessel continued to move. Under such circumstances it seems to me that the prompt decision of the pilot was correct—indeed, that nothing else could have been prudently done. He ordered the helm hard aport, the engines full speed astern, and the anchor dropped, in the hope of stopping the ship's way, and at the same time of keeping her in water of sufficient depth. The order was obeyed at once, but the effort was in vain, and the collision took place. The cost of repairing the damage was \$8,022.98, which was paid about January 1, 1901.

Upon these facts, which I find to be established by the testimony, part of which comes from the mouth of disinterested witnesses, I am unable to find affirmatively that the pilot was negligent. On the contrary, I think that the government has not only failed to sustain the burden of proof in this respect, but that the evidence as a whole justifies the pilot in the course that he pursued. The shoal at the foot of the Finn's Point range warranted him in following the practice of other vessels that drew as much water as the Falloden Hall, and in keeping to the west side of the channel. As he approached the pier, darkness having fully set in, he found the breadth of the accessible channel nearly occupied by vessels. Almost upon the ranges, perhaps a little to the east of them, were the dredges at anchor. West of these was a tug with a tow, and somewhere in that neighborhood the lights of the launch, which the captain (as his deposition seems to indicate) apparently supposed to be a barge. The pilot received a signal to pass the tow to port, and, even if he had refused to acquiesce in this maneuver, he could not have passed to starboard without encountering the serious risk of collision with the tow or with one of the dredges. The space between the Newcastle and the tow was too narrow to afford a safe passage in the dark, and he was, therefore, driven to the west of the Newcastle, where he knew the water would soon become too shallow for the steamship. Forced into this critical position, the insufficiently lighted pier was suddenly discovered, and he was obliged to act upon the instant. It must be presumed that, as a licensed branch pilot, he knew that he was in the neighborhood of the quarantine station, and that the pier was an obstacle that must be avoided. But I do not think he was bound at his peril to know in the dark within a few yards, precisely where a relatively small, invisible, and unlighted object was to be found. If he had had the aid that is now afforded by the light on the southern end of the pier, and had thus been warned a little sooner,

so that precautions might have been taken—even five or ten minutes earlier—I have little doubt that the collision would have been avoided. As it was, he found himself in a position of peril without fault of his own, and was forced to choose one of two dangers. If he made an error of judgment under such circumstances, I do not think it should be reckoned as actionable negligence.

Judgment may be entered in favor of the defendant.

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THE RICHARD F. C. HARTLEY.

(District Court, E. D. Pennsylvania. August 3, 1903.)

No. 55.

I. COLLISION—SAILING VESSELS CROSSING—VIOLATION OF RULES.

A collision occurred off the coast of South Carolina in the night between the United States bark Chase and the schooner Hartley, on crossing courses. Each vessel saw the other's lights when a mile or more distant. The Chase was sailing close hauled, while the Hartley was running free, and was therefore bound by the rules to keep out of the way, and to avoid crossing ahead of the Chase; there being no circumstances to prevent. The evidence indicated, however, that she attempted to cross ahead, and thus brought about the collision. The Chase kept her course and speed, as required by the rules, until a collision became imminent, when she changed her course, in an attempt to prevent it. *Held*, that the Hartley was solely in fault.

In Admiralty. Suit for collision.

James B. Holland and J. Whitaker Thompson, for libellant.

Henry R. Edmunds and John A. Toomey, for respondent.

J. B. McPHERSON, District Judge. The Salmon P. Chase is a bark owned by the United States, and used as a practice ship in the revenue service. In the early morning of May 6, 1897, a collision occurred between the bark and the schooner Richard F. C. Hartley on the Atlantic ocean, about 50 miles east of Charleston, S. C., as a result of which the bark received a good deal of injury. The collision took place between half past 1 and 2 o'clock, the weather being clear, and both the wind and the sea being moderate. There is some dispute concerning the exact direction of the wind, but I do not think the decision of the case depends upon the determination of this controversy. All the witnesses agreed that the wind was blowing from a northerly direction, but they differ upon the question whether it blew exactly from the north, or from a point or two east or west of north. Perhaps the moderate discrepancy of the testimony may be accounted for by the fact that the witnesses speak of the two hours from midnight to the time of collision, and evidently during that period different observers at different moments might have correctly noticed that the wind was blowing from somewhat different points. The Chase was under easy sail, and was proceeding from Charleston to Baltimore upon a course about east north-east, sailing by the wind, close hauled on the port tack, and was properly manned and equipped. She had a cadet and a seaman on



the lookout upon the forecastle, and there were also upon deck at the same time a gunner, who was on the main deck in charge of the watch, a second lieutenant in the revenue service, who was in command of the vessel after 12 o'clock, a cadet, who was the "gentleman of the watch"—apparently a general utility man—and a third cadet, who was at the wheel. So far as appears, all these persons were competent, and I see no reason to doubt that they discharged their duties faithfully. The Hartley was sailing light, bound upon a voyage from Providence, R. I., to Jacksonville, and was going free before the wind upon the starboard tack. About half past 1 the lights of the Hartley were discovered by the lookout on board the Chase about a mile or a mile and a half distant, bearing from one to two points, or thereabouts, on the port bow. Both her lights were occasionally seen, and sometimes her red light only was visible, but for the most part she displayed her green light alone. It is manifest, therefore, that the vessels were upon crossing courses, and, as the Chase was close hauled, while the Hartley was sailing free before the wind, it was the duty of the schooner to keep out of the road. Article 17 of the Act of Aug. 19, 1890, c. 802, (26 Stat. 320), provides for such a situation in the following language:

"Article 17. When two vessels are approaching one another so as to involve risk of a collision, one of them shall keep out of the way as follows, viz: (a) A vessel which is running free shall keep out of the way of a vessel which is close hauled."

Article 22 goes on to enjoin:

"Every vessel which is directed by these rules to keep out of the way of another vessel, shall, if the circumstances of the case admit, avoid crossing ahead of the other."

And article 21 defines the duty of the other vessel as follows:

"Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed."

It is evident, therefore, that, as the Hartley was sailing free before the wind, it was her duty to keep out of the way of the Chase, while it was the duty of the Chase to maintain her course and speed. In keeping out of the way of the Chase, the Hartley was also bound to avoid crossing her bows, if the circumstances of the case permitted the schooner to avoid a course that is usually so full of danger. I have carefully examined the testimony concerning the maneuvers of the Hartley, which is, as usual, somewhat conflicting, and have come to the conclusion that she clearly failed in her duty. Her lookout either failed to discover the lights of the Chase in time to enable the proper course to be pursued, or, if the Chase was seasonably discovered, the Hartley endeavored to cross her bows, and thereby brought about the dangerous situation from which the collision resulted. I think the latter supposition is the more probable explanation of what took place. The schooner's witnesses testify that the lights of the bark were seen three or four miles away, but I do not believe them when they say that they saw the green light almost all the time. If this were true, a collision would scarcely have been possible, unless the bark had changed her course, and this I am

satisfied she did not do until a few minutes before the vessels came together. I think the Hartley saw both lights of the Chase when the vessels were more than a mile distant; and it was then the schooner's duty to pass to windward of the bark,—a course that was safe and easy,—and not to attempt to cross her bows. But the testimony leaves me in little doubt that the Hartley persisted in the attempt to cross to leeward of the Chase, believing that she had time and room enough for this maneuver. As the vessels approached each other, however, and it was discovered that a collision threatened, the Hartley gave the order to luff, apparently for the purpose of making the tardy effort to pass to windward. Up to this time, the Chase had maintained her course and speed, but, believing correctly that the Hartley was endeavoring, in the first instance, to cross her bows, she had just put her helm hard astarboard, in order to give the Hartley as much room as possible to leeward. When it was observed, however, that the Hartley was about to luff, the helm of the Chase was ordered hard aport, but before the order could be fully executed, the Hartley resumed her attempt to pass to leeward, and the helm of the Chase was again put hard astarboard. By this maneuver she was brought up into the wind with her sails shaking, and at this juncture the vessels came together; the starboard bow of the Hartley striking the starboard bow of the Chase, scraping also along the side, and doing a good deal of damage.

Under these circumstances, I think there can be no question about the sole liability of the Hartley. She was the vessel sailing free, and violated her duty to keep out of the way of the vessel close hauled. This was a fault for which she should be held liable, as a number of cases have decided. *Bentley v. Coyne*, 4 Wall. 509, 18 L. Ed. 457; *The Charles H. Trickey*, 66 Fed. 1020, 14 C. C. A. 225. Moreover, even if the testimony was more evenly balanced, it would still be my duty to find the Hartley liable, under the rule that where a collision occurs between two sailing vessels, one close hauled and the other sailing free, the presumption is that the vessel sailing free was at fault, and the burden of proof is upon her to remove that presumption. She is bound to show clearly that the other vessel was at fault, before her own prima facie liability is overcome. *Carll v. The Wiman* (D. C.) 20 Fed. 245; *Thompson v. The Republic*, 23 Wall. 20, 23 L. Ed. 55; *The Rabboni* (D. C.) 53 Fed. 948. The evidence not only does not overcome the presumption, but, in my opinion, shows with distinctness that the Hartley was at fault from the beginning, and that her fault is probably attributable to the belief that she had ample space and time to cross the bows of the Chase, although she was forbidden by the sailing rules to risk the attempt.

A decree may be entered in favor of the libellant, with a reference to a commissioner, if the parties should be unable to agree upon the amount of damage.

BOCK et al. v. INTERNATIONAL NAV. CO.

(District Court, D. Massachusetts. July 14, 1903.)

No. 1,465.

1. ADMIRALTY—PLEADING—INTERROGATORIES.

Under admiralty rule 23 the libelant in a suit against a corporation may attach to his libel interrogatories to be answered by an officer of the corporation named therein.

2. SAME—INTERROGATORIES TO OFFICER OF CORPORATION.

Officers of a corporation respondent may be interrogated in admiralty by questions attached to the libel as to matters relevant to the issues, whether such matters are within their personal knowledge or are known to them through information received in their official capacity, the right being limited, however, to questions which do not unduly pry into the defense upon which respondent relies, and which are concerned with issuable facts.

In Admiralty. On exceptions to interrogatories annexed to libel.

Solomon Lewenberg, for libelants.

Putnam & Putnam, for respondent.

LOWELL, District Judge. The following interrogatories were annexed to the libel in this case: (1) What is your full name, residence, and occupation? (2) How long have you been connected with the International Navigation Company, and in what capacity? (3) Did the International Navigation Company own or control the steamship New York from March 1, 1901, to March 18, 1901? (4) For how long a period previous to March 1, 1901, did said International Navigation Company own and control said steamship? (5) When was said ship built? (6) On or about March 14, A. D. 1901, was there an explosion or other chemical action on said steamship, which caused ammonia fumes to escape into an apartment on said steamship used or occupied by passengers? (7) When was the receptacle or tank from which said ammonia fumes escaped first constructed and placed on said steamship? (8) For what was said tank or receptacle used? (9) Give dimensions and measurements and capacity of said tank or receptacle? (10) Was said tank or receptacle inspected since it was first put in for use on said steamship? (11) If answer to Int. 10 is in the affirmative, give the names of such persons making said inspection, their last known residence and addresses, and the dates when said inspections were made. (12) Did any of the servants or agents of said International Navigation Company repair said tank or receptacle after the fumes escaped therefrom? (13) Give the names and addresses and last known residences of said persons making said repairs. (14) Has any part of said tank or receptacle been removed by the servants or agents of the respondent? (15) If answer to Int. 14 is in the affirmative, state for what reasons said parts were removed. (16) If answer to Int. 14 is in the affirmative, give reasons for said removal, and state where said parts were removed to, and where are they now. (17) What was the cause of said escape of ammonia fumes from said tank or receptacle? Answer fully. (18) Has your company, or any of its servants or agents, ever caused a chemical analysis

of the materials used in said tank or receptacle? (19) If answer to Int. 18 is in the affirmative, state results of analysis. (20) Are Herbert Maynard and John H. Child doing business in Boston, in said district, as Maynard & Child, the general agents for New England States of the said International Navigation Company; and, if so, for how long a period have they been such general agents?

The libelee excepted thereto:

1. Because under admiralty rule 23 and the general practice in admiralty it is not permitted to interrogate the officers of a corporation libelee. That rule 23 should be given some effect as against a corporation libelee seems clear. Unless there is some reason to the contrary, not based upon mere form, a libellant is entitled to the like information from an individual and from a corporate libelee. If all information is not to be denied him, he must be allowed either (1) to address his interrogatories to the corporation in form, though in fact they are to be answered by its officers, or (2) to interrogate the officers directly. The second course seems admissible, as the more convenient, and as not outside the fair intention of the rule. Either way the result is practically the same.

2. Because the officers of the corporation cannot be interrogated except as to matters within their personal knowledge. Where the interrogation of officers is allowed by statute or by court rule, they are ordinarily required to answer interrogatories addressed not only to their personal knowledge, but to their information. This is true where there is no express provision for such answers in the statute or rules. *Gunn v. New York, New Haven & Hartford R. R.*, 171 Mass. 417, 50 N. E. 1031; *Robbins v. Brockton Street Railway*, 180 Mass. 51, 61 N. E. 265. The information of the officer interrogated is ordinarily, if not always, the knowledge of the corporation. The information thus called for is only that received by the officer in his official capacity.

It was urged that interrogatories in admiralty are not like those permitted in equity or by statute, inasmuch as they are not evidence for the deponent. This is asserted on the authority of *The Serapis* (D. C.) 37 Fed. 436, 442, and *Havermeyers v. Compania Transatlantica* (D. C.) 43 Fed. 90; but the authorities relied on in the case last mentioned do not all of them sustain the proposition to support which they are cited. In *The L. B. Goldsmith*, Fed. Cas. No. 8,152, the court held merely that answers to interrogatories are not conclusive evidence for either party. In *Cushing v. Laird*, Fed. Cas. No. 3,509, no reasons were given for the ruling, and the decision of the District Court was reversed on appeal, though upon another ground. The case of *Cushman v. Ryan*, 1 Story, 91, 103, Fed. Cas. No. 3,515, is apparently in point, so far as its language is concerned; but a closer examination shows that Mr. Justice Story probably had in mind only that response to the allegations in the libel which is made by an ordinary sworn answer. He relied expressly upon the opinion of Judge Ware in *Hutson v. Jordan*, Fed. Cas. No. 6,959. But Judge Ware, in *The David Pratt*, Fed. Cas. No. 3,597, drew a distinction between the response made to a libel by the ordinary sworn answer and the response made to special interrogatories, saying:

"The master, by answering these interrogatories, would make his answers evidence; for, though the general answer of the respondent is not properly evidence any further than the charges in the libel, which are equally verified by oath, yet the answers to special interrogatories, which are sometimes subjoined to the libel and sometimes put at the hearing, are evidence."

And in *Jay v. Almy*, 1 Woodb. & M. 262, 267, Fed. Cas. No. 7,236, Mr. Justice Woodbury said:

"Each party in admiralty has a right, if he chooses, to the answer under oath of the other; and, if not so answering when requested, he may take the fact pro confesso. If an answer be given when asked for, it is evidence for either side."

It is not necessary now to decide if the answers to these interrogatories will be evidence for the deponent. The conflict of authority is stated in order that the correctness of the opinion expressed in the *Serapis*, in *Havemeyers v. Compania Transatlantica*, and in *Benedict's Admiralty Practice*, § 519, be not assumed without further consideration. In *Gammell v. Skinner*, 2 Gall. 45, Fed. Cas. No. 5,210, Mr. Justice Story likened interrogatories in admiralty to those in equity. Care must be taken not to allow the libellant by interrogatories to pry unduly into the defense upon which the libelee relies; and, as was said in *Robbins v. The Brockton Street Ry.*, 180 Mass. 51, 61 N. E. 265, "The interrogator cannot compel the other party to get up his case for him." In the *Havemeyer Case* it was held that only such interrogatories should be allowed as were concerned with issuable facts.

The libelee further excepts to interrogatories 8 and 9, because they are intended thus to pry into the libelee's case. Upon the whole, however, I think these interrogatories should be answered. To interrogatories 10, 11, 12, 13, 14, 15, 16, and 17 exception is taken on various grounds, and, as the interrogatories are objectionable on the grounds above stated, they need not be answered. I have some doubt about interrogatories 18 and 19, but, upon the whole, deem them admissible. Interrogatory 20 is not further objected to.

The exceptions to interrogatories 10 to 17 are sustained. The exceptions to the other interrogatories are overruled.

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#### DAVIS v. HARRIS et al.

(Circuit Court, N. D. Iowa, W. D. August 25, 1903.)

#### 1. REMOVAL OF CAUSES—TIME OF APPLICATION—MOTION FOR RETRIAL UNDER IOWA STATUTE.

Code Iowa, § 3796, provides that when a judgment has been rendered against a party served by publication only, and who does not appear, such person may, within two years after the rendition of the judgment, appear in court, and move to have the action retried; and, security for costs being given, the case shall be retried as to such defendant as if there had been no judgment, and upon the new trial the court may confirm the former judgment, or may modify or set it aside. As such section is construed by the supreme court of the state, the judgment rendered remains in force, unless upon the new trial it is modified or set aside. *Held* that, on the filing of a motion under such statute for a retrial, the cause was not removable; the federal court having no power to modify or set aside the judgment previously rendered therein by the state court.

**On Motion to Remand to State Court.****E. C. Herrick and O. H. Montzheimer, for plaintiff.****N. L. Guernsey and J. T. Conn, for defendants.**

SHIRAS, District Judge. This suit was brought in the district court of O'Brien county, Iowa, for the purpose of quieting the title in the plaintiff, W. J. Davis, to 80 acres of land situated in that county; it being averred in the petition filed that the defendant T. E. Marshall is in possession of the premises, and that the defendants, each and all, make some claim to the premises adverse to the title of the plaintiff. Notice of the suit was given personally to the defendant Marshall, and by publication to the other defendants, under the provisions of the state statute, they being nonresidents of Iowa, requiring them to appear and defend by the 2d day of the December term, 1902, of the district court of O'Brien county. On the 10th day of December, 1902, being the 3d day of the December term, a decree by default was entered in the case, none of the defendants having appeared or otherwise made defense, wherein it was adjudged that the plaintiff was the owner of the premises, and that the several defendants were barred of all claim, right, or title thereto. On the 5th day of May, 1903, Stephen R. Harris, Albert H. Harris, Mary S. Harris, and Anna G. Harris filed a motion for a retrial of the case as to them, on the ground that they had been served with notice of the pendency of the suit by publication only; that they had a good and meritorious defense to the action, and as evidence thereof they tendered an answer, wherein they averred that they were the owners of the fee-simple title of the land, holding title thereto under William Hoffman, to whom a patent had been issued by the United States on the 1st day of December, 1859; that their codefendant, T. E. Marshall, held possession of the premises under a lease from them, he being their tenant; that the only claim the plaintiff had to the land was by virtue of a tax title and deed, which it was averred were invalid and voidable for several reasons, set forth at length in the answer. On the same day the motion for a retrial was filed, the defendants who joined in the motion also filed in the state court a petition for the removal of the case into this court, averring therein that at the time the suit was begun, and ever since, the defendant Stephen R. Harris was and continued to be a citizen of the state of Ohio; that the defendants Albert H. Harris, Mary S. Harris, and Anna G. Harris were each of them, when the suit was begun, and continued to be, citizens of the state of Pennsylvania; that the plaintiff, W. J. Davis, when the suit was begun was, and continued to be, a citizen of the state of Iowa; and that the value of the land exceeded \$2,000. The state court granted the order of removal, and, upon the filing of the transcript in this court the plaintiff filed a motion to remand, and also a plea to the jurisdiction of this court, and thus the question is presented whether the case was a removable one when the petition asking the removal was filed and presented in the state court.

The motion for a retrial, filed in the state court, was based upon the provisions of section 3796 of the Code of Iowa, which provides that when a judgment has been rendered against a party served by publi-

cation only, and who does not appear, such person may, within two years after the rendition of the judgment, appear in court, and move to have the action retried; and, security for costs being given, the case shall be retried as to such defendant as if there had been no judgment, and upon the new trial the court may confirm the former judgment, or may modify or set it aside. In construing this section, the Supreme Court of Iowa, in *Stanbrough v. Cook*, 83 Iowa, 705, 49 N. W. 1010, held that the clause therein to the effect the case should be retried as if there had been no judgment referred only to the mode of trial, and that "in all other respects the judgment stands as rendered until, upon a new trial, grounds are disclosed for modifying or setting it aside." The same rule is held in *Morton v. Coffin*, 29 Iowa, 235. It thus appears that when the petition for removal was filed in the state court, the case, in due accordance with the provisions of the state statute, had proceeded to judgment, which judgment is yet in force, and will remain so, unless upon a retrial ground for modifying it or setting it aside is proven to exist.

In *Vannevar v. Bryant*, 21 Wall. 41, 22 L. Ed. 476, in construing the removal act of March 2, 1867, c. 196, 14 Stat. 558, which authorized a removal at any time before the final trial of the case, it was said:

"In *Insurance Co. v. Dunn* [19 Wall. 214, 22 L. Ed. 68] it was held that after a motion for a new trial had been granted, a removal might be had. But after one trial, the right to a second must be perfected before a demand for the transfer can be properly made. Every trial of a cause is final until in some form it has been vacated. Causes cannot be removed to the circuit court for a review of the action of the state court, but only for trial. The circuit court cannot, after one trial in a state court, determine whether there shall be another. That is for the state court."

It will be remembered that in the case at bar the parties seeking a retrial of the case are not proceeding in equity to have a judgment set aside for fraud or other equitable ground. The motion for a retrial was filed by them in the state court under the provisions of the Code of Iowa. They chose that forum and that mode of relief, and they must be bound by the meaning of the state statute as interpreted by the Supreme Court of the state. By that interpretation, it is settled that in this case a judgment has been rendered which is valid and binding, unless, upon the motion for a retrial, ground for reversing or modifying the same is proven. The Circuit Court of the United States is not clothed with the jurisdiction to reverse or modify the judgment of the courts of the state.

The real controversy or question arising on the motion for retrial filed in the state court is whether the judgment already entered in the case shall be affirmed, reversed, or modified. This court cannot send its mandate to the district court of O'Brien county, directing that court to modify or reverse the judgment already entered by it when it had jurisdiction over the case. The judgment already entered in the district court of O'Brien county will stand in full force and effect until it is reversed or modified by some court having authority so to do. If the right of removal exists in this case, then the jurisdiction of the state court over the same is at an end; and if this court, upon hearing the motion for retrial, should conclude that the judgment should be modified or reversed, how would that be done? This court

cannot reclothe the state court with jurisdiction, and command it to enter the modification or reversal. If this court should reach the conclusion that a retrial should not be granted, and the judgment should stand affirmed, from which court should process be issued to enforce the affirmed judgment? The judgment is the act of the state court, and forms part of the record of that court. The affirmance would be the act of this court, and it would not seem possible for this court to issue process unless this court ordered a judgment to be entered on its records; but, if that were done, it might in some cases deprive the party of advantages, by way of lien or otherwise, which inhered in the state court judgment.

These considerations compel the conclusion that, as the record stood in the state court when the petition for removal was filed, it did not present a controversy over which this court could rightfully assume jurisdiction, the case having gone to judgment, and which judgment of the state court remains in full force and effect, and will so remain, unless upon the hearing upon the motion for retrial, filed under the statute of the state, the same is modified or reversed by the court in which the judgment was rendered.

The motion to remand the case to the state court is therefore sustained.

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In re LANTZENHEIMER et al.

(District Court, N. D. Iowa, Cedar Rapids Division. August 24, 1903.)

1. BANKRUPTCY—SECURED CREDITORS—MORTGAGE ON EXEMPT PROPERTY—DE-  
FENDANTS.

Bankruptcy Act July 1, 1898, § 57h, 30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443], providing that the value of securities held by creditors shall be determined by converting them into money, or by agreement, etc., and the ascertained value shall be credited on the claim, and a dividend paid only on the unpaid balance, is not limited by section 6, Act July 1, 1898, 30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424], providing that the act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition, so as to authorize a creditor holding a mortgage on exempt property to receive a dividend on his entire claim, and resort to the security only to satisfy a balance unpaid.

Submitted on Exceptions to Ruling of Referee with Respect to Claim of Mahala J. Brodie.

Hemenway & Martin, for the creditor.

SHIRAS, District Judge. The facts in this case are that the creditor, Mahala J. Brodie, holds a mortgage upon a piano belonging to the bankrupt as security for the claim she seeks to prove up against the estate, and it was ruled by the referee that she could prove up her claim only for the difference between the amount of her claim and the value of the security held by her. To this ruling the creditor excepts, and now contends that, as the piano is exempt from execution under the provisions of the state law, she should be permitted to receive a dividend on the full amount of her claim, and then resort to



the security to make good the balance left unpaid. The provisions of clause h, § 57, Act July 1, 1898, 30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443], are to the effect that the value of securities held by creditors shall be determined by converting them into money, or by agreement, arbitration, compromise, or litigation, and the ascertained value shall be credited upon the claim, and a dividend shall be paid only on the unpaid balance. This clause of the section makes no distinction between cases wherein the creditor holds security upon property exempt from execution, and those wherein the security is upon property liable to general execution. Counsel contend, however, that section 6, Act July 1, 1898, 30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424], which declares that "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition," limits the provision of clause h of section 57 in such sense as to require the holding that, when the security is on property exempt by the laws of the state, the creditor is entitled to receive a dividend upon his entire claim, leaving the security unimpaired; it being urged that unless this rule is adopted, the exempt property is indirectly subjected to the claims of the general creditors. If by the statute of the state it was provided that the creditor could not enforce a mortgage or other lien upon exempt property until the non-exempt property had been exhausted, there would be force in the contention of counsel, for by the provisions of section 6 the bankrupt is declared entitled to all the benefits secured to him by the exemption laws of the state; but the court is not justified in giving a strained construction to the state exemption law in order to evade the plain meaning of clause h of section 57 of the bankrupt act of July 1, 1898 (30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443]). If the bankrupt proceedings had not been instituted in this case, the creditor would have had the full right to enforce her mortgage security upon the piano, without exhausting the nonexempt property of the debtor; and the exemption privileges secured to the bankrupt by the state statute are not restricted or lessened by holding that the creditor can prove up her claim, and receive a dividend only on the difference between the value of the security and the full amount of her claim.

The rule contended for by the creditor would result, in the great majority of the cases, in giving to the creditor a greater share in the estate of the debtor, without really benefiting the bankrupt; and I can see no good reason why the court should interpolate into clause h of section 57 an exception not named therein, to wit, that if the security held by the creditor is upon exempt property, the creditor can prove his claim for the whole amount due.

The argument relied on by counsel for the creditor in this case is "that the effect of requiring the claimant to exhaust the security is to enhance the general estate *pro tanto*, and by so much to diminish the bankrupt's exemption." This result, however, is not caused by any modification of the state exemption law by the provisions of the bankrupt act, but results from the act of the bankrupt himself. Under the provisions of the state law, he could have held the piano ex-

empt as against all his debts, including that due to the mortgagee. He chose, however, to give a mortgage on the property, as he had a right to do, and he thus subjected the piano to a liability for the debt due the mortgagee. If bankruptcy proceedings had not been brought, the mortgagee could have sold the piano, and applied the proceeds to the payment of the secured debt. This would have benefited the general creditors by reducing the amount of the debts collectible from the nonexempt property, but that fact could not have been successfully urged as a reason why the creditor could not enforce the mortgage lien until the nonexempt property had been exhausted. The institution of the proceedings in bankruptcy did not change the rights of the mortgagor and mortgagee in this particular. The latter still retained the right to enforce the mortgage against the property, and in requiring the mortgagee to credit upon her claim the value of the mortgage security, as provided for in section 57 of the bankrupt act, no burden was cast upon the exempt property other or different in its results than would have been the case had the proceedings in bankruptcy not been brought. The effect upon the exemptions of the bankrupt, whatever it may be, of enforcing the mortgage lien is the result; not of any special provisions of the act, but of the act of the debtor in creating a special lien upon the exempt property; and there is nothing in the act which requires the ruling that greater protection must be extended to exempt property in the administration of estates in bankruptcy than would be afforded under the provisions of the state law in case the debtor had not been adjudged a bankrupt.

The exceptions to the ruling of the referee are overruled.

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BRIDGEWATER ROLLER MILLS CO. v. RECEIVERS OF BALTIMORE  
BUILDING & LOAN ASS'N.

(Circuit Court, W. D. Virginia. August 4, 1903.)

1. MORTGAGES—PURCHASER OF PORTION OF MORTGAGED PROPERTY—RELEASE  
OF OTHER PROPERTY BY MORTGAGEE WITHOUT NOTICE OF ALIENATION.

A purchaser of one of two parcels of real estate which were subject to the same mortgage, who neglected to notify the mortgagee of the purchase, thereby lost the right to insist that the other parcel should first be subjected to the mortgage as against a subsequent mortgagee thereof, to whom the first mortgagee released in ignorance that any of the property had been alienated by the mortgagor.

So far as essential to an understanding of the following opinion, the facts may be stated as follows:

G. W. Berlin, being the owner of two parcels of land known respectively as the "mansion house" and the "mill property," mortgaged both of them to Mrs. Strough. Thereafter Berlin conveyed the mill property to the Bridgewater Roller Mills Company (to be hereafter styled the "Mill Company"), which duly recorded its deed, but gave no actual notice to Mrs. Strough of this alienation. Thereafter Berlin applied to the Baltimore Building & Loan Association (to be styled hereinafter the "Association") for a loan to be secured by mortgage on the mansion. The association declined to make the loan unless Mrs. Strough would release to it her mortgage on the said prop-

erty; and in consideration of the payment to her of a part of the sum which Berlin had applied to borrow, she, still being ignorant of the alienation of the mill property, made a release of the mansion house property to the association. Still later the mill company applied for and obtained a loan from the association, secured by mortgage on the mill property. Thereafter Mrs. Strough brought her suit to foreclose her mortgage on the mill property. In this suit, in which both the mill company and the association were parties, it was decreed that the mill property be sold to satisfy, in their order, the mortgage of Mrs. Strough and the mortgage of the association on the mill property. This property has been sold, and the fund is now in court. In the meantime the association brought its suit against Berlin, and foreclosed its mortgage on the mansion house, which at the sale brought only enough to satisfy the lien of the association. The mill company has filed its petition praying that the claim of the association against it be abated by the amount brought by the mansion house property at the sale.

Roller & Martz and Winfield Liggett, for plaintiff.  
T. N. Haas, for defendant.

McDOWELL, District Judge (after stating the facts as above). In view of the conclusion I have reached on the merits, it is not necessary to express an opinion on the question raised by the plea of res judicata.

While the state of facts existing here is unusual—so much so that no authority treating of a similar state of facts has been cited—I am of opinion that the case on the merits is with the association. The question presented is somewhat complex, arising from the fact that the association occupies the dual position of mortgagee of G. W. Berlin and releasee of Mrs. Strough, as to the mansion house property. However, the controlling fact in the case to my mind is that the mill company was negligent in failing to give Mrs. Strough notice that it had purchased the mill property. This negligence left Mrs. Strough free to release or subordinate her claim on the mansion house without thereby impairing her rights against the mill property. *Bridgewater Mills Co. v. Strough*, 98 Va. 725, 37 S. E. 290. But, since all persons are presumed to know the law, of what value would this right be to Mrs. Strough if the releasee did not get that which he bargained for? Her power to make such release would be utterly valueless. And to hold that such release does not protect her releasee is to argue in a circle. It is to say that the mill company's negligence merely results in requiring it to proceed in a roundabout way to avoid the effect of the release. The nearest analogy that has been suggested, or that occurs to me, is the case of a purchaser with notice from a purchaser without notice. A., owner of a tract of land, mortgages it to B., who does not record his mortgage. A. then sells and conveys the same land to C., who becomes a complete purchaser for value, and without notice of B.'s mortgage. Under such circumstances C. acquires an indefeasible title, and, if B. should now record his mortgage, and if C. should thereafter convey to D., he also would acquire an indefeasible title. D. is protected, despite his knowledge of B.'s unpaid and now recorded mortgage. It may be said that the analogy is imperfect in that B.'s right was irretrievably lost when C. purchased, and that D. has not put B. in any worse position than he was before. But this is not sound. If D. were held

not to get good title, the result would be that B.'s right would only be suspended until C. sells the land. But the law is settled that D. acquires an indefeasible title. And the reason for it is that to hold otherwise would render C.'s title an unmarketable one. The benefit to C. coming from his innocence would be quite imperfect if he could not pass a good title to his purchaser. In the case at bar the negligence of the mill company gave to Mrs. Strough an indefeasible right to release the mansion house; a right good as against the mill company, and good as between her and the association. And to say that the taking of this release does not shield the association as against the mill company is to say that Mrs. Strough had not the right to make it. To so hold is to say, first, that the mill company has not lost its rights, but has merely been delayed in asserting them; and, second, it is to say that Mrs. Strough's supposed right is valueless to her. No one knowing the law (if this is the law)—as all persons are presumed to do—would give Mrs. Strough a valuable consideration for such a release. The benefit to Mrs. Strough of the right to release the mansion house lay in the value she could get for such release from a proposing purchaser or mortgagee of the mansion house, who would have at least constructive notice of the alienation to the mill company. Sheldon, Subrogation, § 75.

I think a release made by Mrs. Strough to Berlin would have been ineffectual. The injustice involved in allowing Berlin to pay his debt with the property of the mill company is so great that to this extent Mrs. Strough's right to release is restricted. Thus, in the case of an innocent purchaser, it is held that he can pass a good title to any one with notice, except to his vendor. 2 Pom. Eq. Jurisp. § 754. And in the case at bar, if Mrs. Strough had made the release to G. W. Berlin, and if Berlin had thereafter mortgaged the mansion house to the association, I am inclined to think that the release would not have availed the association. Under such circumstances the association could have had no higher rights than Berlin. But as we have the case, Mrs. Strough released directly to the association. It stands in a position similar to that of a purchaser with notice (other than the vendor) from a purchaser without notice. To grant the relief prayed for by the mill company, we must treat the association merely as the successor in interest of G. W. Berlin. So to do is to lose sight of the fact that the association is the direct grantee of a right, given Mrs. Strough by the negligence of the mill company, to impose the whole of Mrs. Strough's debt on the mill property. And the relief asked by the mill company is, in effect, that the burden of this debt be put back on the mansion house. If Mrs. Strough had this right, she had the power to effectually pass it to any one except G. W. Berlin.

The petition of the mill company should be dismissed, with costs to the association.

## GREGG v. METROPOLITAN TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 18, 1903.)

No. 1,162.

**1. RAILROADS—FORECLOSURE—PREFERENCE—DIVERSION OF EARNINGS—REIMBURSEMENT.**

The gross earnings of a railroad company are reimbursed for a diversion to the benefit of mortgagees, so that the current operating expense creditors are not entitled, on account of the diversion, to a preference from the proceeds of the corpus of the mortgaged property when sold on foreclosure, where the company borrows money on its notes, secured by its mortgage bonds, and the proceeds are passed to its general credit in the banks making the discount, and then checked out to pay current expenses, the money not being borrowed to pay any particular debts.

**2. SAME—CURRENT INCOME—SALE OF MILEAGE.**

Where a railroad company sells to brokers and others mileage in bulk, and at a discount, over other railroads, for whom it acts in issuing the same, the proceeds not accounted for to them, but used for its own purposes, are not part of its current income, as respects the rights of its current operating expense creditors and mortgagees relative to the questions of diversion from and reimbursement of its gross earnings.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a second appeal. In the former case we decided that preferential six months' claimants had no preference over mortgagees in the proceeds of the corpus of the mortgaged railroad property, unless there had been a diversion of the current earnings which the mortgagees should equitably restore, and that the burden was upon such claimants to show such diversion. We reversed the former decree, denying a preference to Gregg and certain other claimants who had established debts entitled to preference of payment out of current income, upon the ground that the master, in reporting that there had been no diversion of income during the six months preceding the receivership, had erred in treating car trust debts as debts of the income, and properly payable out of current income, and remanded the case for a re-reference, with leave to take further evidence. *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 48 C. C. A. 318. The master has again reported that there was no diversion for which the mortgagees could be made accountable. Exceptions by appellant were overruled, and preference again denied to the appellant. From this decree an appeal has been prosecuted.

Harlan Cleveland, for appellant.

Morrison R. Waite and Herbert Parsons, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

There is no surplus income arising from the operation of the receiver applicable to the payment of this or any other debt, nor is it claimed that there was any diversion of income by the receiver, by which the mortgage creditor profited, upon which to found an equity against the bondholders. *Burnham v. Bowen*, 111 U. S. 776, 782, 4 Sup. Ct. 675, 28 L. Ed. 596; *International Trust Co. v. Townsend Brick Co.*, 95 Fed. 850, 37 C. C. A. 396, 405. The proceeds of the sale of the mortgaged property are insufficient to pay the mortgage debts, and, if the appellant is to be paid at all, he must be paid at the expense of the

mortgage creditors out of the proceeds of the sale of the mortgaged property. Before the mortgage creditors can be displaced in respect of the corpus of the property, it must appear that the current earnings which accrued during the period shortly before the receivership were not applied to the payment of current operating expenses incurred within the same period, but were used in the permanent improvement of the property mortgaged, or for the payment of the mortgage debt, and that, as a consequence of this misapplication, current expense creditors have been disappointed. This is the well-settled rule in respect of the payment of these so-called preferential debts of the income. *Central Trust Co. v. East Tenn. V. & G. Ry. Co.*, 80 Fed. 624, 26 C. C. A. 30; *International Trust Co. v. Townsend Brick Co.*, 95 Fed. 850, 37 C. C. A. 396; *Rhode Island Locomotive Works v. Continental Trust Co.*, 108 Fed. 5, 47 C. C. A. 147. This was the law as declared in the opinion upon the former appeal and as such is the law of the case. *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 227, 48 C. C. A. 318.

For the sole purpose of permitting certain creditors of the income to establish, if they could, that there had been a diversion of current earnings by which the mortgagee had profited, and the extent of such diversion, we remanded this case, that additional evidence might be heard by the special master, and a report made. Upon this second reference the master reported that during the six months next preceding the appointment of a receiver claims aggregating \$99,215.49 had been paid by the railroad company, which had inured to the benefit of the mortgage creditors. The items were as follows:

|                         |             |
|-------------------------|-------------|
| Car Trust notes .....   | \$88,209 31 |
| Interest on bonds ..... | 5,504 53    |
| Sidings .....           | 3,045 45    |
| Land purchased .....    | 2,257 20    |
|                         | <hr/>       |
|                         | \$99,215 49 |

The appellant excepted, because he did not report two other items, which he claimed were of like character, viz.:

|   |            |
|---|------------|
| For car couplers to replace couplers in use, to comply with act of Congress ..... | \$2,712 54 |
| Expenditure on Union Depot viaduct .....  | 442 44     |

The master did not report the aggregate earnings during that period, and it is not possible, from the report alone, to know whether the gross current earnings of the company were sufficient, if properly applied, to have paid the current operating expenses, and leave a net income which was sufficient to have authorized the expenditure for permanent improvements and equipment and the payment of interest upon the mortgage debt shown to have been made during that period. But the master also reported that during the same period of time the company received from sources other than current earnings the following amounts:

|  |              |
|--|--------------|
| Money borrowed .....                             | \$127,781 25 |
| Money collected from sale of mileage books ..... | 98,712 54    |
| Old earnings collected (not current) .....       | 2,148 47     |
|  | <hr/>        |
|  | \$228,642 26 |

But, if it be assumed that the gross earnings were insufficient to pay current operating expenses and leave a surplus which might be properly applied to the permanent improvement of the property and interest upon the mortgage debt, then the master has reported that gross earnings were more than reimbursed by the money derived from other sources. In *Central Trust Co. v. East Tenn., V. & G. R.*, 80 Fed. 624, 26 C. C. A. 30, 32, it was shown that during the period covered by the creation of the preferential claims under consideration the net earnings were insufficient to justify the payment of interest on the mortgage debts and to make certain improvements which had been made. In determining whether a case had thereby been made for compelling a restoration by the mortgagees, this court said:

"But it is also shown that during the same period money was borrowed on open account more than sufficient to equal the diversion complained of, which went into a common treasury, from which operating expenses, preferential claims, interest, and improvements were paid, without any definite showing as to whether the borrowed money was applied to the payment of interest and improvements or to current income debts. Under this system of book-keeping, the addition of borrowed money to the income arising from operation showed a substantial surplus after payment of the great mass of income debts, and all disbursements on account of interest upon the two mortgages foreclosed, as well as upon improvements in the roadway. Prior to the period covered by the maturity of appellant's claims, there was a surplus of gross earnings over all operating expenses; but it cannot be contended that the company was under any obligation to future creditors to accumulate a surplus to meet possible deficiencies in the income to meet future income debts, or that it was improper to apply such surplus in payment of interest. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658-675, 8 Sup. Ct. 1011, 31 L. Ed. 832. Whatever diversion there may have been of income to payment of debts or liabilities not properly debts of the income, seems to have been more than reimbursed by the money borrowed. The burden is upon complainants to show that there has been a misappropriation of earnings to the improvement of the mortgaged property, or to the payment of interest, before the mortgagees can be justly called upon to reimburse the fund applicable to debts of the income in consequence of such diversion. If interest was paid or improvements made out of borrowed money, then there was no diversion; or, if made out of gross earnings, and the latter was reimbursed by borrowed money, the diversion was made good. The abstracts showing income from all sources and disbursements upon all accounts are somewhat complicated, in consequence of the mode of bookkeeping adopted. The commissioner and court below concurred in reporting that there was no diversion shown. In the absence of the very cogent evidence of mistake of fact, or of some error of law, the finding of fact by the commissioner must be accepted as final. *Emil Kiewert Co. v. Juneau*, 78 Fed. 708, 24 C. C. A. 294; *Kimberly v. Arms*, 129 U. S. 512-524, 9 Sup. Ct. 355, 32 L. Ed. 764; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Turley v. Turley*, 85 Tenn. 256, 1 S. W. 891."

In reversing this case upon the former appeal we affirmed what has been said in the case cited, and in directing a reference we said:

"It is said, in support of the report, that money was received from the sale of bonds, and from sources other than current earnings, which more than made good any income applied to contract obligations. If that is true, the appellant cannot complain." 109 Fed. 220, 227, 48 C. C. A. 318.

But it is contended that no such reimbursement of "gross earnings" has been shown in this case as was shown in the case cited above. To make the distinction, the appellant excepted to the item of \$127,781.35, money borrowed as a reimbursement of the gross earnings fund, be-

cause only \$430.17 of the money so borrowed was in fact paid into the "common treasury," the remainder being paid out upon certain specific debts of the company without reaching the treasury. He also excepted to the item of \$98,712.54, realized from the sale of mileage on account of other railroads, and not accounted for to them, upon the ground that this was not money derived from a source other than current earnings, and should have been so treated.

First, as to the money borrowed during the period under inquiry. The master reports that this was money borrowed from banks on the promissory notes of the company at different dates, and secured by first mortgage bonds of the company, deposited as collateral security. By a stipulation filed in this court it is agreed that these notes were never paid, and that the bonds constitute a part of the bonds secured by the mortgage herein foreclosed, and that these bonds will share equally with the other bonds secured by the mortgage, which appellants seek to displace. Thus this so-called borrowed money has been, in effect, contributed by the mortgagees against whom appellant asks equitable relief. This borrowed money is shown to have been checked out for the following purposes:

|   |              |
|---|--------------|
| To pay Car Trust notes.....   | \$22,629 83  |
| To the payment of current pay roll.....   | 70,370 17    |
| Upon general debts of the company, not beneficial to the bondholders, and not current operating expenses entitled to preferential payment ..... | 33,569 44    |
| To the treasury of the company.....   | 430 17       |
|   | <hr/>        |
|   | \$126,999 61 |

The item of \$22,629.83 was used in payment of Car Trust notes constituting part of the \$88,208.31 charged in the report as a diversion. It is very plain that the alleged diversion must be cut down to this extent, for to that extent it is demonstrated that there was no misapplication of the fund arising from current operating receipts, which is the only fund chargeable in equity with current expense debts. If we deduct this amount from the reported aggregate of apparent or possible diversions, we have \$76,585.66 as the sum which has been paid out to the mortgage creditors, or for their benefit. But it is further shown that of this money, raised at the direct expense of the mortgage creditors, \$70,370.17 was paid in reduction of existing current expense claims, viz., labor claims constituting current pay rolls. If the right of the creditors of the class to which Gregg belongs to displace prior fixed liens be a purely equitable right bottomed upon the theory that the mortgagee has received something which he cannot equitably retain, it would seem most inequitable that the payment of current labor claims by money borrowed through an enlargement of the mortgage debt should be disregarded in the adjustment of the equities of the two classes of creditors solely because the money so borrowed is shown to have been directly applied to their payment without first having been paid into what is figuratively called "the common treasury." But for this payment of the current pay rolls with money in effect contributed by the mortgage creditors, the unpaid debts of the income would now be \$70,000 greater than they are. That such payments did not directly profit Gregg, as his debt is still unpaid, is no answer.



We must deal with the creditors of the income and the creditors by mortgage, for the purpose of such a proceeding as this, as constituting two classes of creditors. It is only upon this plan that Gregg has any standing whatever, for his debt was created during the month immediately preceding the receivership, and was not payable until after the date of the appointment of the receiver. If his rights are to be dealt with separately and apart from other creditors of his class, he would have no standing, for there is no pretense of a diversion after his debt was made. We must also treat "gross earnings" for the period of six months preceding the receivership as a single fund, and all debts made for current operating expenses during that time as equally payable out of that fund before any part of it is justly applicable for other purposes. But, if we do this, we must also regard all contributions made to that fund, during the same period, from sources other than income from operation, as a reimbursement pro tanto on account of payments therefrom either for permanent improvements or mortgage interest. The remainder of the borrowed money was paid out upon general debts, debts which were not debts of the income nor of advantage to the mortgage creditor.

Now, it is conceded that if this borrowed money had been paid into what is called the "common treasury" of the company, and then paid out in usual course, that the gross earnings fund would thereby have been reimbursed, and the case brought precisely within the facts of *St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co.*, 125 U. S. 658, 675, 8 Sup. Ct. 1011, 31 L. Ed. 832, and *Central Trust Co. v. East Tenn., V. & G. R. Co.*, 80 Fed. 624, 26 C. C. A. 30, 32. But what is the "common treasury"? Money which is subject to the disposition of the financial agents of the company may be said to be money in the common treasury, although it may be in different banks and arise from many sources. There is no evidence of any special method of keeping the funds, and the proceeds of these discounted notes seem to have been passed to the general credit of the company in the bank making the discount, and then checked out to pay such obligations as the company saw fit to pay. The mere circumstance that the money is deposited to the credit of the company in one or several banks, if the deposits were alike subject to the checks of the company, is of no significance, for it is in the common treasury of the company in as full a sense as if but one account had been kept. There is no evidence that any part of this money was borrowed to pay the particular debts to which it was in fact appropriated, and the fair inference is that the fact that the proceeds of these discounted notes were paid out upon particular debts was only accidental. But it is said that the reimbursement of gross earnings improperly applied to improvements or mortgage interest by money arising from other sources only operates to relieve the bondholders from liability to restore because the mingling of money arising from current earnings with such other money makes it impossible to say whether in fact current earnings have been misapplied, for it may be that the mortgage interest paid or the permanent improvements made were in fact paid from the fund which arose from such other sources. This fact that general debts to the extent of about \$33,000 were paid out of borrowed money, and not out of the

"gross earnings fund," is a fact which does distinguish this case from the two cases in which that fund was held to be reimbursed by borrowed money, and is a fact of some significance in the administration of this equity in favor of preferential debts of the income; for it cannot be said that the gross earnings depleted in favor of the bondholders has thereby been made good. We shall therefore ignore this item of \$33,000 borrowed money as not a reimbursement of the current earnings fund, because it was never in fact paid into that fund, nor applied in easing that fund by the payment of claims which were an equitable charge thereon.

Excluding this part of the money borrowed, the account between the two classes of creditors stands thus:

|  |                    |
|--|--------------------|
| Diversion reported by the master.....              | \$99,215 49        |
| Reimbursements of that fund:                       |                    |
| Borrowed money applied to pay Car Trust notes..... | \$22,629 83        |
| Borrowed money applied to pay pay rolls.....       | 70,370 17          |
| Old collections not current income.....            | 2,148 47           |
| Borrowed money paid to company treasury.....       | 430 15             |
| <b>Total reimbursements .....</b>                  | <b>\$95,578 62</b> |
| <b>Balance of diversions .....</b>                 | <b>3,636 87</b>    |
|  | <b>\$99,215 49</b> |

There, however, remains as an additional reimbursement the sum of \$8,712.54, which was paid into the current income fund from the sale of mileage books sold on account of other railroads, and not accounted for to them. This item was excepted to upon the ground that it did not represent money derived from a source other than current earnings. The exception was overruled, and it is now assigned as error. The contention is that this was in fact current earnings, and should be treated and regarded as a fund primarily appropriated to the payment of current income debts. If this were conceded, the result would be to enlarge the current income fund to that extent. If that fund was \$8,712.54 larger than shown by its exclusion, it may be that the gross earnings thus swelled would be large enough to provide a fund sufficient to pay current operating expenses and leave a net income ample to make the improvements and pay the interest by which bondholders have profited. To ascertain how this would leave the matter would require a recasting of the master's report, for we have already referred to the fact that he has failed to report whether the gross earnings were insufficient to justify the payments which he has reported as diversions. But we are of opinion that this item of receipts was properly reported as an extraordinary item, not properly to be regarded as current income. Mileage books were sold in bulk, and at a discount, to brokers and others, aggregating \$128,000. These books represented mileage over the C. S. & H. R. Co. and other railroads for whom it acted in issuing such books. Of this, \$98,712.54 represented the price of mileage sold and collected on account of other railroads, and as such constituted a part of the traffic balance due to such roads. Concerning the transaction, the master, who had all the witnesses and books before him, reports as follows:

"This money was never treated as current earnings by the accountants of the company. It was carried in a suspense account. The mileage books were

sold at a discount (about \$16 per book; price about \$20). The transaction, apparently, amounted to the borrowing of that much money by the railroad company on the security of the mileage books, the money to be repaid in the future in the services of the C. S. & H. Railroad Company by the carrying of passengers, or in similar services of other railroad companies, who were to be reimbursed by the C. S. & H. Railroad Company for such services. Could a sale of bonds to raise money be distinguished, in principle, from such sale of mileage books, made in quantities to brokers, and at such discounts as to preclude any probability that the transaction was a mere selling of tickets in the usual course of business? It appears to have been resorted to as a means of raising money on the general credit of the railroad company after all ordinary means of doing so had been practically exhausted. The mileage books were promises to render services on presentation, and sold as they were, in the way they were, in bulk, and on the faith of the general credit of the railroad company, and it appears to this amount not accounted for, the proceeds seem distinguishable from earnings."

It is difficult to see why money derived from such a source should be regarded as ordinary current income, such as is primarily devoted to ordinary current operating expenses. By the transaction the company created a debt to each of the companies upon whose lines such mileage was sold. The company itself did not regard it as current earnings, and did not carry the income in that account. Merion, the auditor, testified that the money thus raised was "paid out for anything we had to pay; it went direct to the treasurer." Now, it is evident that, if these proceeds had been used to pay mortgage interest, the current operating expense creditors could not complain, and equally evident that, if the payments claimed to be diversions were paid out of the fund thus swelled, that fund was thus reimbursed to the full extent of this fund from a source other than current income.

We see no error in the decree, and it is accordingly affirmed.

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In re MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1903.)

No. 1,171.

1. APPEAL—PARTY ENTITLED TO APPEAL—INTERVENER.

One who was permitted to intervene in a railroad foreclosure suit to assert certain rights in respect to the proceeds of the property after its sale, in whose favor certain orders were entered, and against whom, 20 years later, a decree was entered for a sum of money as costs, had become by reason of such proceedings a party to the suit, and entitled to appeal from the decree against him if otherwise appealable.

2. SAME—APPEALABLE DECREE—FINALITY.

A decree against a party to a proceeding for costs to be paid to the clerk for services rendered, and awarding execution therefor, is final in such sense as to be appealable.

3. SAME—DECREE AWARDING FEES TO CLERK.

A decree of a Circuit Court against a litigant, allowing costs to the clerk as a matter of positive law, under a statutory provision, is not one made in the exercise of the court's discretion, as in the allowance of costs as between the parties, and is appealable.

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† 2. Finality of judgments and decrees for purpose of review, see notes to *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.

† 3. See *Appeal and Error*, vol. 2, Cent. Dig. § 823.

**4. SAME.**

Such a decree is also appealable, although not based upon the statute, but in the nature of a quantum meruit allowance for extraordinary services rendered under an order of court, for which no fee is provided; the discretion of the court in making such allowances being subject to review by appeal.

**Petition for Writ of Mandamus.**

This is an application for a mandamus to the Circuit Court of the United States for the Eastern District of Michigan, to compel the allowance of an appeal from its decree. The facts necessary to be stated are as follows:

In 1881 the Farmers' Loan & Trust Company, as trustee under a mortgage made to secure bonds issued by the Detroit & Bay City Railway Company, obtained a decree for the sale of the mortgaged railroad for the satisfaction of the bonds so secured. One Addison Mandell was appointed master to sell, and he did sell, the said railroad, and, by direction of the court, paid the proceeds, of sale to the complainant, the Farmers' Loan & Trust Company, to be paid by it in payment and satisfaction of the bonds. The road was purchased for the Michigan Central Railroad Company, though that fact does not seem to have appeared on the record of the foreclosure proceedings. Certain of the bonds so secured did not mature until 1902 and 1903, and were guaranteed, both as to principal and interest, by the Michigan Central Railroad Company. Holders of such bonds to the amount of \$424,000 refused to surrender their bonds to the said trust company for payment, preferring to hold onto the investment. In 1882 the said Michigan Central Railroad Company filed in the foreclosure case, the title of which was "The Farmers Loan & Trust Company et al., Trustees, v. The Detroit & Bay City Railway Company," an intervening petition setting forth the situation in respect of the bonds which the holders refused to surrender for payment, and praying that the Farmers' Loan & Trust Company might be ordered to pay to it the sum of \$424,000, so held by it for the ultimate redemption of the bonds maturing in 1902 and 1903, and offering to secure same. An order to show cause was made, and the trust company appeared and demurred. The demurrer was overruled, and an order made that the said trust company repay to the said master, Addison Mandell, the said sum of \$424,000, and take his receipt for same. Payment was accordingly made, and deposited to the credit of the court in the National Bank of Commerce in New York, a designated depository of the United States in New York City, which was directed to hold same subject to the further order of the court. The master accordingly took a certificate of deposit, and reported his action accordingly. Thereupon the Michigan Central Railroad Company filed a supplemental petition setting out the above facts, and praying that said money be paid over to it upon its giving security to repay same to the said master or into the registry of the court when so ordered. Thereupon an order was made directing the master to pay to said railroad the said sum upon the execution of a satisfactory bond in the sum of \$800,000, conditioned "to pay to the holders of said 424 Detroit & Bay City Railway Company bonds the interest thereon as it becomes due, and the principal thereof at its maturity, when and where by the terms thereof the same shall become due and payable, or to repay the said sum of \$424,000, or any part thereof which the said court may direct, into the registry of said court at any time the said court may order or direct, and shall also deliver to the said master in chancery, in pledge for collateral security to the said bond, the amount of \$424,000 in registered bonds executed by the said company of a series of bonds, \* \* \* and that the last-described bonds be registered in the name of the clerk of the Circuit Court of the United States for the Eastern District of Michigan, transferable only upon the order of the court, and that said \$800,000 bond and said last-described bonds be deposited in a safe of the Trust, Security & Safe Deposit Company of Detroit, Michigan, under the control of, and only to be opened upon the order of, this court, and that the use of said safe be furnished at the expense of said Michigan Central Railroad Company." In accordance with this order a bond conditioned as provided, and running to W. D. Harsha and his successor as clerk, etc., was made; and the collateral bonds were

also duly registered in the name of said clerk, and the original and collateral bonds then delivered to said Addison Mandell, and were deposited in said safe, as required by the order, and the key delivered to the said clerk. In 1892 the Michigan Central Railroad Company paid off 266 bonds which matured in that year, as it was required to do, and then filed its petition, showing such payment, and exhibiting the canceled bonds, and prayed that its own bonds, held as collateral, to the amount of \$266,000, be released and delivered to it, which, upon order of the court, was done.

Thereupon W. D. Harsha, the clerk of said court, mentioned above, filed his petition, entitled as of the original foreclosure case, reciting the above facts, and, among other things, stating (1) that he is the clerk of said court, and has been continuously since January 6, 1882; (2) that since December 11, 1882, the said \$800,000 bond and the said \$424,000 Michigan Central Railroad Company bonds collateral thereto were continuously in the care, custody, and control of petitioner as clerk; (3) that by order of the court he had opened the safe deposit box, and, after proper identification of the 266 bonds presented by the railroad company, he had "assigned and delivered to the said Michigan Central Railroad Company \$266,000 of the registered bonds deposited December 11, 1882," and had reported his action to the court.

The said petitioner then concluded as follows:

"That your petitioner claims compensation for the receiving, keeping, and paying out of the \$424,000 aforesaid paid back to the master, Addison Mandell, by the Farmers' Loan & Trust Company, and subsequently deposited in a designated United States depository subject to the order of the court, which was subsequently withdrawn from the court and paid to the Michigan Central Railroad Company as above set forth; that he claims compensation, also, for other special services as clerk in identifying, canceling, transferring, and assigning said bonds, and for clerk's fees, as follows:

|   |                  |
|---|------------------|
| One (1) per cent. on \$266,000.....   | \$2,660 00       |
| For special services in examining, identifying, checking, canceling, and assigning bonds..... | 50 00            |
| For other services as clerk above referred to, for filing papers and entering orders .....    | 85               |
|   | <hr/> \$2,710 85 |

"That your petitioner is chargeable as clerk with the above-mentioned fees, and is accountable for the same to the United States.

"Therefore, your petitioner prays that the Michigan Central Railroad Company be directed to show cause on Monday, November 3, 1902, why it should not forthwith pay to your petitioner the sum of \$2,710.85 for services as above set forth, together with costs of this proceeding."

The Michigan Central Railroad Company appeared and demurred to so much of the petition as related to the claim for \$2,660 for 1 per cent. commission upon \$266,000, the items of \$50 and 85 cents, respectively, being admitted. This demurrer was overruled, and an order in these words entered:

"The Farmers Loan & Trust Company, James H. Blake, and Charles Merriam v. The Detroit & Bay City Railway Co.

"In the Matter of the Petition of W. S. Harsha, Clerk, etc.

"Upon the petition of Walter S. Harsha, Clerk, for compensation from the Michigan Central Railroad Company. Walter S. Harsha, the clerk of this court, having heretofore filed his petition for compensation from the Michigan Central Railroad Company, and the said Michigan Central Railroad Company having filed its demurrer to said petition on the 24th inst., and the matter having been argued and submitted, after mature deliberation thereon said demurrer is by the court now here overruled; and it is ordered, adjudged, and decreed that the said petitioner do recover against the said Michigan Central Railroad Company for the services mentioned in said petition the full sum of two thousand seven hundred ten and  $\frac{85}{100}$  (\$2,710.85) dollars, as prayed, and that said petitioner have execution therefor."

A petition praying for an appeal was thereupon filed by the said railroad company. Upon this the following indorsement was made: "The foregoing petition on appeal is denied, and the claim therein made is disallowed, on the ground that no appeal lies from an order or decree allowing costs only. Henry H. Swan, District Judge Presiding." Thereupon this application for a mandamus to compel the allowance of the appeal so prayed and denied was made, and a rule made to show cause entered at a former day of this term. To this a full answer has been filed, setting out more fully the proceedings in the old foreclosure suit, and somewhat broadening the grounds upon which the appeal was denied.

George E. Tegart, for petitioner.

Walter S. Harsha, in pro. per.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The appeal in this case should have been allowed. It may be that the Michigan Central Railroad Company was not originally a party to the foreclosure suit of the Farmers' Loan & Trust Company against the Detroit & Bay City Railroad Company. That it subsequently became a party by intervention for the purpose of obtaining relief in respect of a part of the purchase price of the railroad sold under the decree in that cause is undeniable. Under that intervention the petitioner made the bond and gave the collateral security out of which has grown the clerk's claim for the compensation adjudged by the decree complained of. The proceeding thus grafted upon the old foreclosure suit constituted a properly related ancillary suit, the parties to which were the petitioner and the Farmers' Loan & Trust Company. In the course of the execution of the orders and decrees made in that intervention the clerk of the court claimed to have been entitled to certain costs and commissions, which he asserted by his own subintervention, and to which he made the petitioner a party. It is therefore not the case of an effort to appeal from a decree by a stranger whose application to intervene had been denied, as in *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49, but the case of one who had become a party for the purpose of the intervention, and who had been treated as such for more than 20 years. In respect of any matter within the scope of the intervention the petitioner had thereby become an actor, with liberty to present its contention and obtain an adjudication, and a consequent right to have whatever was done reviewed by this court if the matter was one in its nature appealable. *Ex parte Jordan*, 94 U. S. 248, 24 L. Ed. 123; *Hamlin v. Toledo, etc., R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; *Williams v. Morgan*, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559. Indeed, it is hard to realize how the decree for \$2,710.85 against the petitioner can be of any validity whatever unless it was a party to the proceeding in which the decree was pronounced. That the decree was final, we have no doubt. It finally settles the liability of the petitioner to pay to W. S. Harsha, as clerk, the sum of \$2,710.85, and directs execution to issue therefor. It was upon a matter distinct from the general subject of the litigation. *Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 224, 10 Sup. Ct. 736, 34 L. Ed. 97. Nothing remains to be done but to collect

and pay out the money. An affirmance here will end the matter forever. Such a decree is final, so far as to be appealable. *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656; *Potter v. Beal*, 50 Fed. 860, 2 C. C. A. 60. That in the future there may be another application for further commissions or compensation, when the petitioner shall apply for and obtain the release of its remaining securities, does not deprive the decree made of its final character. The petitioner is thereby directed to pay, not into court subject to further order, but to W. S. Harsha, as clerk, "for the services mentioned in said petition, the full sum of \$2,710.85, as prayed, and that said petitioner, W. S. Harsha, have execution therefor." When this decree is executed, it is a complete end of the whole claim for commissions or compensation, so far as same had accrued and was presented by the intervention of Harsha.

But it is said that the decree was for costs only, and, as such, is not independently appealable at all. This is the ground upon which the court below really denied the appeal, though other reasons have been since advanced. The clerk's claim, as presented by his petition, was plainly and distinctly planted upon section 828, Rev. St. U. S. [U. S. Comp. St. 1901, p. 635], which, among other fees, provides that a clerk may receive, "for receiving, keeping and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid." For special services growing out of his execution of the order requiring a delivery of 266 of the registered bonds of the company to the company, he claimed an allowance of \$50. This latter was admitted as a reasonable compensation. For the service claimed to have been rendered in "receiving, keeping and paying out" of \$266,000 of money arising from the original foreclosure sale, the clerk claimed a commission of 1 per cent., or \$2,660. To this claim as advanced by the petition the Michigan Central Railroad Company was required by a rule to show cause why the prayer of the petition should not be granted. The railroad company appeared and demurred to this claim of \$2,660. The demurrer was overruled. The railroad company, pleading no further, was thereupon decreed to pay, "for the services mentioned in the petition the full sum of \$2,710.85, as prayed, and that said petitioner have execution therefor." The petition and demurrer presented the question as to whether Harsha, as clerk, had ever had any such custody, control, or management of the proceeds arising from the foreclosure sale made by special master, Addison Mandell, as to entitle him to the commission allowed by section 828. It involved, also, the question of what constitutes a "receiving, keeping and paying out of money," within the meaning of sections 828, 995, Rev. St. [U. S. Comp. St. 1901, pp. 635, 711]. There has been some diversity of opinion as to whether, under section 828, a clerk was entitled to the commission of 1 per cent. unless he had had the responsibility growing out of the actual "receiving, keeping and paying out of money," while in other cases it has been held that whenever the money became subject to the order of the court the clerk's commissions attached, although he had neither actually received, kept, or paid out any part of it. *Upton v.*

Treblecock, 4 Dill. 232, Fed. Cas. No. 5,541; Thomas v. Railway Co. (C. C.) 37 Fed. 548; Easton v. Houston, etc., Ry. Co. (C. C.) 44 Fed. 718; Leech v. Kay (C. C.) 4 Fed. 72; Ex parte Prescott, 2 Gall. 146, Fed. Cas. No. 11,388; Insurance Co. v. Quinn (C. C.) 69 Fed. 462; Farmers' Loan & Trust Co. v. Dart, 91 Fed. 451, 33 C. C. A. 572; Johnson v. Southern B. & L. Ass'n (C. C.) 95 Fed. 922; United States v. Kurtz, 164 U. S. 49, 53, 17 Sup. Ct. 15, 41 L. Ed. 346. In equity and in admiralty the taxation of costs, as between the parties, is a matter of sound legal discretion, and for this reason it is said that generally an appeal will not lie alone from a decree taxing costs. *Canter v. Ins. Co.*, 3 Pet. 306, 317, 7 L. Ed. 688; *U. S. v. Brig Malik Adhel*, 2 How. 209, 237, 11 L. Ed. 239; *Elastic Fabric Co. v. Smith*, 100 U. S. 110, 25 L. Ed. 547; *Dubois v. Kirk*, 158 U. S. 58, 67, 15 Sup. Ct. 729, 39 L. Ed. 895; *Kittredge v. Race et al.*, 92 U. S. 116, 120, 23 L. Ed. 488; *Paper Bag Cases*, 105 U. S. 766, 772, 26 L. Ed. 959; *Gamewell Fire Alarm Tel. Co. v. Municipal Signal Co.*, 77 Fed. 490, 23 C. C. A. 250. But if the appeal be also upon the merits, the court, having the whole decree before it, may also consider the action of the court in this respect, upon a proper assignment of errors. *The Scotland*, 118 U. S. 507, 519, 6 Sup. Ct. 1174, 30 L. Ed. 153; *City Bank, etc., v. Hunter*, 152 U. S. 512, 515, 14 Sup. Ct. 675, 38 L. Ed. 534; *Citizens' Bank v. Cannon*, 164 U. S. 311, 323, 17 Sup. Ct. 89, 41 L. Ed. 451; *Campbell Printing Press Co. v. Duplex Printing Press Co.*, 101 Fed. 282, 41 C. C. A. 351; *The Kissinger Co. v. The Bradford Co.* (decided at present session) 123 Fed. 91. In *Wood v. Weimer*, 104 U. S. 786, 792, 26 L. Ed. 779, there is a dictum that no writ of error lies as to cost alone. But in that case it was said, "But there are other questions, and this may therefore properly be taken up." But in all the cases cited, except that of *Wood v. Weimer*, supra, the taxation was between the parties in either admiralty or equity causes, and the only question was as to the exercise of a sound discretion in the disposition of the costs as between the parties. The ground upon which the right of appeal was denied was because the question was not one of positive law, but of discretion. The case of *Bank of the United States v. Green*, 6 Pet. 25, 8 L. Ed. 307, did present a question of the construction of an Ohio statute in respect of the marshal's poundage tax. But that case arose upon a certificate of division under section 6 of the judiciary act of 1802 (2 Stat. 159, c. 31), which the court said did not involve any matter "arising at the trial of the cause, but was upon a mere matter arising upon the service of the execution by the marshal, and was a mere question for the Circuit Court upon a collateral contest between the marshal and the bank as to his right to fees. It was not, therefore, a case within the purview of the judiciary act of 1802." But the decree from which an appeal was denied, here under consideration, did not involve any question of taxation of costs as between parties. The clerk claimed that under the chapter settling fees he was entitled, as a matter of positive law, to a fixed commission. The demurrer challenged the interpretation of section 828 insisted upon, and denied that the clerk was entitled to any commissions as provided by that section. Upon this point the demurrer was overruled, and a decree pronounced allowing



the commissions claimed. It would be most extraordinary if such a question was not subject to review, for it would place the construction of the statute settling costs and fees entirely within the arbitrary control of each court to whom the question was presented.

The appellate jurisdiction of this court, under the sixth section of the act of 1891, is very broad, and we see nothing in any of the decided cases to justify us in holding that an appeal will not lie when the decree complained of involves the construction and application of a positive statute involving the allowance of any costs at all. If the provision of section 828 applied, the court had no discretion as to the compensation to be allowed. If it did not apply, when properly construed, to the facts of the case, it was error of law to hold that it did control, and to allow compensation according to its terms. That the decree was final and appealable, we entertain no doubt. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Williams v. Morgan*, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559; *The City of Augusta*, 80 Fed. 297, 25 C. C. A. 430; *Farmers' Loan & Trust Co. v. Dart*, 91 Fed. 451, 33 C. C. A. 572.

Finally it is sought to justify the denial of the appeal prayed upon the ground that the allowance made was not the commission provided by section 828 for receiving, keeping, and paying out money, but a mere equitable compensation for the extraordinary services rendered by the clerk, and for which no special allowance is provided by the statute. It is immaterial for the purposes of this application whether the decree made against the Michigan Central Railroad Company was based upon the claim as presented by the pleading to which it demurred, or was an allowance upon grounds outside of the case made by the petition, in the nature of a quantum meruit for extraordinary services rendered under an order of the court, and for which no fee is provided by the statute. The decree making the allowance, whether based upon the terms of section 828 or otherwise, was an appealable order.

The power of the chancellor to fix an allowance out of a fund in court for the services of a special master, receiver, counsel, trustee, etc., is not uncontrollable, as it would be if orders making such allowances were not subject to review. In such matters great latitude may be properly accorded to the judge administering a property, and acquainted with the services and qualifications of persons rendering special services under the court's direction. Nevertheless, if wrong principles be applied in settling such compensation, or an allowance grossly excessive be made, it would be competent for an appellate court to correct the wrong. The most extravagant allowances in such cases, and the grossest misapplication of correct legal principles, might go unchallenged unless the matter was subject to review by appeal. *Trustees v. Greenough*, 105 U. S. 527, 528, 26 L. Ed. 1157; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; *Mason v. Pewabic Mining Co.*, 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745.

That the allowance in this instance was to the clerk does not distinguish the appealable character of the order from one making a similar allowance to any other person acting under the court's order, such as a special commissioner, master, receiver, or trustee.

Nor is it essential to the right of appeal that the allowance shall be made from a fund in court. If there is no fund, and the court undertakes to provide one by pronouncing a decree against one of the parties to the proceeding, and directs execution to issue, every reason exists for allowing a review which could possibly exist when an allowance is made out of a fund in which the appealing party has only an interest.

The conclusion we reach is that the appeal prayed was wrongfully denied. It is accordingly ordered that a writ of mandamus issue, commanding the respondent to allow the appeal as of the day when it was denied.

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MEYERS et al. v. JOSEPHSON.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1903.)

No. 1,231.

1. BANKRUPTCY—LIFE INSURANCE POLICY—ABANDONMENT BY TRUSTEE.

Where the trustees of a bankrupt failed to have insurance policies on his life appraised, or to provide for the payment of premiums thereon, but abandoned the same to the bankrupt as valueless to the estate, which abandonment was subsequently approved by the court, they are not entitled to recover the proceeds of such policies, on the death of the bankrupt pending the proceedings, from the beneficiaries, the premiums having been kept up by them or by the bankrupt.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Georgia.

In Bankruptcy. On petition to superintend and revise, in matter of law, bankruptcy proceedings in the District Court for the Southern District of Georgia.

For opinion below, see 121 Fed. 142.

C. Henry Cohen and Geo. S. Jones, for petitioners.

Jno. P. Ross, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. We have given this petition careful and attentive consideration, and therefore now, at this time, considering that the insurance policies on the life of the bankrupt, Josephson, were onerous contracts which, in the interest of the bankruptcy estate, might well have been abandoned by the trustees; that the trustees, by failing to provide for the premiums falling due on the 24th of March, 1901, and otherwise by failing to have said policies appraised and sold with the assets of the estate, and in permitting the policies to be delivered to the bankrupt, substantially abandoned said onerous contracts, which abandonment in fact has since been approved by the bankruptcy court; and that the decree of the District Court is in all respects equitable and just—

It is now ordered and decreed that the petition for superintendence and revision herein filed be denied, and the decree of the District Court in favor of Mrs. Rosa Josephson be approved and affirmed.

## DOWAGIAC MFG. CO. v. MINNESOTA MOLINE PLOW CO.

(Circuit Court of Appeals, Eighth Circuit. June 1, 1903.)

## 1. INJUNCTION—JURISDICTION TO PUNISH FOR VIOLATION—FILING OF MANDATE FROM APPELLATE COURT.

Where a mandate from the Circuit Court of Appeals, directing the entry of a decree granting an injunction, has been filed in the Circuit Court, jurisdiction to punish for contempt for a subsequent violation of such injunction is in the Circuit Court, and not in the appellate court.

On Demurrer to Petition to Attach for Contempt.

See 118 Fed. 136, 55 C. C. A. 86.

Wm. G. Howard and Fred L. Chappel, for petitioner.

Ephraim Banning, for respondent.

Before SANBORN and VAN DEVANTER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge (orally). An examination of the affidavits discloses the fact that the contempt charged in this case occurred subsequent to the filing of the mandate of this court in the United States Circuit Court. The proposition to which Mr. Howard has addressed himself, to the effect that every party in a proceeding is bound to take notice of the order of the court, and obey it, is undoubtedly sound; and, if there had been a violation of the injunction which was practically ordered by this court during the time antecedent to the remission of the mandate, the court would proceed to punish for contempt, if it thought proper to do so. But when the mandate of this court was remitted to the Circuit Court, the decree of that court was, in effect, modified, as declared by the opinion of this court; or, if not modified simply by the filing of that mandate, it was in the power of that court, upon motion of the successful party, to so change its decree that it would read in accordance with the opinion then handed to it by this court. If that application has not been made, it may still be made; and if there has been a violation of that decree since the mandate was remitted, we are unanimously of the opinion that the jurisdiction to punish for that violation is not in this court, but in the Circuit Court. For this reason, the demurrer will be sustained, and the petition dismissed.

**DOWAGIAC MFG. CO. v. MINNESOTA MOLINE PLOW CO. et al.**

(Circuit Court, D. Minnesota, Fourth Division. August 4, 1903.)

**1. INJUNCTION—VIOLATION AND PUNISHMENT—MANDATE DIRECTING INJUNCTION.**

A defendant in a suit for infringement of a patent, who had given bond to respond in damages should complainant recover, cannot be charged with criminal liability for contempt of court for offering to sell the infringing article after a mandate has been issued from the appellate court directing a decree enjoining further sales, where such decree has not been entered, and it is not shown that defendant had actual notice that an injunction was directed. So far as civil rights or liability are concerned, a party is charged with knowledge of all orders and proceedings in a cause; but he cannot be charged criminally on a presumption, and in such case defendant might reasonably suppose that the obligation of his bond continued until final decree was entered.

**2. SAME—DAMAGES FOR VIOLATION—PROCEEDINGS FOR CONTEMPT.**

Damages sustained by one party by reason of acts of the other, claimed to have been in violation of an injunction, cannot be recovered by proceedings for contempt.

**3. SAME—ACTS CONSTITUTING VIOLATION.**

The issuance of circulars by a defendant advertising for sale articles which have been adjudged infringements of complainant's patent, and against the sale of which an injunction had been ordered, does not in itself constitute a breach of the injunction.

In Equity. On petition to have defendants attached and punished for contempt of court.

See 124 Fed. 735.

Fred L. Chappell, for complainant.

Ephraim Banning, for defendants.

LOCHREN, District Judge (orally). In the decree that was entered on the 4th of January, 1902, this court held that the first structure was an infringement of the patent of the complainant issued to Hoyt. It held also that the patent was valid, and ordered an injunction and an accounting of profits and damages. With relation to the second structure it was held that there was not an infringement, and in respect to that the bill was dismissed. Both parties appealed, as I remember it. A bond had been given at an earlier stage of the case as an alternative where a temporary injunction had been asked for to secure the complainant in the recovery in the profits and damages which it should ultimately show itself entitled to. I suppose the effect of this appeal was as a supersedeas with respect to the decree, and that the bond is still operative. I think that the injunction was superseded by the appeal, the injunction ordered by the decree, and that the bond still continues in case defendant should manufacture and sell the structure which it was enjoined from doing by the terms of the decree.

The result of the appeals was a decision on the 1st of September, 1902 (118 Fed. 136, 55 C. C. A. 86), affirming the decree, except in respect to the second structure, which was held by the Court of Appeals also to be an infringement of complainant's device, and the decree was directed to be modified in that respect. The mandate

¶ 2. See Injunction, vol. 27, Cent. Dig. § 524.

was sent down later and filed, but no decree in conformity with that mandate has been entered until to-day. The effect of that modification is to require a decree which shall enjoin the defendant from manufacturing the second structure as well as the first. The complainant was entitled to have entered that decree immediately, and to have an injunction issued and served upon the defendant restraining it from manufacturing and selling that second structure. The rule is undoubtedly that, where an injunction has been ordered (and that was the effect of the decision of the Circuit Court of Appeals), a party knowing that order, who should deliberately violate the injunction that had been ordered, although not yet issued, would be guilty of contempt of court; otherwise an order of court might be violated before there would be opportunity to make the formal decree or order and have the proper papers served on the party intended to be enjoined. But, in order to convict a person of contempt under circumstances of that kind, it must be shown clearly that he had knowledge of the order for the injunction in such a way that it can be held that he understood it, and with that knowledge committed a willful violation of the order. In this case the only evidence as to knowledge on part of the parties who are here complained of rests in the correspondence between Mr. Barber and Mr. Chappell as to the result of the hearing at St. Louis, and the circular which was afterward sent out from the office of the complainant. It seems to me that the correspondence referred to cannot be held to certainly have the effect of notifying Mr. Barber that the defendant was enjoined from the sale of that second structure. Nothing was stated in that correspondence referring to the injunction at all. All that was stated was that the Court of Appeals had held that the second structure was an infringement of the Hoyt patent; and, without being notified of the effect of that decision, or as to any order for an injunction, it does not seem to me entirely clear that the defendant may not have supposed that its liability on the bond was still continuing until the decree was finally entered, and that until that time it would have to respond upon that bond. I do not think it is sufficiently clear to warrant punishment for criminal contempt that this party intentionally and knowingly set at naught the order of the Court of Appeals, which it may not have understood as having the effect of ordering an injunction. That should appear clearly in order to warrant punishment. It is true in a civil case parties to a suit are held to the obligation of taking notice of all orders and judgments in the case, and their civil liabilities will rest upon their duty of taking such notice; but I do not think they can be convicted criminally upon any presumption of that kind. It must be shown, in order to convict them, that they had actual knowledge, and that there was an intentional violation of the order for an injunction. I think they have failed to make such showing in this case; and it seems to me that the complainant has not proceeded with the promptness that it might have proceeded with after the decision in having a formal decree entered, and the injunction served, if need be, if it was desired to absolutely stop the defendant from proceeding further.

The complainant does not seem to insist upon punishment to any extent upon this application, but claims that the court ought to compensate the complainant for losses and expense that it has been put to by reason of the conduct of the defendant. As far as compensation goes, I think that must be sought in the accounting which will follow this decree, and that the complainant is entitled to nothing more. I do not understand that the office of a proceeding for contempt ordinarily, or in a case of this kind, is to compensate the party complaining for any injury that he has sustained by reason of acts of the defendant which constitute the contempt. If he has a legal right to recover on account of these acts, it must be in some other procedure. I do not think the object of contempt proceedings is to obtain damages from one party for the use of the other. Parties cannot recover damages they have sustained in this summary manner ordinarily. They must be recovered in an ordinary proceeding. If there are any precedents for recoveries of this kind, I am not familiar with them, and none have been cited which convince me that such is the proper proceeding.

Now, the main claim as to injuries results from the circulars which it is alleged the defendant distributed since this decision of the Circuit Court of Appeals. The circulation of these circulars offering to make sales of these structures would be evidence that they were engaged in the business and were making sales, and this, with other evidence, might be proof of the fact of sales being made; but I do not discover anything in the injunction which would make the circulation of circulars a substantive breach of the injunction. It would be evidence of other acts which would be substantive breaches—that is, the fact of the making sales; but circulars alone, if there were no sales made or attempted, would not, I think, be a breach of the injunction. I think this proceeding must be dismissed.

Ordered accordingly.

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In re NEIMANN et al.

(District Court, E. D. Wisconsin. September 8, 1903.)

**1. BANKRUPTCY—EXEMPTIONS—MEMBERSHIP IN EXCHANGE.**

Rev. St. Wis. 1898, § 2982, subd. 19, exempts to debtors certain life insurance policies, and all moneys or other benefit, charity, relief, or aid to be paid by any mutual, beneficiary, or fraternal corporation or association "providing insurance on the assessment plan, and authorized to do business in this state." The Milwaukee Chamber of Commerce is a corporation organized for the usual purposes of trade and commerce, a membership therein having a substantial market value. By the charter and rules it is provided that its surplus funds, arising from dues and assessments, shall constitute a gratuity fund, to be invested, the net income at the close of each year, together with the proceeds of any assessment made for the purpose, to be divided among the widows and heirs of members who have died during the year. *Held*, that such provision does not render the corporation an assessment insurance company, within the meaning of the exemption statute, so as to entitle a bankrupt to hold exempt his certificate of membership therein, but that the same is property of his estate, which vests in his trustee.

**In Bankruptcy.** On question certified by the referee, namely, whether a certificate of membership in the Milwaukee Chamber of Commerce, held by the bankrupt, Fred Klein, is entitled to exemption under section 2982, subd. 19, Rev. St. Wis. 1898.

John F. Harper, for bankrupt.

Markham, Hamilton & Markham, for trustee.

SEAMAN, District Judge. Membership in the Chamber of Commerce confers a valuable property right, so that it is conceded, and is unquestionable, under *Page v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, that its benefits pass to a trustee in bankruptcy, unless exempt by the state statute. The provision referred to exempts certain policies of life insurance, and "all moneys or other benefit, charity, relief, or aid to be paid" by any "mutual, beneficiary, or fraternal corporation" or association "providing insurance on the assessment plan, and authorized to do business in this state," to the amount of \$5,000, "when the insured pays the premiums or assessments, or any part thereof." The Milwaukee Chamber of Commerce is incorporated for the usual purposes of such associations in trade and commerce, but provides in its charter and rules for converting its surplus funds, arising from dues and assessments after all expenses are paid, into a "gratuity fund," to be invested and raise an income. This net income, "together with the proceeds of any assessment made for the purpose," is to be divided at the close of each year among widows or heirs of members who have died during the year. It is contended that these provisions for a "gratuity fund," out of which dividends are payable to widows and heirs of members, bring the case within the exemption statute above cited; otherwise stated, that they constitute, in effect, "insurance on the assessment plan," so that the property right of the member is not subject to claim on behalf of creditors.

For solution of this question no aid is furnished by any authority brought to my attention. It does not appear to have arisen in any reported case in the state, and no ruling fairly in point appears elsewhere. In the recent case of *Page v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, cited in the referee's opinion, like provision for membership benefit in a gratuity fund existed under the rules of the Philadelphia Chamber of Commerce, but exemption of such membership held by the bankrupt was denied. The opinion refers to no statutory provision, however, which resembles the Wisconsin statute, nor does it appear that the exemption was claimed as in the nature of insurance; so that the Wisconsin statute, invoked for the present claim, must be construed independently.

With the property right in membership thus settled, I find no difficulty in construing the exemption provision as inapplicable to the features of the Chamber of Commerce membership. The prime objects thereof are the privileges of trade which the member thus obtains, and the gratuity fund provision is a mere arrangement for equitable distribution of the surplus means, arising from dues and assessments, to the representatives of deceased members, thereafter having no benefits of the association, in lieu of dividing the surplus among all members.

It merely saves for the family a small share in the surplus when the interest of the member ends with his death. If this incidental provision is insurance in any sense of that term, it is not within the well recognized meaning of "insurance on the assessment plan," mentioned in the statute (subdivision 19, § 2982), for which certain associations are expressly "authorized to do business in this state." The surplus principal is retained by the Chamber of Commerce as the property of the surviving members, and subject to distribution among them when dissolution occurs, or association business ceases. The net income only passes to the representatives of deceased members, together with any special assessments which may be voluntarily raised for that object, while the members in being have no share or interest in sums so derived. If the value of membership is enhanced by this feature, it is plainly of minor consideration in the actual value and benefits of such membership, and I am of opinion that no construction of the statutory exemption is authorized to include therein this property right of the bankrupt, and that it is neither within the letter nor within the spirit of the statute.

Concurring with the opinion of the referee that the bankrupt is not entitled to such exemption, his order, accordingly, is affirmed.

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#### THE NORTHTOWN.

(District Court, E. D. New York. July 16, 1903.)

##### 1. DEFECTIVE SHIP—PERSONAL INJURY—NEGLIGENCE.

Libelant was injured by the fall of a boom of the steamer from the breaking of the iron goose-neck, by which the boom was fastened to the mast. The ship was but a year old, and the iron was large, heavy, galvanized, and painted, and would have supported a weight of 150 tons had not the material been defective. There was at the time no additional weight on the boom, and the iron had been inspected the day before, and thereafter used for lifting without any accident. The broken faces of the iron gave no appearance of previous break or crack, but showed internal fault in the iron, not discoverable by exterior examination. *Held*, that the ship was not chargeable with negligence.

George C. Bodine, for libelant.  
Convers & Kirlin, for claimant.

THOMAS, District Judge. The libelant was injured seriously by the fall of a boom on the steamship. The lower end of the boom was fastened to the mast by an iron goose-neck, whose forked end was attached to the boom, while its other end, terminating in an eye, was fitted into the jaws of a spindle, through which an iron pin was passed. The boom had been used shortly before the fall for lifting some comparatively light drafts of cargo, whereupon, in order to reeve a new fall, the boom was lowered to the deck. After the fall had been rove, the boom was raised to an angle of about 45 degrees, when the eye of the goose-neck broke, permitting the boom to fall to the deck, on which it slid in such a way as to produce the injury to the libelant, who was acting as winchman. The accident happened



on February 12, 1902. The vessel was new in April, 1901. The goose-neck was of sufficient size, made of the proper kind of iron, and, if there were no defect in the material, should have supported a weight of 250,000 pounds. No substantial strain came upon the goose-neck at the points of breakage. In originally providing the goose-neck, the shipowner performed the whole duty required by law, and the sole question is whether suitable and proper care was observed in maintaining it, and in the inspection necessary therefor. Although there is some evidence that there were indications of rust on the broken faces of the eye, the evidence preponderatingly shows that such faces were bright, but that the iron at the places of breakage had latent defects, which were incapable of detection by means of ordinary and usual methods of inspection. Mr. McLane, who was an expert in such matters, and had at one time been in the employ of the persons who built the ship, stated that the chemical makeup of the iron often affects its brittleness in cold weather, and that if the iron contained too much phosphorus it might break under the influence of moderate cold, and that the only way in which it could be discovered was by chemical examination. The weather report shows that the mean temperature on the date of the accident, February 12th, was 24 degrees; on February 11th, 20 degrees; on the 10th, 24 degrees; and on the 9th, 29 degrees, above zero. The day before the accident, Mr. White, the first mate of the Northtown, shifted the boom from another mast to the mast where the accident happened, and at that time made an examination of it in its new position. The boom was used for lifting some heavy pieces of pitch pine. This examination was with the eye alone, and his evidence is that no exterior defect was at the time visible. There was no inspection on the day of the accident, and, as substantially no strain was brought upon the eye at the places of breakage, the examination of the previous day should be regarded as practically sufficient, although it is probable that no exterior inspection would have discovered the defect. The burden of proof is upon the libellant. If the fall of the boom raises a presumption of negligence, yet a large and heavy galvanized and painted goose-neck, part of the original construction of a fine ship, new in the previous year, was inspected the day before the accident; it was thereafter used for drafts without accident; its eye broke on both sides, without any additional weight upon the boom, and the broken faces gave no appearance of previous break or crack, but did show internal fault in the iron, not discoverable by exterior examination. It is considered that however lamentable the accident, the master performed the duty required by law. The libel will be dismissed.

## THE OTTAWA.

ANGLO-AMERICAN OIL CO., Limited, v. LUCKENBACH et al.

(District Court, E. D. New York. July 15, 1903.)

## 1. COLLISION—TOW AND MEETING STEAMSHIP.

A collision between a steamship passing out through the channel to sea from New York and the tow of a tug coming in *held* to have been due in part to the fault of the tug in failing to keep the tow farther away and in part to the defective steering gear of the tow, which was allowed to sag across the course of the steamship, the latter being well to the side of the channel, and not in fault.

In Admiralty. Cross-libels for collision.

Peter S. Carter, for Luckenbach and others.

Wing, Putnam & Burlingham, for Anglo-American Oil Co. and for steamship Ottawa.

THOMAS, District Judge. On a clear morning in November, with a light northerly wind and a strong ebb tide, the outbound steamship Ottawa, 309 feet in length, collided, almost head-on, with a loaded coal barge, the Smith, in tow of the tug Luckenbach, inbound. The Luckenbach was 150 feet in length, her hawser to the Smith was 100 fathoms, while the hawser from the stern of the Smith to the loaded barge Thomas was 175 fathoms in length. The Smith and Thomas were each 206 feet in length. Thus the total length of the tow was 2,212 feet. The collision happened near the turn from the Main Channel into Gedney's Channel, just after the Ottawa had passed Black Buoy No. 7, and after exchanging one whistle with the tug. Concededly the steamship passed the tug at a sufficient interval, and would have passed the Smith had she not sagged on to the course of the steamship. The evidence shows that the rudder of the Smith was in such a condition as to impair its efficiency, and, as the captain of the Thomas states that at the time of the collision his barge was the distance of her length, 206 feet off Black Buoy No. 7—the southerly line of the channel—it is probable that the Smith was farther to the southward at all times than is claimed for her. It would be possible to ascribe the fault to the condition of the Smith's rudder, and undoubtedly its defects contributed to the accident, but it is thought that the tug did not keep her tow sufficiently to starboard, and that upon reaching Black Buoy No. 7 she starboarded too quickly for the purpose of entering the Main Channel, thereby aiding the Smith in her progress towards the course of the Ottawa. In any case the evidence preponderatingly shows that the Ottawa was far on to the right-hand side of the channel, and that the barge was allowed to get in her way.

Pursuant to this finding, the libel against the Ottawa must be dismissed, and a decree entered for the libellant, Anglo-American Oil Company, Limited, against Lewis Luckenbach and another.

## THE JOHN F. GAYNOR.

(District Court, E. D. Pennsylvania. August 24, 1903.)

No. 64.

## 1. COLLISION—DAMAGES RECOVERABLE—COST OF SURVEY.

The entire expense of a survey, made necessary in part by damage due to stress of weather, and in part by the damage caused by a collision, should not be charged to the vessel adjudged in fault for the collision.

In Admiralty. On exceptions to commissioner's report.  
See (D. C.) 115 Fed. 382.

Henry R. Edmunds and Parker F. Kirlin, for libelant  
Le Roy S. Gove, for respondent.

J. B. McPHERSON, District Judge. The claimant's exceptions to the commissioner's report have all been carefully considered, but I do not think they need be discussed in detail. For the most part, they turn upon questions of fact that the commissioner has found adversely to the claimant, and upon nearly all of these questions I see no reason to disturb his findings. But in two respects I think the report should be somewhat modified. The survey made by Lloyd's surveyors was in part occasioned by damage due to stress of weather, and only in part by the damage due to the collision. The cost of the survey should therefore be apportioned, awarding \$10 to the first-named account, and \$20 to the account of the collision damage. So, also, with regard to the agency charge of Peter Wright & Son. Part of the service rendered by them seems to me not to be properly chargeable to the collision,—certainly, so much of it as has to do with attendance upon this litigation should not be charged for in this form,—and I have therefore concluded to reduce this item to the sum of \$200.

Objection is also made to the commissioner's fee, and it is agreed that I shall dispose of this objection now as if it were raised upon appeal from taxation of the libelant's bill of costs. I do not think the objection should be sustained. In my opinion, the quantity and quality of the work done by the learned commissioner deserves the compensation for which he asks. The decree recommended by him may be entered, with the modification directed in the foregoing opinion.

## THE JOHN H. STARIN.

(District Court, E. D. New York. July 30, 1903.)

## 1. COLLISION—OVERTAKING STEAM VESSELS—EVIDENCE CONSIDERED.

Conflicting evidence considered, and *held* not to sustain the claim of libelants that in a collision between their tug and a steamer the latter was the overtaking vessel, and in fault, but to preponderate in favor of the claim of the steamer that she was overtaken and run into by the tug.

In Admiralty. Suit for collision

John F. Foley, for libelant.

James J. Macklin, for claimant.

THOMAS, District Judge. The tug John Fleming, light, left Palmer's Coal Dock, on the Brooklyn side of the East river, for the purpose of going to Jackson street, which is somewhat below Grand street, on the New York side. It was about 5 o'clock a. m., February 14, 1902. The weather was clear, the day was just breaking, and the lights on the vessel were displayed properly. When a little to the westward of the center of the river, and about opposite Grand street, New York, the starboard side of the Fleming came in collision with the port side of the inbound steamer Starin, which was plying between New Haven and New York. The contention of the Fleming is that the steamer was overtaking her, and that the persons in the pilot house of the tugboat were attracted by two whistles of the steamer, given to a tow coming up the river close into the New York side; that immediately following such signals, the steamer, which was angling to port, struck, with the bluff of her bow, the tug, about 5 feet ahead of her stern bits, which were about 25 feet forward of the stern, and raked along her side to a point near the forward bits, which were some 30 feet aft of the tug's stem. The contention of the Fleming is that the steamer was going to port to escape a carfloat passing up the river on her starboard hand, and, miscalculating the distance, or not seeing the tug, collided with her, and that the captain of the steamer immediately acknowledged that it was his fault, which the latter denies. It will be noticed that the captain of the Fleming, as well as those on the Starin, place the float well on to the New York shore. If so, there was no occasion for the Starin to go far to port, although her signals might indicate the propriety of so doing, if there was not sufficient room for passing the float. The tug's destination was on the New York shore, nearly opposite the vicinity of the collision, and she was probably heading at a suitable angle for the desired landing. The evidence of the steamer tends to show that she had ported, for the purpose of straightening her course after rounding Corlaer's Hook, and that at the time of the collision the wheel was somewhat to port. The parties in the pilot house of the Starin are not as definitely in accord respecting the position of the wheel at and shortly before the collision as is desirable. The substantial evidence for the tug was given by Quillin, formerly her pilot, but not at the time of the trial in the libelant's employ. He was a fair appearing witness. Smith, the deckhand, gave similar

evidence. Jones, the engineer, did not see the accident, but went out, and saw the vessels in collision. Green repaired the Fleming. He testified that the break was from a point a little aft of the afterside bitt to a point five or six feet forward of the forward bitt; that the seat of the injury was between the engine room and the fireroom door. Kelly, the captain of the Fleming, was not aboard, and had not been since 5 o'clock on the previous evening. However, Kelly made the report to the local inspectors, and stated that he had a conversation with the captain of the Starin after the accident, while the pilot in charge now states that he had the conversation. The evidence on the part of the Starin is to the general effect that she was proceeding under one bell, with the captain, pilot, and quartermaster in the pilot house, and a lookout ahead; that she signaled the float, which was some 200 yards below, when the pilot, looking about, saw the Fleming overtaking them, and said, "What is that fellow going to do?" that the captain and the quartermaster then looked behind, and saw the Fleming; and that she was always overtaking the steamer, and that at no time was she forward of the steamer. McAllister, captain of the Starin, the pilot, and quartermaster, and the lookout of the Starin supported her contention. While they do not agree in all details, their evidence is in general accord as to the position of the vessels. On the whole, they were very well-appearing witnesses, and gave their evidence with much clearness and fair recollection of details. The captain of the Starin was an unusually acceptable witness. The Starin's evidence clearly outweighs that offered by the libelant, and whatever inferences may be urged on account of the locality of the contact and the nature of the injury, the burden of proof is on the libelant, and he has not sustained it.

The libel should be dismissed.

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#### THE COLUMBIA.

(District Court, E. D. New York. July 13, 1903.)

**1. INJURY TO EMPLOYÉ—DEFECTIVE HAWSER ON TUG—INSPECTION.**

A tug is liable for injury to an employé thereon from the breaking of its hawser by the swell of a passing steamer bringing an additional strain on the line, it being over a year old, and in a bad condition, as would have been disclosed by a careful inspection, but not being frayed or worn on the outside so as to disclose its condition on the casual inspection given it by the master.

Ralph Underhill, for libelant.

Frank V. Johnson, for claimant.

THOMAS, District Judge. The libelant was a deckhand on the Columbia, and was standing near the hawser which ran from her stern to the barge Rover, in tow, which was carrying about 300 tons of copper, but was not fully loaded. Karlson was standing by for the

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 237.

tug to enter Erie Basin, and do whatever was necessary in the handling of the hawser, which was in the neighborhood of 35 fathoms, including the bridle, one of whose parts was composed of the main line, and the other of a somewhat smaller line spliced to such main line. The bridle was sufficient in size. While the Rover was going at usual towing speed, the spliced piece of the bridle broke, about one foot from the point of union to the main line, and either whipped against the libelant, or he was thrown against it, in such manner as to break both bones of his right leg, and to inflict other injuries of a less serious character. The evidence shows that, upon a general inspection, the line looked fairly well on the outside, but was in bad condition on the inside. It had been in use for a year, and had been used two or three times a week. After the accident the spliced part of the bridle was replaced and the piece taken out and sold for junk. There is evidence of inspection of a general nature. The captain of the tug stated that he was accustomed to look at it, but did not describe with what care or attention he examined it. His evidence is as follows:

"Q. How long had you known this hawser? A. About one year. Q. How long had it been in use in doing this kind of work? A. I had been using it close on to a year. Q. Was it a new one then? A. Yes, sir. Q. Did you ever examine it and look it over? A. I had occasion to look it over once in awhile. Q. About how frequently? A. Maybe once a day sometimes—sometimes maybe only once a week. Q. Depending on how often you used it? A. Yes, sir. Q. How often did you use it on the average? A. About twice a week. Q. What was the condition of the rope before the accident? A. It appeared to me to be all right all the time that I used it. Q. Did you see it after it broke? A. Yes, sir. Q. Was there any defect in the rope that you saw? A. No, sir."

It seems from his statement that the master did not discover the bad condition of the broken bridle after the accident. Its condition was so defective that a master of proper capacity should have recognized it. It is inferable from his testimony and his manner of giving it that it was a mere general examination. It was not the careful inspection required of the master. Such detailed examination as was required was not the duty of the libelant, who had been on the vessel but 12 days. The alleged cause for the breaking at the time is that a Sandy Hook boat had passed astern of the tow, and that when the swell from such vessel finally reached the Rover it rolled her in such a way as to bring an additional strain upon the towing line and break it. The evidence shows that the Sandy Hook boat passed astern of the tow in the main channel, the Rover at the time being to the eastward of such channel, at a distance variously estimated from 60 feet by the fireman to 1,500 feet by the captain, and when the swell reached the Rover the Sandy Hook boat was half a mile away. The tow must have traveled some distance before the swell reached it. The tow had just crossed the bay, and was accustomed to towing in such waters, and, of course, to receive the swell of passing vessels. She had a hawser something over a year old, that was in bad condition in fact, although it was not frayed or worn on the outside so as to show bad condition in that respect, upon casual inspection, and there is no evidence of any sort of careful examination.

The libelant was detained from his work about 17 weeks, and makes

the usual complaint of pains at the present time. He had no medical bills. His wages were \$30 per month and board, and when he watched nights he got \$1 extra. A very moderate compensation is \$750, for which the libelant will have a decree.

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REGINA MUSIC BOX CO. v. F. G. OTTO & SON et al.

(Circuit Court, D. New Jersey. July 29, 1903.)

1. EQUITY—PRACTICE IN FEDERAL COURTS—STATUTORY PROCEEDINGS IN AID OF EXECUTION.

A federal court sitting in equity will not enforce a state statute providing for supplementary proceedings in aid of execution, which are designed to provide a statutory remedy at law as a substitute for a creditors' bill, but will leave the creditor to enforce his rights by the recognized equitable procedure.

In Equity. On motion for appointment of receiver.

See (C. C.) 106 Fed. 78; (C. C.) 114 Fed. 505.

Antonio Knauth, for the motion.

Carl G. A. Schuman, opposed.

KIRKPATRICK, District Judge. The complainants in this cause obtained a decree in this court requiring the defendants therein to account for their profits in manufacturing and selling a device which the court had adjudged to be an infringement of patents owned by the complainants. The amount of such profits had been ascertained, and a further decree made requiring the defendants to pay the same. On an execution issued therefor, the marshal of the district has returned nulla bona. Such a return having been made to the writ, the complainant obtained an ex parte order to examine the defendants respecting their property and choses in action, and now, upon the evidence adduced on such examination, ask for the appointment of a receiver of the defendant corporation. These proceedings, known as "supplementary proceedings," are authorized by the statutes of several of the states, and are adapted to aid the enforcement of executions on judgments at law, and as a substitute for a creditors' bill in equity. They provide a legal statutory remedy for an equitable one. In *Byrd v. Badger*, Fed. Cas. No. 2,266, the court said:

"The examination of a judgment debtor being a substitute for a creditors' bill, and having for its assertion equitable rights, the action of the state Legislature cannot so far affect the equity jurisdiction of this court as to convert it into a common-law jurisdiction, by enabling a party to pursue in it an equitable right contrary to the established practice and proceedings of chancery."

That is to say, a federal court sitting in equity would not enforce an equitable right except in the manner prescribed by its own practice; that it would not assume a common-law jurisdiction and enforce in equity the state statutes respecting supplementary proceedings.

In the case of *Frazer v. Colorado Dressing & I. Co.* (C. C.) 5 Fed. 163, the court went much further, and held that the state statutes authorizing supplementary proceedings were of no force and effect in federal courts, and cited the case of *Byrd v. Badger*, supra, as authority therefor. In 1872 Congress passed an act providing that "a party recovering a judgment in a common law cause in any Circuit or District Court shall be entitled to similar remedies \* \* \* by execution or otherwise to reach the property of the judgment debtor as are now provided in like causes by the laws of the state in which said court is held." Act July 1, 1872, c. 255, § 6, 17 Stat. 196. This statute limited the right to the use of supplementary proceedings to those who had recovered judgment in a common-law cause, and in 1881, in *Re Boyd*, 105 U. S. 647, 26 L. Ed. 1200, the Supreme Court said that "a party in whose favor judgment is rendered in a common-law cause is entitled to the remedy known as supplementary proceedings."

It would seem, then, that the federal courts sitting in equity have refused to enforce the statutes of the states respecting supplementary proceedings, as being an exercise of common-law jurisdiction, and have left the creditor to his equitable remedy of a creditors' bill, and that the act of Congress above referred to limits the right to such remedy to judgments recovered in actions at common law.

I am of the opinion that the order for the examination of the defendants was improvidently granted, and that the motion for a receiver should be denied.

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#### CRISP v. UNITED STATES & AUSTRALASIA S. S. CO.

(District Court, S. D. New York. June 24, 1903.)

1. SHIPPING—LIABILITY FOR FAULT OF COMPULSORY PILOT.

The fault of a compulsory pilot is not imputable to the shipowner, nor to a charterer where the pilot is his agent.

2. SAME—SELECTION OF WHARF BY CHARTERER—UNSAFE APPROACH.

Under a charter providing that the wharf for discharging shall be selected by the charterer, where the ship can always safely lie afloat at any time of tide, the charterer is liable for the vessel's loss of time and expense due to an unsafe approach to a discharging wharf selected by him.

In Admiralty. Action for charter hire.

Convers & Kirlin, for libellant.

Wing, Putnam & Burlingham, for respondent.

ADAMS, District Judge. This is an action which was brought by the libellant, as master of the S. S. *Salfordia*, to recover a balance of \$2826.40 charter hire, alleged to be due to the owners of the steamer from the respondent, under a charter party, dated July 6th, 1900.

The charter party provided for a term of about six months. The steamer entered upon its performance at New York, on the 17th of



August, 1900, and, having been loaded for Melbourne and Brisbane, was ordered by the charterer to proceed to Sydney, N. S. W., via Melbourne, where she arrived on the 6th of November, 1900, and reported to the respondent's agents.

While the steamer was lying off Sydney Head, awaiting orders, a pilot came on board, bringing an order from the agents for the vessel to proceed to a wharf, known as Federal Wharf, about 10 miles distant, and somewhat beyond a draw-bridge, known as Pyrmont Bridge, through which it was necessary for the steamer to pass to reach the wharf. The steamer's beam was 51 feet, but the master, in response to an inquiry, advised the pilot that it was 52 feet. There was apparently enough room in the opening of the bridge, on the surface of the water, for the steamer to pass, with three or four feet margin, but when she got in the opening, she stuck upon some obstructions under the water, causing some delay and expense to the charterer, for which it deducted the amount in controversy from the steamer's hire, and which it seeks in this action, to maintain as a defence to the hire which remains unpaid.

From the nature of the pilot's employment, it was his duty to know whether the steamer could go through the opening. The public had been notified by the Department of Public Works of Sydney, through the New South Wales Government Gazette, published by authority of the Government, that the opening was only available "for vessels at forty-four feet beam and under." Nevertheless the pilot had negligently remained ignorant of the true capacity of the opening and attempted to take the steamer through at a stage of the tide when it was impossible, and the damages resulted.

A compulsory pilotage law was in force in New South Wales at the time (2 St. New South Wales, p. 1568) so that the employment of this pilot was obligatory.

It is a matter of dispute between the parties as to whose agent the pilot was, the libellant contending that the respondent should be liable for his negligence. At common law, no action can be maintained against the owner of a vessel for the fault of a compulsory pilot—*Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155—and it does not appear how an action in personam in admiralty differs in principle, there being no question of a fault of the ship or of a lien upon her. Even, therefore, if the pilot was the respondent's agent, his negligence is not imputable to it and the responsibility for the loss is to be determined by the agreement of the parties, as expressed in the charter party.

It was there provided that the steamer was "to be employed \* \* \* in any lawful safe trade," and:

"7. That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide.

"16. That in the event of loss of time from \* \* \* breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service \* \* \*.

"17. \* \* \* The act of God, enemies, fire, restraint of Princes, rulers

and people, and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation throughout this charter party always mutually excepted."

In this aspect of the case, the libelant relies upon the section first quoted, and some others which I do not deem it necessary to consider, and the respondent upon the last two quoted sections.

I conclude that the libel should be sustained. The loss of time and expense were primarily due to an unsafe approach to a wharf selected by the respondent. A covenant for a safe loading or discharging place implies that a port to be named by the charterer shall be one where the vessel can safely get with her whole cargo and can discharge her whole cargo without touching the ground—Carver's Carriage by Sea, § 449—and, of course, without being subject to obstructions, at any stage of the tide, in a bridge opening it may be necessary to use to reach the discharging wharf—Mencke v. Cargo of Java Sugar, 187 U. S. 248, 23 Sup. Ct. 86—Although the accident might have been avoided by a better knowledge and more care on the part of the pilot, it was proximately ascribable to the failure of the respondent to comply with its covenant that the discharge should take place at a wharf where the steamer could always lie afloat at any time of the tide and its accompanying duty with respect to the approaches. This does not necessarily mean that a vessel, under these circumstances, should be precluded from using a wharf, where it could always lie afloat but which it could only safely approach at a certain stage of the tide, but I consider that a fair construction of this contract requires that the risk of approaching the wharf at any stage of the tide should be the respondent's, notwithstanding the steamer is under the charge of a pilot, compulsorily employed, and he fails in his duty to be familiar with the approach.

The terms of sections 16 and 17 do not afford any relief to the charterer from the payment of the charter money, under the circumstances of the case.

Decree for the libelant for the sum of \$2826.40, with interest.

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#### THE NEW YORK CENTRAL NO. 22.

THE JOHN FLEMING et al.

(District Court, S. D. New York. June 18, 1903.)

1. COLLISION—TOWING ON LONG HAWSER IN NEW YORK BAY—CARE REQUIRED OF TUG.

The method of towing on long hawsers in the crowded waters of New York Bay can only be justified, if at all, by the exercise of the utmost exactness on the part of the tug in performing her duty to keep the tows in line so that passing vessels can navigate safely with regard to them, and by the exercise of the utmost vigilance to see that the tow's lights are at all times exhibited as required by pilot rule 11.

2. SAME—TOWS—FAILURE TO EXHIBIT LIGHTS.

A tug having two scows in tow on a long hawser held in fault for a collision between one of the scows and a barge in tow alongside another

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¶ 2. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

tug, occurring in New York Bay, in the night, because she permitted the scows to drift across the channel without the lights required by the pilot rules. The scow also *held* in fault for the failure to exhibit the proper lights.

8. SAME.

A tug having a barge alongside *held* not in fault for a collision between the barge and a scow in tow of another tug because of her failure to have a lookout forward, where her master was acting as a lookout from the pilot house, and it did not appear that the scow, which carried no lights, could have been seen by a lookout in time to have avoided the collision which occurred through the culpable negligence of the scow and her tug.

In Admiralty. Suit for collision.

Carpenter, Park & Symmers, for libellants.

Butler, Notman, Joline & Mynderse, for the N. Y. Central No. 22.  
John F. Foley, for the John Fleming and Nos. 24 and 10.

ADAMS, District Judge. This action was brought by the owner and the master of the barge E. Brisbon against the tug N. Y. Central No. 22 to recover damages caused to them by collision, happening about midnight, on the 14th of December, 1900, between the barge, which was in tow alongside of No. 22, and an unknown vessel, which afterwards turned out to be Scow No. 24, in tow on a hawser of the tug John Fleming. The claimant of No. 22, brought in the Fleming and No. 24, also No. 10, which formed a part of the Fleming's tow, by petition.

The No. 22 with the Brisbon on the starboard side and two canal boats and a barge on the port side, started from 65th Street North River, and was proceeding down the upper New York Bay, bound for the Kill van Kull. All proper lights on the tug and tow were displayed. The Fleming with No. 24, on a hawser about 200 fathoms long, and No. 10, astern of No. 24, on two hawsers, running from the stern corners of No. 24 to the forward corners of No. 10, about 50 fathoms long each, was returning to New York, from sea, where the scows had been dumped.

The Fleming, besides the usual navigation lights, exhibited three staff lights, meaning that she had a tow on a hawser more than 600 feet astern. Article 3, Inland Rules (Act June 7, 1897, 30 Stat. 97, c. 4 [U. S. Comp. St. 1901, p. 2877]). The scows did not exhibit the lights required by Pilot Rule 11, there being nothing more than one white light visible, which was aft on No. 10.

The Fleming proceeded to the vicinity of Robbins Reef Light and when she reached a point on the edge of the flats, on the westerly side of the channel, about a third of the way from Robbins Reef Light to Liberty Light, she stopped to take in the hawsers and get the scows alongside in order that she might dock them. This took her some time and the scows drifted up the Bay, and across the channel, with the flood tide which prevailed.

The pilot of No. 22 saw the green light and the towing lights of the Fleming when about a mile distant and he then supposed that she was on a course up the Bay with a tow astern, although he did not see any lights astern indicating a tow there. The Fleming was

so far on his starboard that he did not consider any further attention to her was required, and he proceeded on his course and had passed the Fleming, several hundred feet away, when a dark object suddenly loomed up a little on his port bow, which he recognized as a dumping scow and endeavored to avoid by reversing and starboarding his helm but without success, and his starboard barge was brought in sharp contact with No. 24, so injuring the barge, that she sank to her deck. He had seen from the beginning, a white light on his port hand, which he supposed was an anchored vessel, but which turned out to be on No. 10, which was drifting up the channel, further to the eastward than No. 24.

There can be no question that the Fleming was grossly in fault for permitting her barges to drift such a distance away and to block the channel without the lights on them, required by law, to indicate their positions. This method of towing on long hawsers in the crowded waters of New York Bay can only be justified, if at all, by the exercise of the utmost exactness on the part of the tug in performing her duty to keep her boats in line, so that passing vessels can navigate safely with regard to them, and by the exercise of the utmost vigilance to see that the tow's lights are at all times exhibited, as the rule requires. No. 24 was also in fault for the failure to exhibit lights.

In view of the culpable negligence of the Fleming, I am not disposed to hold No. 22 in fault for her failure to have a lookout stationed forward. Her master was performing the duties of one from the pilot house and was not otherwise engaged, the wheel being handled by one of the deck hands. It appears that the master was reasonably vigilant and it is doubtful if a lookout stationed elsewhere could have discovered No. 24 in time for No. 22 to have avoided her. Nor do I consider that No. 22 should be held because of the Fleming's exhibition of towing lights. They did not call upon No. 22 to avoid a tow, without lights, in a place it should not have been.

The libel is dismissed as to No. 22, without costs. The petition is sustained as to the Fleming and No. 24, with costs, and dismissed as to No. 10, without costs. An order of reference to ascertain the damages will be entered.

In re CHASE et al.

In re B. H. GLADDING CO.

(Circuit Court of Appeals, First Circuit. June 18, 1903.)

No. 470.

**1. ASSIGNMENTS—PRECEDING BANKRUPTCY—CLAIMS OF ASSIGNEES—PAYMENT—EQUITABLE LIEN.**

Where an insolvent made an assignment for the benefit of his creditors, and prior to the filing of a bankruptcy petition the assignee collected dues, continued insurance on the property, arranged for guarding the same, collected outstanding goods, conducted much correspondence, took an exhaustive inventory, and incurred a liability for rent, such assignee acquired a lien on the assets for his necessary disbursements, and the reasonable value of such services as benefited the bankrupt's estate, unaffected by Bankr. Act, § 64b (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), prescribing the debts of a bankrupt entitled to priority on distribution of his estate, subject to the limitations of *Randolph v. Scruggs*, 23 Sup. Ct. 710, 190 U. S. 533, 47 L. Ed. —.

**2. SAME—SURRENDER OF ASSETS—WAIVER OF LIEN.**

That such assignees paid to the trustee in bankruptcy the gross amount received by them, and surrendered all other assets in their hands, did not deprive them of the right to apply to the court for the payment of the amount of such lien.

**3. BANKRUPTCY—EQUITIES OF TRUSTEE.**

The rule applied that trustees in bankruptcy have no equities greater than those of the bankrupt, and sometimes will be ordered to do full justice, even in some cases where the circumstances give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant.

**4. SAME—ASSIGNMENTS.**

An assignment for the benefit of creditors, fairly made and intended to facilitate the equal distribution of the insolvent's property among his creditors, without any attempt to defraud or embarrass persons to whom he was indebted, is not so contrary to the policy of the bankrupt act as to preclude the assignee from recovering for disbursements and services made for the benefit of the estate prior to the filing of the bankrupt's petition.

Petition for Revision of Proceedings of the District Court of the United States for the District of Rhode Island, in Bankruptcy.

See 120 Fed. 709.

Seeber Edwards (James C. Collins, Jr., and Edwards & Angell, on the brief), for petitioners.

Herbert A. Rice (Walter B. Vincent and James Harris, on the brief), for respondent trustee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a petition under section 24b of the act establishing a uniform system of bankruptcy, approved July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], asking for a revision of the decree of the District Court for the Dis-

¶ 4. Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors, see note to *Carling v. Seymour Lumber Co.*, 51 C. C. A. 11.

trict of Rhode Island in the matter of B. H. Gladding Company, bankrupt. The bankrupt is a corporation domiciled in Rhode Island, and on the 10th day of September, 1902, it made a general common-law assignment to the petitioners for the benefit of its creditors, directing an equal distribution among them. No criticism is made of the terms of the assignment, nor any suggestion that it was not framed in all respects for the advantage of all the creditors. The assignor was carrying on a retail dry goods store in Providence, and it had a lease of the premises occupied by it therefor. The petitioners entered into possession of the stock, and held the same until the assignor was subsequently adjudged bankrupt. Meanwhile they continued the business on the leasehold premises. They thus became subject to a claim on the part of the owner of the fee of the leased premises for a certain proportion of the accruing rent thereof. The question of liability for rent is not in form to be completely disposed of by us, and it will remain to be adjusted by the District Court, subject to the rules which we announce herein. The case further shows the following:

"While in possession of the store the assignee collected certain bills due to the company, amounting to \$9,190. They continued the insurance upon the property, arranged for the watching and guarding of the stock in the store, and of the books and papers of the company, got in certain goods of the company which were outstanding, disposed of certain claims against the company, finished up and delivered certain goods made to order, cared for the horses and wagons of the company, conducted much correspondence, and took an exhaustive inventory of the property of said company."

The petitioners turned over to the trustee in bankruptcy all the assets, and submitted to the District Court their claims for compensation for their disbursements and for an allowance for their services, and for protection against the demand made by the owner of the leased premises. The referee rejected all, and the District Court, without any opinion and in a formal manner, entered a decree affirming his decision. The question involved seems to have been under discussion since the enactment of the bankruptcy act of March 2, 1867, 15 Stat. 227, c. 258. Bump's Bankruptcy (10th Ed.) 848.

It cannot be questioned on this record that the disbursements and services of the assignees were desirable for the preservation of the assets, and for maintaining them so as to yield the largest net return, and so, at least in part, inured to the benefit of the creditors in the bankruptcy. Of course, compensation could not be based on a percentage of the assets, or on any consideration except that of a moderately reasonable allowance for the attention given the property, according to the portion of time which the assignees used therefor, all to be adjusted in such way as not to throw on the estate a double burden of any serious consequence. It can hardly be necessary to argue that such reimbursement and compensation would be in accordance with general equity.

The trustee, however, seems to understand that the case is governed by section 64b of the statute (Bankr. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), which is as follows:

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual

and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

Some of the propositions of the petitioners give color to this understanding of the trustee, but it is without any proper basis. The provision of statute quoted has no relation to this subject-matter. It applies only to sums over which the court in bankruptcy has jurisdiction as such court. In the present case, the claims of petitioners constituted a lien on the assets in their hands adverse to the trustee, and the portion of the statute cited appertains to nothing of that nature. If there had been any doubt on the point, it was removed by *Louisville Trust Company v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. The claims of the petitioners depend altogether on general principles of law, by virtue of which they might have retained assets in their hands until their lien was satisfied.

The fact that, under the circumstances, the petitioners paid the trustee the gross amount received by them, and delivered them the other assets, does not, as is clearly settled, deprive them of the right to apply to the court for payment of the sums for which they once had a lien. It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. *Williams' Law of Bankruptcy* (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery. *Hutchinson v. Le Roy*, 113 Fed. 202, 205, 51 C. C. A. 159; *Hutchinson v. Otis*, 115 Fed. 937, 940, 53 C. C. A. 419; *Batchelder & Lincoln Company v. Whittemore* (C. C. A.; decided April 23, 1903) 122 Fed. 355. Indeed, so sweeping is this rule that in *Hutchinson v. Otis*, 115 Fed., at page 940, 53 C. C. A. 422, we said that parties having an interest might not be held by a court of bankruptcy even to a mistake merely of law. Its breadth is also shown in *Lowell on Bankruptcy*, § 310, where it is said that it has been established ever since 1742, beginning with *Scott v. Surman*, Willes, 400, and that it is so sweeping that, in actions at law brought by assignees in bankruptcy, defendants may prevail on merely equitable defenses. How it happened that jurisdiction in bankruptcy became of an equitable nature is explained historically in an interesting way in *Robson's Bankruptcy* (2d Ed.) at page 2.

But there seems to be an impression that the statutes in bankruptcy have denounced assignments at common law for the benefit of creditors to such an extent as to mark them as so far against the policy of the law that all parties thereto are *particeps criminis*, and that none can establish thereunder any rights *pro* or *con*. There are several answers thereto. First of all, even if assignments were strictly void as such, the assignees, until the intervention of proceedings in bankruptcy, would stand as the agents of the assignors, coupled with possession; and so, having acted innocently in their behalf, they would become entitled as such agents to receive their disbursements and a reasonable compensation, and to hold a lien therefor on the property in their hands. This was well stated by Mr. Justice Brown, then a district judge, in *Hunker v. Bing* (D. C.) 9 Fed. 277, 281, where, under a previous statute in bankruptcy, he said that the respondent in that case, who was an assignee under a common-law assignment, might be regarded as a "factor or agent" of the assignor; so that he might be held "as having done what he did under an implied request to that effect, and to have acquired thereby an equitable lien upon the property in his possession for his necessary services and disbursements therein, which should be respected in bankruptcy so far as they have been necessary and beneficial to the general creditors, or such as the assignee in bankruptcy would otherwise have incurred." Mr. Justice Gray, in *Bryan v. Bernheimer*, 181 U. S. 188, 192, 193, 21 Sup. Ct. 557, 45 L. Ed. 814, noticed the same fact when he said that an assignee under a general assignment is not one for value, but simply "an agent" for the distribution of the proceeds of the debtor's property among his creditors.

Indeed, this proposition of agency is well illustrated by the fact that, ordinarily, common-law assignments contain a clause expressly making the assignee the agent of the assignor; but this clause, of course, is not necessary, because, if the assignment becomes ineffectual as an assignment and as creating a technical trust, the agency is implied by law. On the other hand, it is not to be inferred that the assignor and the assignee are at liberty to create the terms of this agency at their own option. From the time the assignor declares his insolvency by making an assignment, his property must be held equitably for the benefit of his creditors, and he can do nothing which will embarrass or prejudice them in realizing therefrom, whether the result is that they are administered under the common-law assignment or ultimately go into the hands of a trustee in bankruptcy. Therefore, in no event can he impress on them a lien for any amount of compensation arbitrarily agreed on. Anything in this direction beyond what would be reasonable and equitable would be contrary to the policy of the law, and would be declared invalid by the court having jurisdiction of the trust if the assignment is worked out at common law, or by the court in bankruptcy if the property finally comes under its control.

These principles fully justify a reasonable claim on the part of the petitioners. No authority cited to the contrary, either under the present statutes of bankruptcy or any previous act, is of sufficient weight or force of reasoning to preponderate against this conclusion.



Therefore, even if it could be sustained that the statutes denounce these assignments as contrary to their policy, the especial proposition correctly announced by Mr. Justice Brown would require that the decree under consideration should be reversed.

In illustration of this conclusion, it is to be noted that, even in cases of conveyances which are fraudulent at common law either by implication or intent, no such decisive rule exists as that claimed by the trustee. It is obvious that even one who receives a conveyance fraudulently may render such services with reference to the property involved as to enhance its value as it finally comes into the possession of creditors. It is also evident that under such circumstances there would be no equity in permitting the creditors to receive such enhanced value without compensation therefor. Of course, no allowances could be made when the property is recovered from the fraudulent purchaser by a suit at common law; but it is otherwise when the creditors find it necessary, for the purpose of impeaching the fraudulent conveyance, to apply to the chancery courts for their assistance. This is stated in *Clements v. Nicholson*, 6 Wall. 299, 312, 18 L. Ed. 786, as follows:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to, while it scans the transaction with the severest scrutiny, looks at all the facts, and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows the security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors by means of the fraud."

This was cited with approval in *Davis v. Schwartz*, 155 U. S. 631, 639, 15 Sup. Ct. 237, 39 L. Ed. 289, and its rules are accepted by leading authorities. Wait on *Fraudulent Conveyances* (3d Ed.) 346. What was said by Mr. Justice Curtis in *Hastings v. Spenser*, 1 Curt. 504, Fed. Cas. No. 6,201, must, of course, be qualified by the later decision in *Clements v. Nicholson*. If equity applies such rules with reference to conveyances which are denounced by the common law as properly fraudulent, how much more liberally will it apply them to transactions like that at bar.

But neither the present statutes of bankruptcy nor any prior act do, or did, unqualifiedly denounce an assignment like that at bar, intended for the equal distribution of the property of a failing debtor among creditors, without any attempt to defraud or embarrass per-

sons to whom he is under liability. In this respect, assignments at common law stand precisely as do proceedings for the appointment of receivers by federal courts or state courts, which, under the act to amend the Act of July 1, 1898, approved February 5, 1903, become a sufficient basis for an involuntary petition. In section 2 of that act (32 Stat. 797, c. 487), the making a general assignment and an application for a receiver, under the circumstances named therein, are classed together; so that there is nothing in the terms of the present statutes of bankruptcy to justify a claim that an assignment for the benefit of creditors, like that at bar, is any more in fraud of the statutes, or denounced by them, than the action of a state tribunal, which may be one of the highest authority, in proceeding on an honest application for a receiver. It can be no more reprehensible to make an assignment in favor of creditors, free from any attempt to embarrass them and from any dishonest purpose, than to apply to a federal court or state court for the appointment of a receiver; and the bankruptcy statutes do not seek to punish one more than the other.

It was suggested at bar that the present statutes in bankruptcy put some mark of reprobation on assignments for the benefit of creditors beyond any prior like legislation; but no specification of any reasons for this assertion was given us, nor any authority cited in support thereof. There is nothing peculiar in the language of the existing statutes in support of such a proposition. Therefore the decisions of the Supreme Court under prior legislation have full effect, especially as that court then held that a general assignment for the benefit of creditors was an act of bankruptcy. *West Company v. Lea*, 174 U. S. 590, 595, 19 Sup. Ct. 836, 43 L. Ed. 1098. That there was nothing unlawful in such an assignment, but that it was merely voidable by proceedings in bankruptcy, and meritorious unless avoided, has been clearly affirmed by the Supreme Court under the prior statutes. *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377, contains nothing of much importance on this topic, as it relates simply to an assignment made earlier than the period with reference to which it could be avoided by the bankruptcy. The opinion, however, observes, at page 501, that the assignment in that case was not a proceeding in hostility to the creditors, but for their benefit. In *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171, a creditor who had levied an execution on assigned property sought to obtain a priority over the bankrupt's estate in whose behalf the assignment had been avoided. The opinion, at page 509, observes that the assignment was made in good faith, for the purpose of securing an equitable distribution, and without any intent to hinder, delay, or defraud creditors. At page 512 it refers to the fact that there had been no controversy between the assignee in bankruptcy and the assignee under the common-law assignment, which, it says, was "due, doubtless, to the fact that the administration of the debtor's effects in the bankruptcy court would accomplish the same end designed by the assignment; namely, the distribution of the property for the equal benefit of all the creditors." This is enforced again at page 513, where the opinion observes that, even if the assignment was an act of bankruptcy—and we have already observed it was subsequently determined that it was—yet it was not

invalid except with reference to proceedings under the statute. It further observes, in effect, that the object of a general assignment conforms to the policy of the statutes of bankruptcy; because it says that, if it should be held that the litigating creditor in that case could have accomplished his purpose, the result, in his obtaining priority over the other creditors, would have been that the bankruptcy proceedings were the instrument of defeating the very purpose which the bankruptcy statute intended to serve, namely, the same distribution among the creditors which the assignment sought to accomplish. *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760, goes even further in its statements. There was a dissent, but it did not touch any question we are considering. It arose out of the fact that the assignment was made with expressed reference to a state statute which had been rendered inoperative by the bankruptcy legislation of Congress. At page 385 the court suggested what was afterwards held, as we have already said, in *West Company v. Lea*, *supra*, that a general assignment for the benefit of creditors was an act of bankruptcy. On page 386 the opinion adds that, in the absence of proceedings in bankruptcy, and so long as the debtor did not object, "the assignees had authority to sell the property and distribute the proceeds among all the creditors." The opinion then considers the effect of the local statute. On page 387 it repeated the observation made in *Reed v. McIntyre*, that, except as against proceedings in bankruptcy, the assignment was valid for the purpose of securing an equal distribution of the estate among all the creditors in proportion to their several demands.

Nothing in these expressions of the Supreme Court declares that general assignments, honestly made, are contrary to the policy of the bankruptcy statutes; and, on the other hand, they are declared to be in harmony therewith. The trustee, however, relies on *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, and *In re Sievers* (D. C.) 91 Fed. 366, affirmed in *Davis v. Bohle*, 92 Fed. 325, 34 C. C. A. 372. The question before us, however, was not considered in any of those cases; and, indeed, the only authority brought to the attention of the court which we are called on to accept is *Louisville Trust Company v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. The case immediately preceding, *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, to a certain extent broadened the application of *Bryan v. Bernheimer*; but *Louisville Trust Company v. Comingor* gave a new limitation with reference to proceedings involving questions of the claims of assignees like those at bar, which left the decisions relied on by the trustee inapplicable. It is true the court did not pass directly on the present issue. It held, however, that an assignee under a general assignment for the benefit of creditors who makes a claim for services and disbursements, notwithstanding the assignment has been set aside by subsequent proceedings in bankruptcy, has so far an adverse right that he may be entitled to an adjudication thereon by a court of general jurisdiction, so that *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, applies. This excludes the cases now relied on by the trustee. The implication from *Louisville Trust Company v. Comingor*, however, is very forcible, because, if the law is absolute, as

claimed by the trustee and as held in the decree appealed from, that such assignees as those at bar can maintain no claim for services and disbursements, the case decided in *Louisville Trust Company v. Comingor* would apparently have been anticipated by *Bryan v. Bernheimer*, as supplemented by *Mueller v. Nugent*. If the assignee in *Louisville Trust Company v. Comingor* had in law no shadow of claim, *Bryan v. Bernheimer* would have sufficiently disposed of him.

On the whole, it is plain that, under the special circumstances of many cases of this character, there may arise a strong equity in favor of such allowances as are now claimed, and that there is no provision of statute, and no declaration of any court of authority, holding that, as a matter of law, they should never be granted. On the other hand, so far as there are any indications which we are bound to regard, they are to the contrary. Therefore, in the present case, the District Court should ascertain and determine whether, under all the circumstances, the petitioners are equitably entitled to their disbursements, or any part thereof, reasonable allowances for their services, and protection against outstanding claims for rent. None of these matters should be disposed of on any arbitrary rule of law that neither class of allowances can be made, but they should be determined according to what is reasonable and equitable in view of all the conditions.

Since this was prepared, the Supreme Court passed down its opinion in *Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. —, which assures us that the conclusion reached herein is correct. Nevertheless, *Randolph v. Scruggs* does not cover all the details involved at bar. Moreover, the directions and accompanying explanations herein contained seem necessary for the guidance of the District Court. We note, however, that *Randolph v. Scruggs*, at page 539, 190 U. S., page 712, 23 Sup. Ct., 47 L. Ed. —, is careful to hold that an equitable and reasonable allowance for the services of assignors like the petitioners is for only such as have "benefited the estate." Therefore that limitation, and all the phraseology of the opinion in *Randolph v. Scruggs*, must be understood as adopted by us. *Summers v. Abbott*, 122 Fed. 36, decided by the Circuit Court of Appeals for the Eighth Circuit, sustains our conclusions, although it omits the limitation imposed by the Supreme Court.

Let there be a decree in accordance with our opinion passed down this day, with costs for the petitioners.

## LOWRIE v. H. A. MELDRUM CO.

(Circuit Court, W. D. New York. August 5, 1903.)

No. 181.

## 1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

An arrangement of parts in combination so as to produce a new and useful result shows invention, although such parts separately were well known and in common use, where such combination, for the purpose intended, was not obvious to persons of ordinary mechanical skill.

## 2. SAME—CONSTRUCTION OF CLAIMS.

The effect of the words "substantially as described" in a claim of a patent is not to limit the claim to the precise construction shown in the specification, nor to deprive the patentee of the benefit of the doctrine of equivalents, where his invention is of a primary character.

## 3. SAME—INFRINGEMENT—GARMENT FASTENER.

The Steel patent, No. 652,407, for a garment fastener for attachment to a corset, and designed to hold down the skirt band and belt so as to give the waist an elongated appearance in front, was not anticipated, but the device performs a new function and shows invention. Claims 1 and 3 construed, and *held* infringed.

In Equity. Suit for infringement of letters patent No. 652,407, for a garment fastener, granted to Anna M. K. Steel June 26, 1900. On final hearing.

Brundage & Dudley (Frederick F. Church, of counsel), for complainant.

D. Frank Lloyd (Charles H. Brown, E. Hayward Fairbanks, and Harry Cobb Kennedy, of counsel), for defendant.

HAZEL, District Judge. The bill in this case charges infringement of patent No. 652,407, granted June 26, 1900, to Anna M. K. Steel, for a new and useful improvement in garment fasteners. The complainant is the owner of the patent, having acquired such ownership by an assignment which shows good title, and no substantial reason appears for rejecting the assignment because of faulty execution. The object and scope of the invention is to provide means for fastening women's wearing apparel. The device is specially designed to be secured to the front of the clothing, and to the corset, so as to prevent the skirt from raising or working upwards. The device, when in use, produces toward the front a sloping of the skirt band and belt, the effect of which will appear presently. It appears by the specification that the invention—

"Consists, essentially, of a garment fastener composed of a shank provided with means for its attachment to the fastening devices of the corset, and provided at its upper end with hooks located in position to engage with the upper edge of the skirt band, and with hooks located above the plane of the first hooks, and adapted to engage with the upper edge of the belt."

The involved claims are the first and third, which read as follows:

"(1) A garment fastener provided with means for its attachment to the fastening devices of a corset, and with two outwardly and downwardly extending hooks, each in a different plane, the one being adapted to engage with the upper edge of the skirt band, and the other with the upper edge of the belt, substantially as described."

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 28, 29.

"(3) A garment fastener comprising a shank having means for its attachment to a corset, and provided with a row of outwardly and downwardly extending hooks projecting from lateral extensions on said shank, and with a second row of outwardly and downwardly extending hooks in a different plane from that of the first row, substantially as and for the purpose specified."

The specification substantially states that a single hook for the skirt band and a single hook for the belt are sufficient to perform the functions of the device. The use of double hooks, however, is preferred. The answer denies complainant's title to the patent in suit, sets forth noninfringement, want of novelty, and anticipation.

The patented device consists of a shank or narrow metal plate provided longitudinally with a series of apertures or stud slots. When the garment fastener is secured or clamped to the ordinary corset stud, it fits closely to the corset, extending upwards from the band where the plate or shank is attached. The shank at the upper end has preferably two sets of hooks on different planes, one set above the other, each extending laterally from the shank. The hooks extend forwardly and downwardly so as to facilitate holding the top of the skirt underneath the lower set of hooks, and the belt underneath the upper set. Such an arrangement of the garment or skirt prevents ruffling, holds the same snugly in a predetermined position, prevents the skirt or waist from working up, and tends to impart to the person of the wearer an extended waist. It is clear that the functional object of the patent is secured by the arrangement of hooks in different planes extending forwardly and downwardly, thus permitting an engagement of the skirt and belt, resulting in a waist band of the skirt being held down in front, and giving to the belt, which is held in place by the upper hooks over the waist band, a curvature which lends symmetry to the body. This result may be attained either by the use of two hooks, one above the other, or by rows of hooks in different alignments, one above the other. The various elements which contribute to the combination described in the specification, when separated, are not new. The combination of elements, however, consisting, first, of means for fastening the garment fastener to the corset, and, second, lateral hooks, on different planes, extending outwardly and downwardly, so adapted as to engage the skirt by a lower hook or hooks, and to engage the belt by an upper hook or hooks, is a new achievement, and seems to produce a new and useful result, never attained before. Such an arrangement of parts, though well known separately and in common use, has, nevertheless, evidence of invention, and is therefore entitled to protection from an infringer. *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. In my opinion, none of the patents hereinafter referred to, and claimed to anticipate, produce a similar result, or perform the same functions.

The patent is attacked upon two principal grounds, to wit, its invalidity because of the prior art, and such limitations of claims 1 and 3 that defendant's device is not within its provisions. It is contended as to claim 1 that it must be limited to the use of two hooks extending outwardly and downwardly one above the other, and means for fastening the same to the corset studs; and claim 3, likewise, must

be restricted to a shank having upper and lower rows of hooks extending outwardly and downwardly on different planes, and projected laterally on said shank. An examination of the claims of the patent shows that claim 1 provides for means for attaching a garment fastener to two outwardly and downwardly extending hooks, each in a different plane. Claim 3 comprises a shank having means for securing same to the corset with two rows of outwardly and downwardly extending hooks on a different plane, and projecting laterally. The question of infringement or noninfringement must be decided by the restrictions which the prior art justifies placing upon the patent in suit. The antecedent patents chiefly relied upon are those of Towson, No. 189,154, dated April 3, 1877; design patent of Bunnell, No. 25,795, dated July 21, 1896; Morrow, No. 347,276, dated August 10, 1886; Sanders, No. 413,401, dated October 22, 1889; and Dunbar, No. 632,342, dated September 5, 1899. The Towson patent discloses a shank having apertures or slots suitable for fastening to the corset stud, and a hook at its upper end. The Morrow patent has a hook at the upper end of the plate, and a safety pin at the bottom. The Sanders patent is for a belt support. It consists of a shank (without apertures) having two hooks at its upper end, extending outwardly and downwardly on the same plane. The hooks are adapted to engage with the band or belt at its upper edge. Notwithstanding the shank and configuration of the hooks at the upper end, the device is impracticable for the precise uses for which the invention in suit was designed. Its chief purpose is to hold a belt ordinarily worn in athletic games, in position attached to the trousers, to prevent it from slipping upwards. The Bunnell design patent has a garment supporting buckle adapted to retain in position the skirt or shirt waist. The device differs essentially from that of complainant. It has a rectangular or horizontal bar which carries midway of its length an ornamental hook which may be used for supporting a belt or skirt. Its utility depends entirely upon its pleasing appearance, and not upon its construction. The Dunbar patent is for a skirt clasp. It has two members adapted to be fastened to opposite ends of the skirt band, and carrying in opposite directions vertical hooks. It will be noted that none of these patents have a construction such as the Steel patent, and therefore are unable to perform the same functions. The essential elements of complainant's patent is comprised in the particular configuration of the hooks, and hence must be considered from that standpoint, in connection with the prior art. The evidence shows that the method of arranging the skirt or waist and belt, as described in the specification, is owing to a prevalent fashion, which apparently decrees a peculiar lengthening or sloping appearance of the wearer's waist. Does the conception of the complainant produce this result, to the exclusion of garment fasteners of the prior art? This question, as already remarked, must be answered in the affirmative. As each claim of the patent in suit is enabled to perform a new function, which apparently is useful, as the court may well assume from the large sales of the patented device, it follows that such patent must be protected against an equivalent device which performs the same function. *Stirrat et al. v.*

Excelsior Mfg. Co., 61 Fed. 980, 10 C. C. A. 216; *Adam v. Folger* (C. C. A.) 120 Fed. 260; *Parramore v. Taylor*, 114 Fed. 97, 52 C. C. A. 45. The limitations contained in the words "substantially as described," at the end of each claim in suit, cannot in this case be given the legal effect contended for by counsel for defendant, who relied on the doctrine of *Boyden Co. v. Westinghouse Co.*, 70 Fed. 816, 17 C. C. A. 430, and *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. Ed. 125. The doctrine applicable to this contention must be limited and applied as the words of limitation above referred to are explained in the case of *Hobbs v. Beach*, *supra*. In the *Hobbs* Case the implication is clear that, if the invention be a primary one, the patentee ought not to be restricted to the exact mechanism described. Under such circumstances he is entitled to the benefit of the doctrine of equivalents, notwithstanding the use of the limiting words "substantially as described." *Morley Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715. Applying the doctrine of these cases to the case at bar, an infringement of complainant's device is apparent, although the device manufactured and sold by defendant is quite different in construction from that of complainant. Nevertheless it substantially embodies those features of the invention which differentiate the patent in suit from the known field. Defendant's garment fastener accomplishes the same result as that of complainant. The substitution of a suitable narrow plate, with a safety pin at the lower end, to facilitate securing the same to the corset waist, for a shank having apertures to engage the corset studs, is immaterial. Defendant's device has two lower hooks (broader than those of complainant) to fasten the shirt waist or skirt band, and one at the upper to hold the belt in place. This arrangement produces precisely the same fastening effect as that of the invention in suit. Thus construing the scope of claims 1 and 3 of the Steel patent, it follows that the defendant's device is an infringement of them.

Complainant is entitled to a decree for injunction and accounting. Decree may be entered accordingly.

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#### KIRCHBERGER et al. v. AMERICAN ACETYLENE BURNER CO. et al.

(Circuit Court, N. D. New York. August 5, 1903.)

##### 1. PATENTS—PROCESS CLAIMS—VALIDITY.

The Dolan patent, No. 589,342, for a tip for acetylene gas burners, describes and claims a process for burning acetylene gas, and also a burner for carrying such process into effect. Claims 1 and 2, covering the process, are valid as describing and claiming a true process, producing a new and useful result, which may be carried out by any suitable apparatus, and are not merely descriptive of the use or function of the burner shown in the specification and drawings and claimed in the following claims.

##### 2. SAME—ANTICIPATION—INOPERATIVENESS OF ALLEGED ANTICIPATORY DEVICE

The defense of anticipation is not made out where the alleged anticipatory process or machine is inoperative or a failure, while that of the

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¶ 2. See Patents, vol. 38, Cent. Dig. § 73.



patent is operative and successful, even though the same devices or parts are used, but combined in a new way.

**8. SAME—INFRINGEMENT—ACETYLENE GAS BURNER.**

The Dolan patent, No. 589,342, for a process of burning acetylene gas, which consists in surrounding a jet of gas with an envelope of air at the discharge orifice of the burner, for the purpose of preventing its combustion in immediate contact with the burner and until it has been projected some distance therefrom, and also for a burner-tip adapted to carry out such process, was not anticipated, shows invention, and is entitled to a broad construction, as embodying the first successful process and device for the purpose intended. Claims 1, 2, 3, and 4 construed, and *held* infringed.

**2. SAME—VALIDITY.**

A patent for a device which states that a part is preferably made of a stated material is not rendered invalid by the fact that when such part is made of a certain other material the device is inoperative.

**5. SAME—SUIT FOR INFRINGEMENT—STIPULATION AS TO ISSUES.**

Where a suit for infringement of a patent came on for hearing after the proofs had been closed, with an admission in open court as to the points in dispute, no claim being made against the complainant's title, such title is admitted, and cannot be thereafter questioned.

**In Equity.**

The bill of complaint in this action is filed for the purpose of enjoining and restraining the defendants from directly or indirectly making, constructing, vending, counterfeiting, or imitating an invention claimed to belong to the complainants, and alleged to be covered and protected by letters patent No. 589,342, issued to the Acetylene House Lighting Company, on application of Edward J. Dolan, as assignee, by mesne assignments dated August 31, 1897, and thereafter assigned by mesne assignments to Charles W. Iden, whereby he became and now remains the sole owner of said letters patent, and also for an accounting for damages alleged to have been sustained by the infringement of said patent.

Dickerson, Brown & Raegener, for complainant.

Frederick F. Church (Melville Church, of counsel), for defendants.

RAY, District Judge. The bill of complaint, after alleging the grant of the patent hereinafter mentioned and the assignment thereof to Charles W. Iden, accompanied by an allegation that he is now the sole owner thereof and entitled to recover for any past infringement thereof, alleges that said Charles W. Iden, said owner, on the 24th day of April, 1901, for good and valuable consideration and upon certain conditions, granted unto the complainants Moritz Kirchberger, Benno von Schwarz, George von Schwarz, and Philip von Frays, as copartners, the sole and exclusive right to make, vend, and use throughout the United States of America burners adapted to the burning of acetylene gas, and made in accordance with the said letters patent, for and during the entire term of such letters patent, and that the said licensees have fully complied with all the conditions and requirements of the said exclusive license, and that the same is still in full force and unrevoked. It is alleged that the licensees since they became the owners have expended large sums of money in and about the said invention, etc., and that the defendant the American Acetylene Burner Company, well knowing the premises and rights secured to the complainants, have infringed the complainants' rights within the Northern District of New York and elsewhere, unlawfully and wrong-

fully, and are threatening to continue said infringement, and that large damages have been sustained, etc. Notice of the infringement and violation of the rights of the complainants and a request to desist and refrain therefrom is also alleged.

The patent alleged to be infringed was issued upon application of Edward J. Dolan, August 31, 1897, for "Tip for Acetylene Gas Burners." The claims alleged to be infringed are as follows:

"(1) The process of burning acetylene gas, which consists in projecting a small cylinder of gas, in surrounding the same with an envelop of air insufficient to cause combustion of all the gas, and in finally supplying the gas with an additional amount of oxygen by allowing the stream of gas to expand above the burner-tip into contact with the air, thereby burning the same, substantially as described.

"(2) The process of burning acetylene gas, which consists in projecting toward each other two cylinders of acetylene gas, in surrounding the same with envelops of air insufficient to produce combustion of all the gas, and in finally causing the cylinders of gas to impinge upon each other and produce a flat flame, substantially as described.

"(3) The combination in an acetylene burner of the block, A, having the minute opening, C, the cylindrical opening, E, opening without obstruction to the atmosphere, and the air passages, a, substantially as described.

"(4) The combination in an acetylene burner of two air-mixing burners mounted upon a suitable support, and inclined toward each other, the said burners being each provided with an air-ejecting apparatus within the burner itself, substantially as described."

The specifications are as follows:

"This invention relates to a new and useful process for burning rich gases, particularly acetylene gas, and to a new and useful improvement in burners for carrying the same into effect.

"It is well known that great difficulties have been experienced in the making of a suitable burner for acetylene gas. The difficulties have largely been due to the fact that after a certain time of burning a deposit has been formed at the point of exit of the gas from the burner, which has gradually choked the outlet and distorted the flame. This difficulty is not cured by merely mingling air with gas before it is burned. The difficulty seems to be due to the fact that acetylene decomposes at about a red heat, forming benzol, carbon, hydrogen, and other compounds. If at this point of decomposition a receptive surface is present, the carbon is likely to deposit upon such surface, producing the difficulty above described. It is obvious that if a substantial separation can be made between the burner-surface and the acetylene as it issues from the burner this deposit is less likely to occur. This deposit has also been found in practice to be less when acetylene mingled with air is burned than when pure acetylene is burned.

"The burner which is the subject-matter of this application avoids the difficulties herein referred to, and by combining two independent gas jets at a proper angle produces a flat flame. These gas jets issue from two circular orifices, pass through a chamber, where they are surrounded by the indrawn air, and finally meet in space to produce a flat flame. I generally mount these jets upon two separate arms, having a proper inclination toward each other. This, however, is not essential, since they might be mounted in the same standard.

"The object of my present invention is to provide a gas burner of the character described, the construction of the burner being such as to effectually overcome the objections to former burners, hereinbefore noted, and to provide a burner the use of which will result in perfect combustion of the gas.

"To these ends, and to such others as the invention may pertain, the same consists in the peculiar construction of the burner, and in the combination, arrangement, and adaptation of parts, all as more fully hereinafter described, shown in the accompanying drawings, and then specifically defined in the appended claims.

"The invention is clearly illustrated in the accompanying drawings, which, with the letters of reference marked thereon, form a part of this specification, like letters of reference indicating the same parts throughout the several views, and in which drawings Fig. 1 is a central longitudinal section of a gas burner embodying my improvements; Fig. 2 is a like view of a modified form of the burner; Fig. 3 is a perspective view of the preferred form of burner shown in Fig. 1; Fig. 4 is a like view of the burner shown in section in Fig. 2; and Fig. 5 is a side elevation of a duplex burner.

"Reference now being had to the details of the drawings by letter, A designates a gas-burner tip which is preferably made of lava or other material of a like character adapted to the purpose. This tip is preferably made in a single piece, and may be provided with the usual screw threads, which serve to permit the ready attachment of the tip to the body portion of the burner.

"The tip, A, is, at a point at or near its longitudinal center, provided with a contracted passage or opening, C, which connects the two larger chambers or gas passages, B and E, the said cylindrical passage, E, terminating at the extreme end of the burner-tip, thus affording an enlarged passage for the gas.

"In order to prevent the deposit of carbon within the burner or at the burner top, and thereby insure a perfect combustion and a smokeless flame at the point where the same is formed, I provide a series of inclined air passages, a, a, which lead into the enlarged passage, E, above the point at which the contracted opening, C, is provided. Ordinarily a single row or series of these air passages will be found to be sufficient, as is shown in Figs. 1 and 3 of the drawings, though, if for any reason it should be preferred, two or more may be provided, as shown in Figs. 2 and 4 of the drawings.

"In order to produce the best possible results in the use of the burner which I have described, I find it advisable to use the burner in duplex form or in pairs, as shown in Fig. 5 of the drawings. It will be observed that when thus employed the outlets or points of the burner-tips are inclined toward each other. The flames from the burner-tips unite at a point between and slightly above the plane of the burner-tips, where a flat flame is formed. The gas, being forced through the contracted openings within the burner under pressure, serves to produce a flame circular in section, and the uniting of these two flames produces a broad and uniform flame, having great illuminating power.

"The operation of this device seems to be that the gas under pressure escaping in a cylindrical jet through the opening, C, draws in on all sides an envelop of air through the openings, a. This is due to the fact that the chamber, E, is larger than the outlet, C, and to the fact that the air inlets, a, substantially surround the issuing gas jet. The result of this arrangement seems to be to so cool the outside of the flame as to prevent any deposit of carbon at the point of egress. It is, of course, essential that the gas have sufficient pressure—say, from three to four inches of water—to draw in the necessary amount of air.

"The result here accomplished would not be accomplished by an ordinary air-mixing burner, in which the air was mingled generally with the body of the gas, as, for instance, a burner of the type patented to Thomas Holliday on April 20, 1897, No. 581,117. In that type of burner there is an intermediate chamber provided for the special purpose of mingling the air and gas before they escape from the burner.

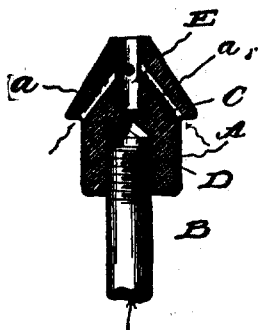
"In my burner an absolutely unobstructed passage is provided for the escape of the original jet of gas, formed by the constricted opening, C. By reason of this fact it is substantially necessary to have two jets, if a flame of considerable candle power is desired.

"The structure of my burner is such that if all of the burner were cut off in a horizontal plane immediately above the outlet, C, the general shape and condition of the flame would not be modified, but in this case an immediate combustion would occur at the outlet. Under the conditions of this burner the point where the gas reaches its kindling temperature is carried upward, but the general shape of the escaping gas body is not materially modified. Of course the shape of the body of escaping gas, though cylindrical as it issues from the round hole, increases somewhat in diameter, approximating in some degree to the form of an inverted cone. Though I use the word 'cylin-

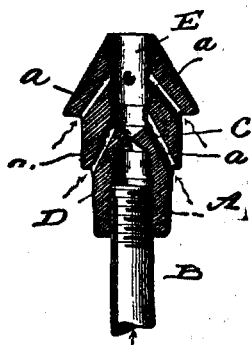
der' in this specification, I do not necessarily limit the shape of the escaping gas to exactly a true cylinder, but intend to include any other form which would be substantially equivalent in its operation."

The drawings annexed are as follows:

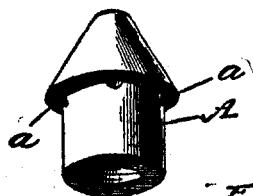
*Fig. 1.*



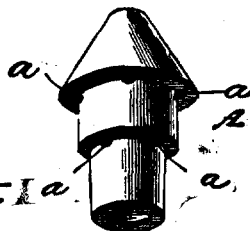
*Fig. 2.*



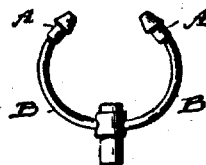
*Fig. 3.*



*Fig. 4.*



*Fig. 5.*



The defendants insist that as the bill of complaint alleges an assignment to Iden, and then the grant of an exclusive license during the life of the patent to the other complainants, this is equivalent to showing absolute ownership in the complainants other than Iden, and that the complaint must be dismissed as to Iden or as to the licensees. The defendants deny infringement, and allege that claims 1 and 2 are invalid and void because their subject-matter was not described nor claimed in the application signed and sworn to by the patentee, and also set up the defense of anticipation.

The burners manufactured and sold by the defendants, and which

are alleged to infringe upon the patent in suit, are known to the trade as the "Gem," "Queen," and "Champion" burners, and are made in substantial accordance with, and are alleged to be covered by, the claims of letters patent No. 617,942, dated January 17, 1899, and No. 634,838, dated October 10, 1899, both issued to Henry E. Shaffer, and which are now owned by the defendant company, though there are some differences in structure, which will be pointed out.

The specifications and claims of patent No. 617,942 are as follows:

"Be it known that I, Henry E. Shaffer, of Rochester, in the county of Monroe and state of New York, have invented certain new and useful improvements in burners for acetylene gas; and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawings, forming a part of this specification, and to the reference numerals marked thereon.

"My present invention has for its objects to provide an improved burner for gas rich in carbon, such as acetylene gas, whereby not only will the light be improved and more perfect combustion had, but the flame will be free from the fluctuations due to variations in pressure of the gas; and to these and other ends the invention consists in certain improvements hereinafter fully described, the novel features being pointed out in the claims at the end of this specification.

"In the drawings, Fig. 1 is a side elevation of a gas burner constructed in accordance with my invention; Fig. 2, a vertical sectional view of the same; Fig. 3, a similar view of a modification; Fig. 4, a horizontal sectional view of the burner shown in Fig. 3; Fig. 5, a cross-sectional view on the line, x x, of Fig. 2. Similar reference numerals indicate similar parts.

"In Figs. 1 and 2 I have shown the preferred form of burner, consisting generally of a body portion, 1, preferably of metal, having a gas passage, 2, a central chamber, 3, and also an upwardly extending external projection, 4, preferably formed with the burner body, and projecting between and preferably close to the under sides of the flames from two burner-tips, 5, arranged with their gas orifices at an angle to each other, and receiving gas from the central chamber, 3. The object of the projection, 4, is to provide a mass of material below the point of co-operation of two gas jets impinging at an angle, which will become heated by proximity to the flames, and will in turn react upon the gas and promote its combustion, and heat the air that reaches the flame from below. In order that as little of the heat of the projection, 4, as possible shall be transmitted to the burner body, I reduce the supporting portions thereof as much as possible by cutting away the metal beneath it, as at 6, leaving only the narrow supporting arms, 7, which are strong enough to hold the projection, but offer a very small heat-conducting surface.

"The burner-tips, 5, are each constructed of soapstone, lava, or similar refractory material, and are preferably provided with two passages, 8 and 9, the former constituting the entrance passage, being in communication with the interior of the chamber, 3, and the latter, being the discharge passage, extending at an angle to the former and communicating with it through the minute gas aperture, 10. The passage, 9, constitutes a chamber for thoroughly mixing the gas issuing from the aperture, 10, with air before burning it, and, in order to accomplish this in the best manner, I provide the lateral air inlets, 11, arranged at right angles to the passage, 9, and about half below and half above the bottom of the passage, 9, the minute aperture, 10, being of course at the lower side of the lateral air passages, which insures the air entering the passages striking the column of gas at right angles, and when it first issues from the aperture, 10. I prefer to form the passage, 9, by drilling in from the outer end of the tip. Then the minute aperture, 10, is drilled, and then the passages, 11, are formed by passing a larger drill through from side to side of the tip, the center of said drill being about on a level with the bottom of the passage, 9, as will be understood from an inspection of Figs. 2 and 5.

"Near the outer end of the passage, 9, are provided very small lateral passages, 12, serving to admit air to the column of mixed air and gas near the

point of combustion, effectually surrounding it and preventing contact with the extreme end of the tip, thereby preventing undue heating of the latter and the formation of a deposit thereon. Tips thus constructed I find give very good results, and insure the consumption of all of the gas, without causing the deposits which sometimes impair the efficiency of burners of this class, and by the arrangement of the passages, 8 and 9, at an angle, as shown, the tips may be readily employed not only in the form of burner shown in Figs. 1 and 2 for producing a flat flame, but also to produce separate vertical jets, as shown in Figs. 3 and 4, as will be described.

"The burner shown in Figs. 1 and 2 not only is well adapted for use in connection with the particular form of tip shown, but the feature of having a central gas chamber, 3, and the gas passages to the tip, out of line with the inlet passages, is particularly advantageous, because the flame is relieved from fluctuations due to variations in the pressure of the gas, the gas contained in the chamber forming a cushion to some extent, and insuring a comparatively even supply to the flame, and the angular arrangement of the passages, 8 and 9, in the tip contributes also to this result.

"While it is desirable to have the burner-tips herein shown and described arranged at an angle to produce a flat flame, they are capable of use in a burner-body of the form of that shown in Figs. 3 and 4, in which the upper portion (indicated by 20) is provided with horizontal radial apertures adapted to receive the tips, the passages, 9, being vertically arranged to produce a series of vertical flames, and while I have shown four tips attached any number desired could be employed. In this construction also it will be noted that the interior of the body constitutes a chamber, and the passages in the tips are not in a direct line with the inlet passage, 21, so that the flickering of the flame due to variations in pressure is materially reduced.

"The tips could be molded or otherwise formed, if desirable, and the specific form changed, without departing from the spirit of my invention; but I prefer that the channels, 8 and 9, be arranged at an angle, as shown, as this feature prevents undue flickering by reason of the change in direction of the flow of gas, and also facilitates the application to the forms of burner-bodies shown herein.

"I claim as my invention:

"(1) In a burner for acetylene and similar gases, the combination with the burner-body having the tapering extension and the round gas apertures discharging gas in converging streams above the extension, and substantially parallel with the faces thereof, thereby causing the extension to be heated by the flames.

"(2) In a burner for acetylene and similar gases, the combination with the burner-body, having the tapering extension, of tips having the round gas-discharge apertures and the surrounding air-supply passages, said apertures discharging air and gas in converging streams above the extension, substantially parallel with the faces thereof, thereby causing the extension to be heated by the flames.

"(3) The combination with the burner-body and the burner-tips, discharging gas in converging streams above the body, of the extension formed on the body, and arranged between the tips, and having a narrow connection with the body to prevent conduction of heat to the latter.

"(4) A burner-tip having the discharge passage or channel open at one end to the air, a gas aperture smaller than the passage and arranged at and discharging axially into the bottom thereof, and separate air channels extending at right angles to the open passage, and operating to supply air to the gas as it first issues into the passage.

"(5) A burner-tip having the discharge passage or channel open at one end to the air, a gas aperture smaller than the passage and arranged at and discharging axially into the bottom thereof, and separate air channels extending into the passage at right angles thereto and intersecting it in the plane of the small gas aperture, whereby the air will be thoroughly mixed with the gas at the point of exit into the passage.

"(6) A tip for acetylene gas burners, composed of a single piece of refractory material having the inlet and discharge passages arranged at an angle with each other, and the small gas aperture between the end of the discharge

passage and the side of the other, and air passages leading into the discharge passage.

"(7) As an article of manufacture, a tip for acetylene gas burners composed of a single piece of refractory material having the entrance and discharge passages arranged at right angles to each other, said discharge passage having separate air passages leading into it from the sides.

"(8) A tip for acetylene and similar gas burners having the discharge passage for the gas and air, the small gas aperture leading into said passage, and the separate air passages extending from the outside of the tip into the lower end of the discharge passage, and directing the air upon the column of gas at right angles to its plane of movement, thereby causing a thorough mixture of air and gas.

"(9) A burner-tip for acetylene and similar gas burners, having the discharge passage, 9, the small aperture, 10, at the bottom thereof, the lateral air channels discharging air upon the gas at right angles to the plane of the latter and at the sides of the aperture, 10, and the small lateral air passages, 12, near the end of the passage, 9, substantially as described."

The specifications and claims of patent No. 634,838 are as follows:

"Be it known that I, Henry E. Shaffer, a citizen of the United States, residing at Rochester, New York, have invented an Improved Acetylene Gas Burner, of which the following is a specification, reference being had to the accompanying drawings.

"My invention relates to burners for acetylene gas having divergent arms provided with diverging gas passages and converging gas exits and suitable air passages to produce a flat flame, such as have heretofore been made entire of metal, and also with metal arms and separable refractory tips.

"My improved burner is fully described and illustrated in the following specification and the accompanying drawings, the novel features thereof being specified in the claims annexed to the said specification:

"In the accompanying drawings, representing my improved gas burner. Fig. 1 is a side elevation; Fig. 1a is an enlarged central vertical section of Fig. 1; Fig. 2 is a central vertical section; Fig. 3 is a partial side view as seen from the direction of the arrows in Figs. 1 and 2; Figs. 4 and 5 represent a modification, the latter figure being a partial section on the line, 5 5, Fig. 4.

"My improved burner has a body consisting of the hollow central stem, A, having the gas supply passage, C. B B' are two hollow divergent arms, having gas passages, D D', which are divergent, and communicate with the minute convergent gas exit orifices, F F'.

"A gas-supply tube is denoted by T.

"E E' denote air-supply passages, which, as shown in Figs. 1 and 1a, are formed by boring through the material between the gas exits and the outlet from the mixing chambers, N N'. In Figs. 2 and 5 the air passages, E and E', are formed by boring from the rear of the arms, B B', through the mixing chambers, and are contracted at H R and H' R', respectively.

"In a modification represented in Figs. 4 and 5, two or more openings, J J', J2, lead the air from the passage, E, to the passage, N, into which the gas is delivered from the orifice, F.

"The air-supply passages deliver air to air and gas mixing chambers, N N', adjacent the gas exits. The said chambers are partially bounded on their proximate sides by the faces, L L'. In use the burner produces a flat flame at O. To insure this form of flame, it is necessary that the jets of gas from the two exits accurately impinge as in other well-known burners having opposite gas exits adapted for the production of a single flat flame. Especial nicety and accuracy of construction are required in acetylene burners on account of the minute size of the gas exits and the consequent fineness of the gas jets.

"In burners of the same general form, having refractory tips, it has been found impracticable to cement the tips in the metal burner arms so as to insure a suitable alinement of the gas exits and jets. It is therefore the practice to light every such burner and adjust the tips after they have been cemented in the metal burner-arms by twisting or bending the arms by means

of a suitable tool, and thus experimentally secure an adjustment suitable for the production of the desired form of flame. The practice is general, and is not only troublesome, but inefficient, for the reason that the high heat to which the burners are subjected in use causes the twisted or bent metal to return toward its original position, whereby the gas exits are thrown out of proper relation, and the flame changed in form.

"My improvement provides, by making the burner body and arms of one piece of nonmetallic refractory material, that the gas exits can be properly formed and arranged to produce the desired form of flame with certainty and without testing and altering, as in the case of composite burners, and without danger of subsequent torsion by high heat. Such improved burners can also be made much cheaper than metal burners with refractory tips.

"It was suggested in patent No. 618,239, granted me January 24, 1899, that burners of the character therein set forth might be made entire of refractory material. The present improvement relates to a distinct class of burners, which are adapted for and heretofore have been provided with refractory tips inserted in divergent arms, and having gas exits directed toward each other to produce a flat flame, the object being to remedy the before mentioned defect in such burners.

"Having thus described my invention, what I claim is:

"(1) The herein described double-jet gas burner, made entire of a single piece of refractory material, with divergent arms having diverging gas passages and converging gas exits and suitable air passages, all as set forth, to insure and maintain the proper form of the flame.

"(2) The herein described double-jet gas burner, made entire of a single piece of refractory material, with divergent arms having divergent gas passages and converging gas exits and suitable air passages, all as set forth, to insure and maintain the proper form of the flame, said air passages leading to mixing chambers adjacent the gas-discharge openings.

"(3) The herein described double-jet gas burner, made entire of a single piece of refractory material, having divergent arms with divergent gas passages, convergent gas exits communicating therewith, air and gas mixing chambers in communication with the gas exits, and air passages leading into the mixing chambers between the gas exits and the outlets from said chambers."

The defendants claim that their burners are made in accordance with these Shaffer patents. Letters patent No. 617,942 are of later date than the patent in suit. The defendants' burners are not made in strict accordance with this patent, as they do not have four air passages, neither are the lower air passages found in the defendants' burners at a considerable distance from the air openings. The complainants contend that the patent in suit is for a pioneer invention; that it is of great value; that the entire calcium carbide and acetylene gas industry was at a standstill for the want of a proper burner; that the advantages of the Dolan burner were quickly recognized, and that the sales of these burners increased rapidly from year to year; that the defendants' burners are partially made in accordance with United States letters patent No. 617,942 to H. E. Shaffer; that this patent distinctly admits that the burners are provided with an air passage near the point of combustion for the purpose of effectually surrounding the gas, preventing contact with the extreme end of the tip, and preventing undue heating of the latter and the formation of deposit thereon.

The defendants contend that the complainants' title is defective; that the process claimed in the complainants' patent is the alleged function of the burner or for the use of the burner shown and described; that claims 1 and 2 of the complainants' patent are invalid and void because their subject-matter was not described nor claimed in the ap-



plication signed and sworn to by the patentee; that amendments were allowed beyond the scope of the original specification and claims, and that, therefore, the patent is void; that complainants' admission by stipulation that the burners of the Dolan patent in suit are inoperative when made of brass limits the alleged invention of the patent to material only; that defendants' burners nor their use in burning acetylene gas infringe the claims of the patent in suit; and that the claims of the patent in suit are not capable of a broad construction.

Claims 1 and 2 of the Dolan patent distinctly assert that the patent relates and is intended to cover the process of burning acetylene gas, which process consists in projecting a small cylinder of gas, and in surrounding this cylinder of gas with an envelop of air insufficient to cause combustion of all the gas, and in finally supplying such gas with an additional amount of oxygen by allowing the stream of gas to expand after leaving the burner tip and coming into contact with the air, and thereby burning such gas in the mode and manner described in the specifications, and the process of burning acetylene gas by projecting toward each other two cylinders of acetylene gas, and in surrounding such cylinders of gas with envelopes of air insufficient to produce combustion of all such gas, and in finally causing these two cylinders of gas to impinge upon each other and produce a flat flame, as described. Claims 3 and 4 cover the combination in the acetylene burner of the block marked "A," having the opening marked "C," another opening marked "E," opening without obstruction to the atmosphere and certain air passages, and the combination in such a burner of two air-mixing burners mounted upon a suitable support and inclined toward each other, the said burners being each provided with an air-ejecting apparatus within the burner as described.

The specifications state that the invention covered by the patent relates both to a new and useful process for burning rich gases, particularly acetylene gas, and to a new and useful improvement in burners for carrying this process into effect. Claim 1 relates to the alleged process through a single burner tip, and claim 2 relates to the process carried into effect by the employment of two tips arranged at an angle.

In *Cochrane v. Deener*, 97 U. S. 780, 24 L. Ed. 139, the Supreme Court of the United States said:

"A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable, while the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances and in a certain order, but the tools to be used in doing this may be of secondary consequence."

It is contended that claims 1 and 2 are void as process patents; that it must, as to these claims, be deemed for the use of the burner, and hence not patentable.

An art or operation or process is an act or series of acts performed by some physical agent upon some physical object, and producing

on such object some change either of character or of condition. It is said to be so far abstract that it is capable of contemplation by the mind apart from any one of the specific instruments by which it is performed. It is so far concrete that it consists in the application of physical force through physical agents to physical objects, and can thus become apparent to the senses only in connection with some tangible instrument and object. 1 Rob. on Patents, § 159.

Here we have a process for burning rich gases, particularly acetylene gas. It is urged that, as nothing is said in complainants' patent that the object or purpose is to produce light or an illumination, we must give a narrow construction, and that the light-producing effect of the process, if any, is not covered by the patent. This court is of the opinion that this construction is decidedly too narrow.

The physical object acted upon is acetylene gas, and air operating through the burner described is the physical agent, and the change produced on the object is that it is burned up, transformed into light, or so transformed as to produce light, and so serve a most useful purpose. Were it not for this particular process, deposits of carbon, etc., would be formed, the flame distorted, but little light emitted, etc. Certainly the character and condition of the acetylene gas, the object, is changed. In order to burn acetylene gas with profit and for use, certain instrumentalities for confining it must be used, and the quantity being burned at a given time must be limited and controlled. This is done by physical agencies—a receptacle for the gas, and a conductor or conductors therefor to the point of combustion. It is not desirable to have the combustion “lying around loose.” So we have a burner or tips, etc., and within and just outside the process is carried on as the process of dyeing textile fabrics is carried on in a tub or other receptacle. The particular mode of treatment here specified is to separate the escaping column of gas from the burner surface, and prevent the formation and deposit at this point of benzol, carbon, etc., one or more of them, and thus choking the burner, and preventing the burning of the gas and the emission of light. This is not only a process, but a useful and a new process, and therefore a patentable process. Claims 1 and 2 are valid.

This process does not consist in the operation of a machine or of the burner, and therefore is not the function of the burner. The defendant says in his brief that the gas would burn if ignited without anything being done to it, and that for aught that appears the flame produced by the gas would be precisely the same under any and all circumstances, and the burning of the gas is not in any way dependent upon the particular structure of the burner having air passages discharging air upon or surrounding the column of gas before ignition.

With this contention this court does not agree. Water heated in a pan would give off steam, but will it be contended that a process for confining and applying steam so as to make it useful and a power in the hands of man is not patentable? The doctrine is firmly established that a new mode of operation or a manner of making is equally patentable with an operating instrument or with an object made. An artificial operation performed by physical agents, and producing physical effects, when within the domain of the industrial arts, is a true

invention, and can be patented as such without reference to the specific instruments engaged or the specific objects in which its effects may be produced. A machine is a thing, but a process is an act or mode of acting. The one is visible to the eye—an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing useful results. The mixing of certain substances together or the heating of a certain substance to a certain temperature is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough in the patent to point out the process to be performed, without giving supererogatory directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is then a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode or some apparatus by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience. 19 O. G. 859, 863.

The application of a known force to known objects in a new manner is a new art. *Foote v. Silsby*, 1 Blatchf. 445, Fed. Cas. No. 4,916; *Higgs v. Goodwin*, E. B. & E. 529. An art may be either a force applied, a mode of application, or the specific treatment of a specific object, and the art must produce physical effects; but it is, of course, distinct from the instrument which it employs, but any available instrument may be employed.

The defendant in his brief says that the invention, if any, is in the burner, which, by reason of its structure, prevents the carbon from depositing upon it, and the alleged process is merely the function or mode of operation of the particular burner, and is therefore not patentable. This claim is a mistake. The burner is constructed in the manner described for the purpose of allowing the process to be carried on, and the process consists in the gas passing through the conductor, into which conductor or conductors comes the air through the apertures mentioned, and then both the gas and the air, the air surrounding the gas, and it may be mixing with it somewhat, pass out, and the gas is ignited and combustion takes place, and we have a continued bright illuminating flame. It is not the burner, which, by reason of its peculiar construction, prevents the carbon from depositing upon it, and which deposit prevents the burning of the gas and the illumination desired, but it is the process mentioned which prevents a deposit of the carbon. The defendant says that the air does not do anything to the gas. This may and may not be true. It passes into the same conductor with the gas, and is supposed to surround the column of gas, but, while it surrounds it, it may mix therewith to some extent. Nor is it necessary to make this process patentable that the patent

should describe just how much air is to be allowed to have access to the gas to envelop it, or how much air would be insufficient to cause combustion of all the gas, etc. It is not sufficient, as has been discovered by the inventor of this process, that the gas come in contact with the air after leaving the conductor at the point of ignition. The inventor of this process has discovered that it is necessary to have the column of gas surrounded by air previous to leaving the conductor. The inventor of this process described in the patent in suit has discovered something new and has patented it. All previous inventors failed to discover this process. Although they tried long and diligently, they failed to accomplish the desired result, and the burning of acetylene gas was a failure.

It has been claimed that this same envelopment of an acetylene stream of gas by air takes place in the Billweller burner, but it is shown by the proofs that this is not true. In the Dolan patent the burners have an air passage near the point of combustion for the purpose of effectually surrounding the ascending column of gas, preventing its contact with the extreme end of the tip, and preventing undue heating thereof and forming a deposit thereon. The defendants admit the theory set forth in the patent in suit just mentioned, but allege that this is not new, and allege that many prior patents produced in evidence would have produced the same results. They also contend that as the Shaffer patent, No. 617,942, has an air duct at quite a distance below the air duct near the extreme end of the tip, the envelop of air in the defendants' burners surrounds a mixed column of gas and air instead of a volume of gas alone, as set forth in the Dolan patent. This may or may not be material, but the lower air duct of the defendants' burner is not made in accordance with the Shaffer patent. The lower air duct is a trifle lower than the air passage, and permits the air to curl around the mixed jet of air and gas, and so states defendants' witness. It is contended that the claims of the Dolan patent are limited to inclined air passages. This court is of the opinion that the claims are not so limited. Whether inclined or not would seem to be immaterial. The fact that one mode of making the air passages is indicated in the drawings or in the specifications (an immaterial matter) does not so limit the Dolan patent that another person may use the same process and the same invention substantially as described in claims 3 and 4, and by merely substituting air passages at right angles with the column of ascending gas escape the charge of infringement or claim a new or different invention.

The Bullier patent and the Pellissier book, edited by Bullier, distinctly claim a mixing of air and gas as their process. Experiments and trials and prior use demonstrate this to be a failure. The deposits occur, and there is no flame with illuminating power; in fact, the gas does not burn except a short time. On the other hand, it is shown that the Dolan process, etc., is a success, and will burn months without clogging. The Dolan patent accomplishes the results desired. The complainants and the patent itself claim that this result is accomplished by surrounding with air the column of gas in the manner and substantially at the points indicated, and by means of the enlarged chamber below the point where the gas is projected into the open air, and it will

be presumed (and there is evidence that such is the fact) that this is the result of the process described by complainants' patent, in the absence of evidence proving the contrary, inasmuch as the mixing theory is a failure and always has been. When a patented process or machine proves a failure, is inoperative, and another follows, and is a success in its operation, the latter is a new invention and patentable, even though we have the same machinery or parts of machinery, but they are combined or put together in a new way; and this is true even if the latter combination closely follows and resembles the first, provided there be a difference. In such case it is evident that the later patentee has succeeded where the other failed; that he has discovered or invented the desired thing to accomplish a new and a useful result; that his change, however unimportant it may seem to the observer, is the key to the whole situation. In such case the defense of anticipation, of prior use, or prior invention is not made out.

This court has diligently searched for (in the records of this case and among the exhibits), but has been unable to find, in the prior art, anything showing a jet of gas surrounded by an envelope of air at the discharge orifice for the purpose of preventing combustion at that point, or which does that, or showing a gas tip made from lava or other refractory material, with a minute gas orifice at the longitudinal center with air passages above. With these among other differences, and failure attending all prior inventions and processes, and success attending the Dolan patent, the conclusion is inevitable that the Dolan patent is valid, and that the defense of anticipation, etc., is not sustained.

This court is also of the opinion that infringement by the defendants is clearly made out.

The defendants' burners, known as the Queen, Gem, and Champion, clearly operate the patented process.

The defendants use and appropriate, substantially, the Dolan patent. Why? Evidently because necessary to successfully burn acetylene gas. The Dolan patent says the tip is preferably made of lava or other similar material adapted to the purpose. The defendants cannot escape the charge of infringement, or make out a defense of prior use, etc., by showing that a tip made of tissue paper or cork or putty will not work or accomplish the desired result. Neither is it a defense, in any aspect of the case or on any point in issue, to show that a tip made of brass is substantially inoperative. The case came on for argument with the proofs closed with an admission in open court as to the points in dispute, and no claim was made that title in the complainants as alleged was in issue or would be disputed. That, in effect, was admitted. It was sought to open the case for further proof, whereupon a certain stipulation on other points was entered into, and no further evidence was taken, and a day for final hearing on the issues then presented was fixed.

This court holds that the question of complainants' title as alleged is admitted, and that it was admitted in open court that all the complainants are proper parties as such, and interested in the determination of the questions involved. This court holds that it is too late to raise that question. All the other questions raised and discussed have

been considered, but it is not necessary to discuss them here in detail. The conclusion is that the Dolan patent, No. 589,342, dated August 31, 1897, is valid, and that claims 1, 2, 3, and 4 have been infringed by defendants as claimed, and that complainants are entitled to an accounting and to the injunction prayed for. A decree will be granted accordingly.

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BRILL v. NORTH JERSEY ST. RY. CO.

(Circuit Court, D. New Jersey. August 29, 1903.)

1. PATENTS—INVENTION—UTILITY OF DEVICE.

The fact that an invention constitutes an important and desirable improvement in an art, in the development of which many inventors have participated without making such improvement, affords persuasive evidence of patentability.

2. SAME—INFRINGEMENT—STREET CAR TRUCKS.

The Brill patent, No. 627,898, for a pivotal truck for electric street cars, the essential purpose of the invention being to provide an improved flexible spring connection between the truck frame and the car bolster, designed to relieve the car body from shock or jar, was not anticipated, and covers a true combination, in which the several elements, although old, separately considered, co-operate to produce a new and useful result, and discloses patentable invention. Patent No. 627,900, granted on a division of the same application, and differing only in details of construction shown, is also valid. Certain claims of both patents also *held* infringed.

In Equity. Suit for infringement of letters patent Nos. 627,898 and 627,900, for pivotal trucks for electric street cars, granted to George M. Brill June 27, 1899. On final hearing.

Francis Rawle, Joseph L. Levy, and Edmund Wetmore, for complainant.

Charles H. Duell and Fred P. Warfield, for defendant.

BRADFORD, District Judge. John A. Brill has filed his bill of complaint against the North Jersey Street Railway Company, a corporation of New Jersey, charging infringement of letters patent Nos. 627,898 and 627,900, and containing the usual prayers. These two patents, the latter being divisional in its relation to the former, bear date June 27, 1899, and were granted to George M. Brill by whom they were, prior to the filing of the bill and the alleged infringement, assigned to the complainant, who has ever since continued the owner thereof. Both of them relate to improvements in pivotal trucks for electric street railway cars. The original application was filed July 3, 1897, and the divisional application November 9, 1897. The charge of infringement as to patent No. 627,898, which contains one hundred and eleven claims, has been restricted to claims 1, 3, 6, 10, 11, 13, 14, 15, 17, 18, 30, 32, 33, 80, 81, 87, 91, 92, 93, 95, 96, 97, 98, 99, 102, 105, 107, 108 and 110. It is only necessary to consider claim 13. It is admitted on the part of the complainant that unless this suit can be maintained with respect to that claim it cannot

† 2. See Patents, vol. 38, Cent. Dig. §§ 28, 29.

be maintained as to any of the claims of patent No. 627,898. That claim is as follows:

"13. The combination in a car-truck, of the side frames, the semi-elliptic springs movably and resiliently suspended from the side frames, and a bolster secured to said springs, substantially as described."

The truck mechanism which is alleged to infringe was manufactured by the Peckham Motor Truck & Wheel Company, a corporation of New York, and was and is used by the defendant. If the above claim be valid, I am satisfied that the defendant must, on the evidence, be held liable as an infringer. The controlling question as to patent No. 627,898 relates to its validity. The combination of claim 13 is "substantially as described" and that claim must be read in the light of the description in order that its real meaning and scope may be understood. When so read it essentially resembles claim 10 which is as follows:

"10. The combination in a car-truck, of the truck-frame, spring-links depending from the truck-frame, semi-elliptic springs connecting the links, and means for connecting said latter springs with a car-body, substantially as described."

The gist of the invention of this patent principally lies in the construction and arrangement of a flexible spring connection between the truck-frame and the car-bolster, so adjusted as to provide relatively to the truck-frame a vertical spring movement, and also a longitudinal and transverse yielding horizontal movement, of the bolster supporting the car-body, thereby relieving the car-body from shock, jerk or jar in the starting or stopping of the car or in its passage over inequalities or curves in the rails or track. The defence of anticipation has been set up as to this patent and was urged at the hearing; but I have failed to find any anticipation of claim 13 or, indeed, of any other of its claims in suit. The prior art is also relied on by the defendant to negative patentability in the invention described and claimed, and many patents and other exhibits have been produced in evidence in support of its contention. There can be no doubt that in a broad sense all the elements entering into the combination of claim 13 were old and well known. At the time the invention embodied in that claim was conceived there was, generally speaking, nothing patentable in such spring-links, semi-elliptic springs, or other elements, separately considered, as entered into the combination claimed. But the several elements, though old, were so adjusted and combined in the mechanism covered by the claim as to co-operate in producing a joint result which could not be obtained from a mere aggregation or assemblage of the different elements. By way of illustration, the spiral springs in the supporting links and the semi-elliptic springs are so associated that the action of the former is modified by that of the latter, and conversely, the action of the latter by that of the former. Claim 13 covers a true combination in contradistinction to a mere aggregation or assemblage. The question remains whether such combination was patentable at the time of the invention. On this point much may be said on either side. I was much impressed at the hearing with the force of the defendant's contention. But it should be borne in mind that what may seem obvious in an invention after it

has been reduced to practice must first be found out or discovered in order that its simplicity may be appreciated. The fact that an invention constitutes an important and desirable improvement in an art, in the development of which many inventors have participated without making such improvement, affords persuasive evidence of patentability. Especially is this true where the improvement relates to matters of such importance and widespread interest as ease, convenience, speed and safety in electric street railway travel. The truck mechanism of patent No. 627,898 has not only materially added to the ease, convenience, speed and safety of travel, but has proved economical. It has commanded a large sale and met with much success. There is, further, the presumption of validity arising from the grant of the patent. This presumption is entitled to much force here; for the application and claims were subject to much controversy and received careful and prolonged consideration in the patent office. I have discovered nothing in the interference proceedings between Brill and Charles F. Uebelacker or other proceedings in the patent office to militate against the validity of claim 13, but, on the contrary, evidence strongly tending to support it. The patent, though not broad, is a meritorious one, and should be sustained unless the objection made on the part of the defendant and now to be mentioned has been well taken. In its description it is said:

"The location of the semi-elliptic springs outside of the wheel-gage on each side of the truck, together with the location of the links for supporting the semi-elliptics closely adjacent to the axle-boxes and the swinging of said springs from the truck-frame from such points gives a better support for the car-body than does the usual link-hung bolster supported from the truck-transoms within the wheel-gage. These general features of construction, however, are embraced in an application filed by Samuel M. Curwen and myself on the 3d day of November, 1896, Serial No. 610,902, and therefore I do not claim the same herein."

It is insisted on the part of the defendant that this statement amounts to a disclaimer of the combination of claim 13 and nullified that claim. But, in the absence of a clear and unequivocal declaration to that effect, it would be unreasonable in the highest degree to impute to Brill an intention to disclaim the very gist of his invention embodied in so many carefully drawn claims. When the above statement by Brill is considered together with the description of the patent granted on the application referred to in that statement, it is evident that the contention by the defendant in this connection is not justified. Patent No. 610,118, bearing date August 30, 1898, for "Improvements in Pivotal Trucks," was granted to George M. Brill and Samuel M. Curwen on an application filed November 3, 1896, Serial No. 610,902. In the description it is said:

"It has been usual to hang the bolster construction, and primarily the 'spring' or 'sand' plank, as it is ordinarily termed, from the transoms, which are disposed across the truck between the side frames, the ends of the transoms being secured to the side frames, the support for the bolster being from the transoms at points within the side frames and mainly within the wheel-gage. In those cases the support or base for the bolster was considerably shorter than the wheel-gage, and according to our experience aided rather than decreased and in some cases considerably amplified the movements of the truck which are communicated to the car-body. According to our present



improvements in this regard we preferably dispense entirely with this 'between-gage' suspension for the bolster (although in some cases it may be desirable to otherwise dispose the suspension) and employ what we call 'equalizing-bars,' suspended directly from the side frames of the truck outside of the wheels, and secure the spring-plank solidly or fixedly to the mediate portions of the equalizing-bars on both sides, thereby materially increasing the span or base of the spring-support for the bolster, enabling it to resist transverse oscillation to a greater extent than under the old method of swinging the bolster. In addition to this we have carried the physical connection of the equalizing-bars with the side frames close to the axles, which relieves the side frames from a large part of the strain which comes upon them when the load is carried by the transoms, and suspended the ends of the equalizing-bars from the side-bars of the truck-frame, thereby vastly increasing the longitudinal base or support of the bolster," etc.

The Brill and Curwen patent does not embody or disclose the combination of patent No. 627,898, but the above language taken from its description satisfactorily explains the meaning of the alleged disclaimer in the later patent. All that was meant was that the patentee did not claim that the mere location of the semi-elliptic springs "outside of the wheel-gage" and location of the spring-links "closely adjacent to the axle-boxes" involved novelty or patentability. The alleged disclaimer in nowise affects the right of the complainant to a decree as to patent No. 627,898.

Patent No. 627,900 is, as before stated, divisional in its relation to patent No. 627,898. There is an intermediate divisional patent No. 627,899, which it is unnecessary to discuss here. Patent No. 627,900 discloses truck mechanism for electric street railway service having the same general elements of construction and mode of operation as that covered by patent No. 627,898; from which it differs, to use the language of the complainant's expert, Livermore, "only in the construction and arrangement of the links and springs which afford the movable and resilient connection between the bolster and semi-elliptic springs on the one hand, and truck frame on the other hand." The charge of infringement as to this patent, which contains 19 claims, has been restricted to claims 13, 14, 15 and 17. It is unnecessary to refer to more than claims 13 and 17. They are as follows:

"13. In a car-truck, the combination with the side frames, of the links comprising bolts pivoted between their ends, said links being pivotally suspended from the side frames, longitudinally-disposed semi-elliptic springs secured to the lower end of said bolts, a cross bolster resting on said springs, and further springs included in the link suspension of said semi-elliptic springs, substantially as described."

"17. The combination in a car-truck having an upper chord, of the longitudinally-disposed semi-elliptic springs, a transverse bolster supported upon said springs, links depending from and flexibly supported on said upper chord and passing through enlarged apertures therein, said links being articulated between their ends, the ends of the semi-elliptic springs being supported upon the lower articulation of said links, substantially as described."

This patent, being divisional relatively to patent No. 627,898, relates back to the date of the original application on which that patent was granted. The latter patent, therefore, does not, with respect to the divisional patent, belong to the prior art; and I perceive no reason why each of the above quoted claims should not be held validly to cover the combination comprising the particular elements described and therein claimed, or why those claims should receive so narrow

a construction as to be limited to the precise form of the elements as shown in the description and drawings of the patent. The charge of infringement of these claims cannot be avoided by any mere change in the form or location of an element or part of an element in the patented combination where the element performs the same function in substantially the same manner as it would without such change. Accordingly, it must be held that the truck mechanism complained of includes, in addition to the other elements of the combination of claim 13, the "links comprising bolts pivoted between their ends, said links being pivotally suspended from the side frames," therein mentioned; and, further, that it includes, in addition to the other elements of the combination of claim 17, "links depending from and flexibly supported on said upper chord and passing through enlarged apertures therein, said links being articulated between their ends, the ends of the semi-elliptic springs being supported upon the lower articulation of said links," within the meaning of that claim.

Let a decree for the complainant in accordance with this opinion be prepared.

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#### AMERICAN TUBE WORKS v. BRIDGEWATER IRON CO.

(Circuit Court, D. Massachusetts. September 9, 1903.)

##### No. 14.

#### 1. PATENTS—SUIT FOR INFRINGEMENT—LICENSE AGREEMENT PRECLUDING MAINTENANCE.

A patentee made an agreement, for a consideration paid, to assign his patent for the term of an extension to complainant, and bound himself to make every effort to secure such an extension "under the direction" of complainant, and to forfeit a sum of money if he failed to prosecute his application "as directed by" complainant. His application for an extension was opposed by defendant, which employed counsel to defeat it. Afterward a contract was made between the patentee and defendant, by which the latter was licensed for a royalty during the term of the extended patent, and it withdrew its opposition, and the extension was granted. Less than a month before the extended term of the patent expired, complainant brought suit against defendant for its infringement, and obtained a decree with an order for an accounting. On the hearing before the master the facts in relation to the contract between complainant and the patentee and its terms were shown, and defendant filed a supplemental bill based thereon for a dismissal of the suit. *Held*, that such evidence was sufficient to warrant a finding that complainant was a party to the license contract with defendant, or at least had knowledge of it, and that its failure to object or to notify defendant of its interest therein was a ratification of the same, which precluded it from maintaining a suit in equity for infringement.

In Equity. Suit for infringement of patent. On supplemental bill filed by defendant.

George W. Estabrook, for plaintiff.

Richardson, Herrick & Neave, and Clarence A. Bunker, for defendant.

COLT, Circuit Judge. This supplemental bill, brought by the defendant, raises the question whether the complainant was a party to,

or had knowledge of, the contract of June 16, 1873, entered into between the defendant and Adams, the patentee. It is clear that the original bill must be dismissed if the complainant acted in concert with Adams in making this contract, or if it had actual knowledge of the contract, and did not repudiate it.

At the time the contract was made, the complainant had a secret agreement with Adams for the assignment of the extended term of his patent, for which it had paid him a valuable consideration. By the terms of that agreement Adams was to make every effort to secure the extension "under the direction" of the complainant, and was to forfeit the sum of \$5,000 if he failed to make and prosecute the application for an extension "as directed by" the complainant.

When Adams, in accordance with his agreement, made application to the Patent Office, the defendant filed objections to the extension, and employed counsel to defeat it. In this condition of affairs Adams began negotiations with the defendant, which resulted in the license and royalty contract of June 16, 1873, and the consequent withdrawal of all opposition to the grant of the extension. Under such circumstances it is immaterial whether the complainant was an actual party to this contract, or whether, having knowledge of what Adams had done, it failed to disavow his action. Adams was bound to conduct all proceedings for the extension under the direction of the complainant; and, if he made this contract without the complainant's direction or consent, the complainant should have notified the defendant as soon as it was informed of the fact. Failure to disclaim, in view of the existing relationship between the complainant and Adams, was a ratification of the contract. The complainant manifestly has no standing in a court of equity upon a bill for infringement if it concealed its knowledge of this contract from the defendant, and quietly waited until the extended term of the Adams patent was about to expire before bringing suit.

The original bill was filed July 10, 1880. The extended term of the Adams patent expired August 2, 1880. The bill charged the defendant with infringement of the Adams patent, and prayed for an injunction and account. The defendant, among other defenses, set up the contract of June 16, 1873. Proofs were taken, and, after full hearing, the court, on February 3, 1886, directed a decree for complainant. The case was then referred to John G. Stetson, a master of long experience, high standing, and acknowledged capacity. The accounting before the master was not concluded until April 9, 1898. During these proceedings, which extended over a period of 12 years, the relations, in general and in detail, between the complainant and the defendant, and between both these parties and Adams, were fully brought out, and thoroughly examined and sifted. As a result of these long and exhaustive hearings, the master, among other things, found that the complainant was a party to the agreement of June 16, 1873. In support of this finding, the master reported, as follows:

"The circumstances under which Adams made the contract of June 16, 1873, with the Bridgewater Iron Manufacturing Company, the wording and terms of the contract, the events closely following its execution, and the omission of the complainant to bring this injunction suit till within less than

a month of the expiration of the extended term of the Adams patent, or, so far as the evidence before me shows, to make any remonstrance against, or to take any action to prevent, the defendant company's unauthorized manufacture of the cast copper cylinders of the Adams patent, support my finding that in making the contract of June 16, 1873, with the Bridgewater Iron Manufacturing Company, Adams, though appearing in the contract as principal, was the agent of and acted under the direction of the American Tube Works, so far as said contract relates to the extended term of the Adams patents.

"Adams' agreement with the American Tube Works bound him to make application for an extension of his patent, and to use all means and make all efforts in his power to obtain the same under the direction of said American Tube Works, to which company he had agreed to assign his patent for the extended term, upon obtaining the same; having received from said company full payment therefor. Pursuant to this agreement, Adams had made on May 2, 1873, the application for the extension, and the Bridgewater Iron Manufacturing Company had appeared in the Patent Office in opposition thereto, and had filed on June 4, 1873, a statement of its reasons for opposing the application. Adams had no personal interest in arranging for a withdrawal of this opposition, except that he had contracted to prosecute his application by all means and with all efforts in his power, as directed by the American Tube Works. Under these circumstances the contract between Adams and the Bridgewater Iron Manufacturing Company was made June 16, 1873; and the opposition of that company to the extension of the Adams patent thereupon ceased, to the advantage of the American Tube Works. Notice of the taking of testimony in Boston to be used in the Patent Office was acknowledged by the Bridgewater Iron Manufacturing Company, by Nahum Stetson, treasurer, who signed the contract of June 16, 1873. The notice was dated Boston, June 25, 1873, the same day the taking of testimony commenced. So far as the evidence before me shows, Dickerson & Beeman, of New York, who appeared for the Bridgewater Iron Manufacturing Company in the Patent Office, were not notified of the taking of the testimony. The magistrate who took the testimony certified that no one was present in behalf of the Bridgewater Iron Manufacturing Company. Adams, the patentee, was present, and was examined as a witness. The testimony was taken under the direction of the American Tube Works, and at its expense.

"The Bridgewater Iron Manufacturing Company made no formal withdrawal in the Patent Office of its opposition to the extension of the Adams patent after the execution of the contract of June 16, 1873, between it and Adams. It made no further opposition to the extension. It accepted service of notice, but did not appear at the taking of testimony. It took no testimony, and did nothing further in the Patent Office to oppose the extension.

"The facts stated in the two preceding paragraphs indicate clearly that a concert of action between Adams, the American Tube Works, and the Bridgewater Iron Manufacturing Company to procure the extension of the Adams patent was effected by the agreement as to license and royalty contained in the contract of June 16, 1873, and that this agreement was known by the American Tube Works as well as by the parties appearing as principals in the contract.

"The omission of the complainant to bring an injunction suit or to make any remonstrance against or to take any action to prevent the defendant company's unauthorized manufacture of the cast copper cylinders of the Adams patent is consistent with knowledge on the part of the complainant that the defendant company was entitled to a license from them under the extended term of the Adams patent upon the conditions stated in the contract of June 16, 1873, and is inconsistent with lack of such knowledge.

"That the American Tube Works had knowledge of the contract as to license and royalty under the extended term of the Adams patent which Adams had made with the Bridgewater Iron Manufacturing Company, and understood it to be a binding contract as between the two companies, is further shown by direct evidence contained in a letter sent from the Boston office of the American Tube Works, dated April 16, 1877, from E. B. Buckingham, president of that company, to Frank B. Cotton, a clerk in its employ,

then temporarily in Washington, D. C. In this letter Mr. Buckingham writes as follows:

"Have retained George L. Roberts, and I think him a very clear-headed person, and don't think he at first thought we had a very good case on the old patent, but he gave no decided opinion. Has now gone to New York. Will return this week. The point is, the patent is not on process, but on an article made in "way specified"; and the article itself can be produced in other ways, regardless of cost (which does not alter the matter, if it cost \$1 a pound). Further, it has no inherent quality, making it obvious at sight that it is made in any special way, as Whitehouse has, by being different in shape. "If we have to abandon the struggle on Adams, we have Guthrie left; but that places us in poor position, as they can say G.'s is infringement of Adams. Perhaps all we can go for is the  $\frac{3}{4}$  c they promised to pay. I don't feel very "hunky" about it, but perhaps \* \* \*."

This finding by the master led to the bringing of the present supplemental bill, charging that the complainant was a party to the contract of June 16, 1873, or that it had knowledge of such contract, which it wrongfully concealed from the defendant, to its great injury, and praying that the original bill be dismissed, with costs.

In defense of the supplemental bill the complainant introduced a stipulation as to the death of Adams, James F. Guthrie, and Edward Buckingham, former president of the complainant corporation, and as to the fact that both complainant and defendant were Massachusetts corporations. It offered no new evidence of material importance, although it appears that one or more witnesses are living, who could throw much light upon the relation of the complainant to the contract of June 16, 1873, and who could help to disprove its want of knowledge of the contract if such were the fact. The defendant, in support of the supplemental bill, brought forward substantially the same evidence as was before the master. Upon this state of proof, the question now presented is practically the same as if the court were reviewing the finding of the master.

Upon a careful and independent consideration of the evidence, I am satisfied that the finding of the master was right, and that he could have reached no other conclusion.

All the presumptions, facts, circumstances, and acts of the parties are consistent with the complainant's knowledge of this contract, and inconsistent with any other theory. Such knowledge is consistent with the presumption that the secret agreement of December 8, 1869, was carried out in good faith by both parties; that Adams did not violate his duty in the performance of his part of the agreement; and that all his efforts to obtain the extension of his patent were made under the direction of the complainant. This presumption becomes very strong when we bear in mind that Adams had no personal interest in the extension, but a very strong pecuniary interest in not concealing any step he took from the complainant, since he was liable to a penalty of \$5,000 if he failed to make application, "and by all means and with all efforts" prosecute the same in good faith "as directed by" the complainant. Such knowledge is also consistent with the application which Adams filed in the Patent Office, and his accompanying sworn statement concealing the fact that he had agreed to assign the extended term to the complainant. This statement was made in the interest of the complainant, since, if it had come to the knowledge

of the Patent Office that the complainant was in fact the owner of the extended term, it would probably have defeated the grant. Such knowledge is also consistent with the close relation of Adams' counsel to the complainant, with the terms of the contract of June 16, 1873, and the circumstances under which it was made, with the subsequent withdrawal of defendant's opposition to the extension, with the facts relating to the taking of testimony on June 25, 1873, in support of the extension, and with the failure of the complainant to bring suit for infringement until within a few days of the expiration of the extended term. Such knowledge is also consistent with the direct evidence contained in the Buckingham letter of April 16, 1877, in which the president of the complainant company, after expressing doubts as to the success of a suit for infringement, said: "Perhaps all we can go for is the  $\frac{3}{4}$  c they promised to pay"—this being the amount of royalty named in the contract of June 16, 1873; and with the letter from Frank H. Cotton, an employé of complainant company, to William Cotton, its treasurer, dated April 18, 1877, which said, "I find I am acquainted with R. K. Evans here, one of the lawyers who argued our case when applying for the extension."

It is impossible to explain these facts and circumstances upon any other theory than the full knowledge by the complainant of the contract in question. The improbability, inconsistency, and confusion which attend the effort to show complainant's want of knowledge of the contract is illustrated by its attempted explanation of what the Buckingham letter might have meant. It is due, however, to the complainant, to say that it does not rely upon its forced explanation of the Buckingham letter and other circumstances, but rests its defense mainly upon the failure of the defendant to prove its case. An unbroken chain of circumstantial evidence may be as convincing as direct proof; and where, as in the case at bar, we have, in addition to such a chain, the direct evidence of the Buckingham letter, it may be said that a case has been made out which is free from reasonable doubt. It follows that the prayer of the supplemental bill should be granted, and the original bill dismissed, with costs; and a decree may be entered accordingly.

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In re RAPID TRANSIT FERRY CO.

In re CENTRAL R. CO. OF NEW JERSEY.

(District Court, S. D. New York. June 17, 1903.)

1. COLLISION—STEAM VESSELS CROSSING—VESSEL LEAVING SLIP.

Evidence considered, and held to establish the fault of each of two ferryboats for a collision in East river as one was leaving her slip and the other was approaching on a crossing course to enter an adjoining slip; the first (1) for not remaining within her slip until the other was out of the way, (2) in proceeding forward at full speed when the vessels were in a position to be in danger of collision from such movement, and (3) in not reversing when it became obvious that the other would not yield the right of way; the second (1) in failing to keep a good lookout, (2) in failing to hear the signal of the other, (3) in failing to see that the other had started from her slip until she was some distance, (4) in failing to give the other a timely signal that she intended to cross her bow, and

(5) in failing to reverse immediately, when it became apparent that the other was attempting to cross her bow.

2. SAME.—LIMITATION OF LIABILITY—PRIVITY OF OWNER.

The fact that a ferry company having control of two adjoining slips at a dock, one of which was used by its boats, leased the other to another company operating a ferry line, so that the boats of the two lines were obliged to cross each other's courses in entering and leaving their slips, does not make it privity to a collision between boats of the respective lines brought about by negligent navigation by those in charge, so as to deprive it of the right to a limitation of liability under the statute.

3. SAME.

A ferry company is not privity to a collision occurring through the fault of one of its boats, so as to deprive it of the right to a limitation of liability because it did not promulgate special regulations for the navigation of its boats, such navigation being governed by the rules established by law.

4. SAME.

It is the duty of the owner of a steam ferryboat under Act June 7, 1897 (30 Stat. 102, c. 4, § 2, 2 Supp. Rev. St. 1892-1899, p. 626 [U. S. Comp. St. 1901, p. 2884], to post the inspectors' rules in a place where they can be conveniently read; but the failure to do so does not render such owner privity to a collision, and deprive him of the right to a limitation of liability on account thereof, where the collision did not result from the want of knowledge of the rules by the pilot, but from his failure to observe rules of which he had knowledge.

In Admiralty. Petitions for limitation of liability for a collision.

Lester W. Clark (Charles C. Burlingham, of counsel), for Rapid Transit Ferry Company.

De Forest Brothers and Benedict & Benedict (R. D. Benedict, of counsel), for Central Railroad Company of New Jersey.

Butler, Notman, Joline & Mynderse (F. M. Brown, of counsel), for Staten Island Railway Company, owner of the Northfield.

J. Parker Kirlin and Eliot Tuckerman, for third party claimants, represented by numerous proctors.

ADAMS, District Judge. On the 14th day of June, 1901, at about 6 o'clock P. M., a collision occurred between the ferryboats Northfield and Mauch Chunk, in the vicinity of pier 1 East River, resulting in the sinking and total loss of the Northfield, the drowning of three of her passengers and serious injury to others and loss of property on board. The Mauch Chunk was very little injured and no lives or property of passengers on her were lost, nor was any one injured.

On the 27th of June, 1901, the Rapid Transit Ferry Company, the charterer in control of the Northfield, filed its petition herein for limitation of liability, alleging that the Northfield left her ferry slip at the foot of Whitehall Street, New York, at 6 o'clock P. M. on the day in question with a considerable number of passengers and some vehicles on board, bound for St. George, Staten Island, after blowing the customary long whistle to indicate that she was about to start; that the weather was clear and a strong flood tide prevailed; that as she was moving slowly out, the Mauch Chunk was

¶ 2. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.

seen on the Northfield's starboard beam, and distant a quarter of a mile or thereabouts, heading in an easterly direction; that thereupon the Northfield gave a signal of two whistles to which the Mauch Chunk replied with two; that the engines of the Northfield were thereupon hooked up, her course directed to port and she continued on under a jingle bell; that notwithstanding the exchange of signals the Mauch Chunk did not appear to check her speed or change her course to port and accordingly the pilot of the Northfield gave the Mauch Chunk a second signal of two whistles and blew alarm signals in order to attract her attention; that it would have been dangerous to have stopped or backed at this time and the Northfield accordingly kept on at full speed; that there was ample room for the Mauch Chunk to pass astern of the Northfield but instead of directing her course to port, as her two blasts signaled, the Mauch Chunk came on at full speed, apparently under a port helm and struck the Northfield a violent blow just forward of the Northfield's starboard paddle box, cutting her down to the turn of the bilge and penetrating the hull 6 or 8 feet at a distance of five or six feet below the water line; that at the time of the collision, the Northfield's stern was a length and a half or two lengths clear of the end of the easterly ferry rack. Then followed allegations of fault against the Mauch Chunk in several particulars, which will be noticed hereafter, and the ordinary averments necessary to contest the petitioner's liability and to sustain a petition of this character, including a description of actions brought and claims made against the petitioner by parties who were on the Northfield and suffered personal injuries and losses through the collision.

On the 4th of October following, the Central Railroad of New Jersey filed its petition herein for a similar limitation of liability, alleging that, on the day in question, the Mauch Chunk left her slip at Communipaw, Jersey City, New Jersey, with a considerable number of passengers and some vehicles on board, bound for the foot of Whitehall Street, New York, where she was due to arrive at about 6 o'clock P. M.; that the weather was clear and a strong flood tide prevailed; that the Mauch Chunk was cast off from her bridge about 5:54 o'clock P. M.; that she had clear sailing along her customary route and encountered nothing unusual until about two minutes after 6 o'clock, when she was in a position five hundred feet or thereabouts from the Barge Office and about three hundred feet or thereabouts from the spindle which separates Whitehall Street ferry slip from the Rapid Transit Ferry Company's slip; that at that time the attention of the pilot of the Mauch Chunk was attracted by two whistles from the Northfield; that the latter boat was in her slip on the port side of the Mauch Chunk, moving along her rack and a distance of fifteen feet or thereabouts from the bridge; that in such position the courses of the vessels were crossing and the Northfield had the Mauch Chunk on her own starboard bow, in which position it was the duty of the Northfield to keep out of the way of the Mauch Chunk; that the pilot of the Mauch Chunk, realizing it would be highly dangerous if not absolutely impossible for the Northfield to continue coming out of her slip and across the Mauch Chunk's



bow, thereupon immediately and in rapid succession signaled his engineer to slow down, to stop, to back and to back full speed astern; that these signals were all promptly obeyed by the engineer, who threw his throttle wide open and applied live steam on the last signal; that at the earliest possible moment after giving these signals to his engineer the pilot of the Mauch Chunk gave his first signal in reply to the Northfield's two whistles by sounding the alarm signal, consisting of four sharp blasts; that disregarding this warning signal, however, the Northfield continued coming out of her slip, apparently hooked up, and the pilot of the Northfield again blew two whistles; that the Mauch Chunk immediately blew alarm whistles again which were answered by alarm whistles from the Northfield; that at the time the Mauch Chunk first blew her alarm signals the Northfield had ample time to heed them, reverse her engines and return to the bridge; that, furthermore, such a manœuvre was the only prudent one for her to execute; that the collision occurred immediately after the last exchange of alarm whistles, or about thirty seconds after the first two whistles of the Northfield; that at the moment of the collision the stern of the Northfield was lapped on her dock about thirty or forty feet, so that it was impossible for the Mauch Chunk to have directed her course astern of the Northfield; that with her stern thus hinged upon the rack, the Northfield's bow was swung up stream at a slight angle by the strong flood tide, thus bringing the two vessels into collision in such a manner as to knock down the gates, stanchions, deck, sheathing and a portion of the hood on the port side of the bow of the Mauch Chunk and break in the planking of the Northfield just forward of her starboard paddle box. Then follows the charges of fault against the Northfield, which will also be noticed hereafter, and the ordinary averments necessary to contest as well as limit the petitioner's liability, as in the petition of the Ferry Company.

Numerous claims were filed to recover damages for the loss of lives, the personal injuries, and injury to property of those on the Northfield. These claimants alleged fault for the collision on the part of both of the Northfield and Mauch Chunk and that both of the petitioners were in privity with the losses and damages caused by the collision and that neither of them was entitled to any limitation of liability.

Answers were duly filed to the petitions of the Ferry Company and the Railroad Company by each other and by the numerous claimants and issues were raised as to the faults of the respective vessels and as to the privity of the Ferry Company and of the Railroad Company with the alleged negligence of their agents on the vessels.

The faults charged against the Northfield by the Railroad Company are:

- “1. The Northfield was not under command of a competent person.
2. She did not keep a good lookout.
3. She left her slip without blowing a long whistle, commonly known as a slip whistle.
4. She was started from her slip without her captain first ascertaining if the way was clear.

5. She was put under way at full speed before clearing her slip.
6. While she was within the slip her pilot, or those in charge of her, sighted the Mauch Chunk and blew a blast of two whistles, signifying her intention to cross the bows of the Mauch Chunk while the Mauch Chunk had the right of way.
7. Danger of collision being apparent she did not stop and reverse seasonably.
8. She did not make due allowance for the direction and force of the flood tide.
9. Instead of waiting in her slip until the Mauch Chunk had crossed the same and made her landing she started from the slip at full speed, thus bringing about the collision.
10. The Mauch Chunk having the right of way, the Northfield, having her on her own starboard hand, was bound to keep out of the way and did not do so.
11. She did not blow one whistle and did not pass astern of the Mauch Chunk, as she ought to have done."

The faults charged against the Mauch Chunk by the Ferry Company are:

- "1. The Mauch Chunk was not under command of a competent person.
2. She did not keep a good lookout.
3. She did not direct her course to port, as by her assenting signal of two whistles she had indicated her intention of doing.
4. She was proceeding at an excessive rate of speed in crowded waters.
5. In coming round from the North River she proceeded too close to the Battery.
6. She did not stop and reverse seasonably.
7. She did not make due allowance for the direction and force of the flood tide.
8. Instead of starboarding her wheel, and going astern of the Northfield, or stopping and permitting the Northfield to go out of the slip, the Mauch Chunk came on at full speed, thus bringing about the collision.
9. The Mauch Chunk insisted on attempting to enter her slip without waiting, as is usual and customary, for the Staten Island ferry boat to leave her slip on her voyage to Staten Island.
10. The Mauch Chunk did nothing to avoid the collision.
11. After the collision the Mauch Chunk did nothing to assist the Northfield, but entered her own slip, made her landing and departed therefrom on a voyage to New Jersey without attempting to render any assistance to the vessel which she had run down."

The faults urged against the vessels by the claimants are:

The Northfield.

- "1. In starting from the ferry bridge, when her pilot was in a position behind a shed which cut off his view of the Mauch Chunk, at a time when that vessel was entering the East River from the westward, on her usual and known trip, and on a course nearly at right angles with that of the Northfield in leaving her slip.
2. In continuing on her course out of her slip, without having reached a definite agreement with the Mauch Chunk as to the manner in which the vessels should pass each other, under circumstances which left it doubtful that they could pass safely in pursuance of the signals which she gave;
3. In failing, after she had cleared her own slip, to keep out of the way of the Mauch Chunk by stopping and reversing promptly, on seeing that the Mauch Chunk was not checking her headway, or navigating so as to pass under the stern of the Northfield;"

The Mauch Chunk.

- "1. In failing to stand by after the collision; from this fact a statutory presumption of her fault arises;
2. In not maintaining a good lookout;

3. In omitting to give proper whistle signals seasonably, or to act properly on those that she did give;

4. In failing to pass under the stern of the Northfield as she might and should have done;

5. In entering the East River and approaching the mouth of the Northfield's slip, at an unlawful and excessive rate of speed, without using the least degree of caution, at a time when it was known the Northfield was scheduled to start out of her slip, and when, if a proper lookout had been kept, it would have been seen that she had started;

6. In failing to slacken her speed, or stop, or reverse seasonably, in the presence of an obvious danger of collision;

7. In that her navigation was in the charge and control of a negligent and reckless pilot."

The Northfield was raised after the collision and valued at \$5,000; but as such sum would only partly pay for the expenses of the raising, she had no surrender value. The pending freight moneys required to be surrendered, consisting of ferriage on passengers and horses and wagons, amounted to \$25.45 which have been paid into court.

The Mauch Chunk, together with her freight moneys, of the same character as the Northfield's, amounting to \$25, was duly surrendered. Subsequently the boat was sold and produced, after deducting expenses of sale, the sum of \$41,234.25, which sum, with the freight moneys, making altogether \$41,259.25, is in court.

The claims for damages that have been filed greatly exceed these sums.

From the great mass of testimony taken in the cases, much of which is conflicting upon several material points, I gather the following:

The Northfield was a side wheel boat about 210 feet long, with three decks; main, saloon and hurricane. Her two pilot houses were on the hurricane deck, about 22 feet above the water. They were about 110 feet apart and about 50 feet from the bow at each end. Her full speed was about 10 miles an hour. The tide was the last of the flood and running to the eastward between 3 and 4 miles an hour. The easterly rack of the ferry slip running along pier 1, was about 260 feet long and extended about 50 feet out in the river from the bow of the boat as she lay in the slip. The westerly rack was about 100 feet long and extended to about the paddle box of the boat. There was a clear view to the westward from the forward pilot house, embracing the slip of the Mauch Chunk, but from the rear pilot house, such view was obscured by buildings until the boat moved outward some little distance.

When the Northfield was cast off from her bridge, a few seconds after six o'clock, the pilot went into the rear pilot house and sounded a long warning whistle indicating that the boat was about to start. He then started the boat slowly ahead under one bell. He could not see the Mauch Chunk from there, but as the Northfield moved out, and after she had gone 20 or 25 feet, he stepped forward and saw the Mauch Chunk as he left the pilot house. He estimated that she was then about 900 or 1,000 feet away and about 400 feet out from the Battery Wall, coming for the neighborhood of her slip, which was bounded on the west by pier 1. The quartermaster

of the Northfield had been in the forward pilot house for several minutes before the boat started and from there had seen the Mauch Chunk leave her slip at Communipaw. He had put the helm hard aport before the starting and fastened the wheel in a becket. When the Northfield, under the starting bell given by the pilot, had moved out about 30 or 40 feet, so that her forward pilot house was beyond a pavilion, about 170 feet long, on pier 1, and the quartermaster had a clear view up the river also, he blew a signal of two whistles to the Mauch Chunk and hooked his engine up. By this time, the boat was about 75 feet from the bridge and the pilot was then approaching the forward wheel house, which he immediately afterwards entered and remarked to the quartermaster that the Mauch Chunk was not stopping or observing the two whistle signal and he changed the wheel to starboard to throw the stern of the Northfield up the river to the eastward and the bow to the westward, and blew a second signal of two whistles, which was not answered, but both boats then blew alarm signals and they shortly afterwards collided, the Mauch Chunk striking, with her bow, the Northfield on the starboard side just forward of the paddle box. In the meantime, the Northfield had progressed so far up and out in the river that at the time of the collision her stern was clear of pier 1 and her bow had been carried by the tide about 50 feet above the starting place.

The Mauch Chunk started as alleged in the petition of the Railroad Company. She was a propeller, about 160 feet long, with two decks. The pilot houses were on the upper deck, about 25 feet above the water. Her full speed was about 9 miles an hour. As aided by the tidal current, she was making about  $12\frac{1}{2}$  miles, as she first approached the Northfield.

She had no lookout. No one on her heard the warning signal of the Northfield or noticed that she was moving out of her slip until she blew the signal of two whistles. What signal was given by the Mauch Chunk in reply to the Northfield's signal of two blasts is greatly disputed. A number of witnesses on the Northfield and other boats in the vicinity testify that the Mauch Chunk blew a signal of two blasts in reply, indicating an intention to permit the Northfield to go ahead, as the latter had requested. On the other hand, those on the Mauch Chunk testify that when they heard the signal from the Northfield, the Mauch Chunk immediately responded with alarm whistles, as the distance between the boats was not great enough to permit the Northfield's passage ahead. Usually more weight is to be given to the testimony of the witnesses on board of a vessel as to what occurred there than to that of witnesses elsewhere and I am inclined to adopt the Mauch Chunk's contention that she did not consent to the proposed manoeuvre of the Northfield.

It is contended on behalf of the Mauch Chunk that she was only about 300 feet away when the two blast signal was given by the Northfield. This I doubt. The preponderance of testimony shows that the Mauch Chunk was probably 600 or 700 feet to the westward from the Northfield on a line from 200 to 300 feet to the southward, so that she was about 700 feet away when the Northfield's two blast signal was given and that after this, she approached nearer

her slip, under a starboard helm. But with this distance between the boats, the Mauch Chunk, going, with the tide, about 1,250 feet to the minute, was about a half a minute away from collision, unless she immediately took measures to bring herself to a standstill. She was still under considerable headway at the time the boats came together and it is evident that she did not take measures to stop in time which she should have done, as it was evident that the Northfield intended to try to cross her bow and that it would be impossible for her to do so unless the Mauch Chunk stopped her headway.

I conclude that both vessels were in fault for the collision:

#### The Northfield.

1. In not keeping within her slip until the Mauch Chunk was out of the way.
2. In proceeding forward at full speed when the vessels were in a position to be in danger of collision from a forward movement of the Northfield.
3. In not reversing when it became obvious that the Mauch Chunk would not yield the right of way.

#### The Mauch Chunk.

1. In failing to keep a good lookout.
2. In failing to hear the warning signal of the Northfield.
3. In failing to see that the Northfield had started from her slip until she was about 75 feet from her bridge.
4. In failing to give the Northfield a timely signal that she intended to cross the Northfield's bow.
5. In failing to reverse immediately when it became apparent that the Northfield was attempting to cross her bows.

Considerable stress has been laid in the argument for an exoneration of the Mauch Chunk, upon the fact that the Northfield had the Mauch Chunk on her own starboard side and that it was the duty of the Northfield to keep out of the way of the Mauch Chunk and of the latter to keep her course and speed. It would have been obvious to the Mauch Chunk, if she had fulfilled her duty of seeing the movements of the Northfield from the beginning, that the Northfield was not navigating according to the starboard hand rule and that she intended to go ahead. She could not possibly go under the stern of the Mauch Chunk, as the force of the tide, notwithstanding anything the Northfield could do, necessarily carried her up the river and across the course of the Mauch Chunk, so that the rule, if it applied to the case of the steamboat just leaving her slip, afforded no excuse to the Mauch Chunk here. Moreover, if the rules came into operation immediately upon the Northfield leaving her bridge, the Mauch Chunk was not navigating in conformity with them, as instead of keeping her course and speed, she starboarded her helm and changed her course to the port, after the Northfield started. The main cause of the collision, in my judgment, was the assumption on the part of the Northfield that the Mauch Chunk would give way to her and the failure on the part of the Mauch Chunk to observe what the Northfield was attempting to do and to

reverse in time to avoid the collision. It was a clear case of negligence on the part of both of the boats.

The principal difficulty in the case is to determine whether the petitioners are entitled to limit their liability.

The Act under which the petitioners claim the right to limit provides (Rev. St. [2d Ed.] p. 827, § 4283 [U. S. Comp. St. 1901, p. 2943]):

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The object of the law has been authoritatively declared in *Norwich Company v. Wright*, 13 Wall. 104, 121, 20 L. Ed. 585, as follows:

"In view of the fact that the limited liability of ship-owners was, by the general maritime law, extended to all acts of the master except contracts for the benefit of the ship, and in most places even to these; and of the fact, that the English statutes expressly extended it to cases of collision as well as to injuries to cargoes; we see no reason why the fair and natural construction should not be given to the act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction. The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount."

The general expressions used by Mr. Justice Bradley, in thus stating the objects of the law, referred particularly to the hazards incurred in the use of ships and by sea ventures and the Act, as at first passed, excluded from its benefits the owners of vessels of any description used in rivers or inland navigation, (Id. § 4289) but in 1875 and 1886 it was extended to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges and lighters (U. S. Comp. St. 1901, p. 2945) and the original Act always covered the vicinity of this collision, as the waters of the East River belong to the coast waters of the United States (*The Garden City* [D. C.] 26 Fed. 766). Corporations are regarded as individuals and the reason of the rule applies in a case of this kind. The petitioners are, therefore, as much entitled to the protection the Act gives as if the collision had occurred between ships in a remote place, provided it appears that there was no privity or knowledge on their part in the acts of negligence causing it.

Such privity or knowledge on the part of the Ferry Company, is urged by the claimants in several particulars, viz.:

"1. It voluntarily and without lawful authority permitted the other petitioner to use and occupy, for ferry purposes, the easterly one of the two slips

which it leased and controlled, under circumstances which made it necessary for its own boats to cross the course of the boats of the other petitioner at frequent intervals, in a manner attended by danger of collision, without establishing or promulgating, as it had the power to do, rules and regulations to avoid the danger which it knew resulted, and was liable to arise at or about the hour of the day when the collision occurred;

2. It knowingly permitted the pilot, in a negligent manner, to start the boat from the ferrybridge while he was standing on the stern of the boat behind a shed which cut off his view of vessels rounding the battery from the westward, and at a time when it was known the Mauch Chunk was due to arrive at her slip and was probably approaching it."

1. It appears that the Rapid Transit Ferry Company had actual control of the slip next to its own and leased it to the Central Railroad Company of New Jersey. There can be no question, as far as this case is concerned, of the lawful occupation of the slip by the Railroad Company.

There was no authority on the part of the Ferry Company to make regulations for the government of the Railroad Company's boats. The navigation of the boats was governed by law, over which the lessor has no control.

2. This question would be an important one, if it did not appear that the negligent act, which the company was alleged to be in privity with, was not a cause of the collision. The starting of the boat by the pilot from the rear pilot house was undoubtedly negligent, and it is not clear that such negligence was not participated in by the company whose responsible agents on shore were, or should have been, cognizant of the method of proceeding which was usually employed—*The Republic*, 61 Fed. 109, 9 C. C. A. 386—but the negligent act which precipitated the collision, was not the starting of the boat, but her continuance, with an accelerated speed, out beyond the confines of her slip. Until the pilot reached the forward pilot house, the movements of the boat were under the control of the quartermaster. If instead of ringing up full speed, after the boat had progressed a short distance from the bridge, he had stopped the engine, or if necessary reversed it, the boat would not have gone out into the waters where she collided but remained within the protection of the slip. The negligence which brought about the Northfield's share in the disaster, was the negligence of those navigating the boat when she was entirely beyond the control of the petitioner's agents on shore.

It is also urged by the claimants that the Railroad Company was in privity with its agents in the following particulars:

"1. It was operating a ferry to and from a slip next adjacent, to the eastward, of Pier 1, East River, without lawful authority, by virtue of an agreement with the petitioner, the Rapid Transit Ferry Co., under which it was necessary for its boats to cross, at frequent intervals, the mouth of the slip used by boats of the Rapid Transit Company in circumstances of danger; and that it neglected to establish or promulgate needful rules or regulations to avoid the danger that it knew resulted, or was liable to arise, at or about the hour of the day when the collision occurred;

2. It failed to have the regulations for the prevention of collision posted up in the pilot-house in a place where they could be read by the pilots.

3. It maintained in the command and control of the Mauch Chunk a pilot whom it knew to be reckless and unfit for the position."

1. The question to be determined is not whether the ferry was being legally operated. The company had a right to use their boats upon the public waters and to seek landings for them at convenient places. The navigation of the boats was governed by law, as in the case of the Ferry Company, and the petitioner is not in fault for the absence of special regulations for its own boats.

2. The Act of June 7, 1897—30 Stat. 102, c. 4, § 2, 2 Supp. Rev. St. 1892-1897, p. 626 [U. S. Comp. St. 1901, p. 2884]—provided for the furnishing of the Inspectors' Rules to ferry boats and steam vessels and for their posting in "conspicuous places" in such vessels.

It appears that the rules were tacked up on the ceiling of the pilot house over the heads of the navigators. The pilot, in excuse for his failure to fully state the rules on his cross examination, testified that he had never studied them a great deal, because they were not posted where he could see them.

It was the duty of the petitioner to provide for a compliance with the law regarding the posting of the rules and such a compliance involved posting them where they could easily be read but I cannot conclude that the pilot in this case was incompetent because of any inability to see the rules by reason of their position. He had been master of steamboats for 27 years and by his testimony showed a reasonable familiarity with the text of the rules. It was not because the pilot did not know the rules that he participated in the faults of the collision but because he neglected to apply those which he knew very well, requiring him to give a whistle signal of his proposed course and to stop and reverse the engines of his boat in time.

3. There is no evidence that the petitioner knew the pilot to be reckless or unfit for his position, or that he was so.

I must, therefore, hold that the allegations of privity or knowledge on the part of the petitioners are not sustained.

Decrees will be entered limiting the liability of the petitioners, and holding both of them liable to the extent of the surrendered values of the colliding vessels and freight. An order of reference will also be entered to ascertain the extent of the claims of the parties who have suffered loss by the collision.

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#### WILLIARD v. SPARTANBURG, U. & C. R. CO. et al.

(Circuit Court, D. South Carolina. August 17, 1903.)

#### 1. CORPORATIONS—DISSOLUTION—EFFECT OF SALE OF PROPERTY AND FRANCHISES.

A railroad company chartered by the Legislature of a state, whose charter has not been repealed, and which has not been dissolved by legal proceedings, exists as a legal entity, although all of its property, including its franchise to operate a railroad, has been sold under a valid mortgage, and it has ceased to hold meetings or to elect officers or directors.

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¶ 1. See Corporations, vol. 12, Cent. Dig. §§ 2403, 2404, 2409; Railroads, vol. 41, Cent. Dig. § 642½.



**2. PARTIES—ACTION FOR INJURY TO SERVANT.**

A railroad company, whose property and franchises have been sold under a valid mortgage, and who has for years been out of possession, has no interest in an action by an employé of a lessee of the purchaser to recover for personal injuries sustained in the performance of his duties through the alleged negligent operation of the road by such lessee, and is neither a necessary nor a proper party.

**3. RAILROADS—INJURY TO LESSEE'S SERVANT—LIABILITY OF LESSOR.**

Assuming that a railroad company, so long as its corporate existence continues, cannot divest itself of the obligation to perform the duties to the general public imposed by its charter by any lease of its road, it stands in an entirely different relation toward employés of its lessee, and cannot be charged with liability for an injury to such an employé through the negligence of his employer in operating the road.

**4. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.**

An action by an employé of a railroad company operating a railroad under a lease, against such company and its lessor, to recover for a personal injury alleged to have been due to the negligence of another employé of the same employer, presents a separable controversy, and the cause is removable by the lessee company, where it is a corporation of another state.

On Motion to Remand to State Court.

V. E. De Pass and Stanyarne Wilson, for plaintiff.

C. P. Sanders, for defendants.

SIMONTON, Circuit Judge. This action was originally brought in the court of common pleas of the state of South Carolina for Union county, some time in the year 1902, apparently in the month of August. The defendant the Southern Railway Company answered the complaint, and at the same time filed its petition, with bond, for removal into this court, upon the ground that it was the only real defendant in the suit; that the true controversy was with it; and that the plaintiff is a citizen and resident of the state of South Carolina, and it is a corporation of the state of Virginia. The cause having been removed into this court, it now comes up on a motion to remand. This motion presents issues of fact and of law upon the determination of which the result depends.

The plaintiff alleges that the Spartanburg, Union & Columbia Railroad Company, one of the defendants, was and is the owner of the railroad extending from Columbia to Spartanburg, in said state, and passing through the town of Union; that at the time hereinafter mentioned—the date of the cause of action—the Southern Railway Company, the other defendant, a corporation of the state of Virginia, was and is now a common carrier leasing and operating said line of railway together with the tracks, cars, locomotives, and other appurtenances thereto belonging; that the plaintiff was a brakeman of a switch engine train usually operated in or near the depot yards of the Spartanburg, Union & Columbia Railroad Company in the employ of the defendants (in the plural), and was injured on the 5th August, 1902, by reason of the negligence of the conductor of said

¶ 4. Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.

train, said conductor being then and there the agent and representative of the defendants. He lays his damages at \$15,000. The defendant the Southern Railway Company, in its answer, denies the existence of any such corporation as the Spartanburg, Union & Columbia Railroad Company, denies that it held or operated this road under a lease from that company, admits that plaintiff was in its employment at the date of this accident, and denies any liability therefor. At the hearing of this motion the following agreed statement of facts was submitted and used in argument:

"That several years prior to the 5th day of August, 1902, the Spartanburg, Union & Columbia Railroad Company mortgaged its entire property, including its franchises, railroad tracks, roadbed, rights of way, depots, engines, cars, and rolling stock of every description to the Central Trust Company of New York, and that thereafter, but prior to the 5th of August, 1902, the said Spartanburg, Union & Columbia Railroad Company sold and conveyed all of its property, including its franchises, rights of way, roadbed and tracks, station houses, cars, engines, and rolling stock, to the Asheville & Spartanburg Railroad Company, which sale and conveyance was duly authorized by its stockholders; and that thereafter, and prior to the 5th day of August, 1902, the Asheville & Spartanburg Railroad Company consolidated with the South Carolina & Georgia Railroad Company, the Carolina Midland Railway Company, and the South Carolina & Georgia Extension Railroad Company, and on the \_\_\_\_\_ day of \_\_\_\_\_, 1902, leased such consolidated property, including the roadbed, track, station houses, switch tracks, cars, engines, and all rolling stock, belonging to such consolidated company, to the Southern Railway Company; and that prior to and on the 5th day of August, 1902, the Southern Railway Company, as lessee, was in the exclusive use, control, and operation of all of such property. It is further admitted that the Spartanburg, Union & Columbia Railroad Company has not been in the possession or control of any part of the tracks, roadbeds, switches, station houses, or of any of its cars, engines, or rolling stock since the sale and conveyance to the Asheville & Spartanburg Railroad Company, nor was it operating or controlling any of said tracks, roadbeds, switches, station houses, cars, or engines on the 5th day of August, 1902. It is further admitted that there has been no decree of court, or any legal winding up or dissolution of the Spartanburg, Union & Columbia Railroad Company, but that the organization of said company has not been preserved by annual meetings and elections of officers. It is further admitted that the plaintiff and the conductor, by whose alleged negligence the plaintiff is alleged to have been injured, were prior to and at the time of the alleged injury in the sole and exclusive employment of the Southern Railway Company, and that they were at work in the service of the said Southern Railway Company, and not in the service of the Spartanburg, Union & Columbia Railroad Company, at the time of such alleged injuries."

The solution of this case will depend upon these questions: First. Is the Spartanburg, Union & Columbia Railroad Company an existing corporation? Second. If it is, is it a necessary or proper party in this case having any interest in the issues involved therein? Third. If it has any interest in these issues, is that interest such that the controversy between it and the plaintiff is the same as that between the plaintiff and its codefendant the Southern Railway Company, or is the controversy between these two defendants separable?

The Spartanburg, Union & Columbia Railroad Company was incorporated by an act of the General Assembly of South Carolina. The act not only created the artificial being, the corporation, but it clothed it with certain franchises; among these, to operate its road as a common carrier of passengers and merchandise between its

termini, to lease its road, and to mortgage all its property, and to include therein its franchises. Pursuing its powers under its charter, this company did mortgage its entire property, including its franchises, and by a foreclosure in pais in satisfaction of the mortgage it conveyed all the property mortgaged to the Asheville & Spartanburg Railroad Company. This latter company consolidated with certain other companies, which consolidation was approved by the General Assembly of South Carolina. The Southern Railway Company, at the time of the accident complained of, under a lease from the consolidated companies, was in the exclusive possession and operation of the track theretofore of the Spartanburg, Union & Columbia Railroad Company, and the sole owners of the rolling stock thereon. The act incorporating the Spartanburg, Union & Columbia Railroad Company has not been repealed, nor has this corporation been legally dissolved. As a legal entity, it exists.

Under these circumstances is it a proper or necessary party to this suit, having any interest in the issues involved therein? The charter of this company gave to it the right to mortgage its entire property, including its franchises; that is to say, certainly its franchise to operate its road between its termini. This right to mortgage involved all the incidents of a mortgage; that is to say, the mortgagor gave, and the mortgagee took, not only the security of the mortgage, but also the right to enforce it by foreclosure and sale. To this right was essential the power under sale to give clear title to a purchaser. The railroad company exercised this power of mortgage. The mortgage was enforced and foreclosed. A sale was had thereunder, and all of the property of the Spartanburg, Union & Columbia Railroad Company; that is to say, its roadbed, side tracks, plant, and rolling stock ceased to belong to it, and passed to the purchaser, the Asheville & Spartanburg Railroad Company, long before this accident occurred. This Asheville & Spartanburg Railroad Company consolidated with others, and the consolidation leased to the Southern Railway Company. So at the date of this accident there was and could be no privity whatever between the Southern and the Spartanburg, Union & Columbia, no joint or other responsibility between them. The plaintiff was a brakeman on a shifting engine used in operating the road by the former company, operating it under a contract with that company, and none other. He had no contract with, owed no service to, the Spartanburg, Union & Columbia Railroad Company. The charter of that company, its mortgage thereunder, the sale under the mortgage, the consolidation of the companies, and the lease of the Southern are all matters of public record. The plaintiff himself knew with whom he contracted, and in bringing the Spartanburg, Union & Columbia Railroad Company into this controversy he had not a shadow of claim therefor.

Let us assume, however, for the purposes of this discussion, and in deference to the able argument of the counsel for the plaintiff, that by no act, either by way of lease or of mortgage, the Spartanburg, Union & Columbia Railroad Company could divest itself of the duties assumed by it when it accepted its charter, certainly so long as that charter remains unrepealed. "A railroad corporation

cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees." *Washington, etc., R. R. Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675. And even when, by law, it is authorized to lease its railway, so that however the lessee shall be liable to the same extent as the lessor, this will not discharge the lessor from any of its corporate liabilities. *Chicago, etc., R. R. v. Crane*, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. Ed. 1064. And so it has been held that the public can hold the lessor company responsible for injuries resulting from defects in the roadbed, from insufficient plant, and in some states even from acts of negligence of the lessee. *Natl. Bk. v. Railway Co.*, 25 S. C. 222; *Harmon v. R. R. Co.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686; *Parr v. R. R.*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826. But the present action is brought not by one of the public injured by the operation of the lessee railroad, but by an employé of the lessee, injured in the performance of his duty through the negligence of an employé of the lessee, and not from any structural defect in the road. The action is based on a tort quasi ex contractu, growing out of the contract of service and a breach of duty under that contract. There is no such contractual relation between the employé of the lessee with the lessor, and consequently no breach of duty upon which an action could arise. 2 *Elliott on Railroads*, § 472. In *Nugent v. Boston, etc., R. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, this subject is elaborately discussed, and the position of the text-writer sustained. So, also, in *East Line, etc., Ry. Co. v. Culberson* (Tex. Sup.) 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 807, the same subject is discussed, and the same conclusion is reached. In this case the court, among other things, says:

"It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road, and it may be asked does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligations to him? It may be that, if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping the road would be liable. But, if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employés by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be liable merely because it owned the road."

The court also says:

"Where, in similar cases, a recovery has been permitted against a lessor, it has usually been allowed upon various considerations of public policy: First, because the franchises granted are in the nature of a personal trust, and sound policy demands, so far as the general public is concerned, that the corporation receiving the grant should be held responsible for the proper execution of the powers granted; second, for the reason that to deny the liability of the lessor would enable a railroad to shirk its responsibility, and to injure the public by placing its property under the control of irresponsible parties. And, third, because a person who had received an injury at the hands of the operating company, and was ignorant of the relations between that company and the owner of the road, might be at a loss to determine

against which to bring his action, and thereby be placed at a disadvantage in seeking redress."

None of these apply to the case of a servant of a lessee who is injured through the neglect of his employer. He needs no protection as one of the general public, because he can enter the service or not, as he chooses. He is under no compulsion to take employment from an irresponsible company, and he certainly knows whom to sue for a wrong inflicted through his employer's neglect, for the latter is certainly liable to him in such case. The reason of the rule which holds the lessor liable fails in the case of an employé of the lessee, and we think that to follow it in a case like this would be to give it an arbitrary, and not a reasonable, application. The same question is discussed and the same conclusion is reached by the Circuit Court of Appeals of the Sixth Circuit (Taft and Lurton, Circuit Judges) in *Hukill v. Maysville, etc., R. R. Co.* (C. C.) 72 Fed. 752. The question, and the authorities bearing upon it, are elaborately discussed, and the distinction between the action of an employé of the operating company and that of one of the public is forcibly and clearly put. In its learned opinion the court uses this language:

"A person entering the employment of the lessee company acquired no right against the lessee except by virtue of the terms of employment. Such employé came into no privity of contract with the lessor company. No case has been cited to us in which it is held that the servant of the lessee company, even when operating under a void lease, can recover against the lessor company for injuries sustained by the negligence of the lessee company in the operation of the road."

The agreed statement of facts conclusively states that at the time of this accident the Spartanburg, Union & Columbia Railroad was, and for a long period had been, out of possession and control of the railroad, and that the Southern Railway Company was in exclusive possession and operation thereof, and that the plaintiff and the conductor, by whose negligence in charge of the train plaintiff was injured, were both at work in the service of the Southern Railway and not of the Spartanburg, Union & Columbia Railroad. Under these authorities no sort of liability accrued against the last-named railroad. The Southern Railway Company alone is liable.

Apart from all this, is there a separable controversy in this case? Judge Phillips, in *Kelly v. Chicago, &c., Ry. Co.* (C. C.) 122 Fed. 291, in a case in all respects like this, discusses this point, and holds the controversy separable. He says:

"The issues apparent on the face of the petition, in point of fact and law, are not identical as to these defendants. The one is not liable if there be no contract of lease or running arrangement, no matter what was the negligent act of the other, and the other would be liable for its negligent act, no matter if there be no such contractual relation between the two companies. The controversy, therefore, is separable."

He concludes that they were not joint tortfeasors, and for this quotes Bliss on Code Pleading (3d Ed.) § 83:

"Persons are not jointly liable for a tort merely because they have some connection with it, even if it may give a several cause of action against them. There must be a co-operation in fact."

And, quoting Pomeroy's Civil Procedure:

"There must be some community in the wrongdoing among the parties who are united as codefendants. The injury must be in some sense their joint work."

Taking the complaint and the admitted facts, no other conclusion can be drawn than that the tort charged here was committed by the agent of the Southern Railway, alone, upon another agent of the same company.

It is clear from all that has been said that the Spartanburg, Union & Columbia Railroad Company has no interest whatever in the issues in this case; that it is neither a necessary nor a proper party. This being so, and the Southern Railway Company, the only other defendant, being the only party against whom a cause of action is stated, and a citizen of the state of Virginia, had the right to remove the cause into this court. *Wormley v. Wormley*, 8 Wheat. 451, 5 L. Ed. 651; *Wilson v. Oswego Township*, 151 U. S. 64, 14 Sup. Ct. 259, 38 L. Ed. 70; *Arrowsmith v. Nashville (C. C.)* 57 Fed. 165; *Thayer v. Life Association*, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; *Barney v. Latham*, 103 U. S. 214, 26 L. Ed. 514. It is unnecessary to consider whether the Spartanburg, Union & Columbia Railroad Company is a sham party, or that its name was inserted to defeat the jurisdiction of this court—a proposition the court will not willingly entertain, and would be loath to believe.

The motion to remand the cause is refused.

### TRIDELL v. MUNHALL.

(Circuit Court, W. D. Pennsylvania. July 8, 1903.)

No. 30.

#### 1. TRIAL—SENDING OUT PAPERS WITH JURY—PRACTICE.

Where the plaintiff's statement of claim has been made the basis of the court's instructions, and virtually incorporated into them, it is no error to send it out with the jury when they retire to make up their verdict.

#### 2. NEW TRIAL—EXCESSIVE VERDICT—EVIDENCE.

A verdict of \$6,000 for board, room, and care in sickness, furnished during a period of ten years, will not be disturbed as excessive, where, in addition to direct proof with regard to their character and value, the person to whom they were furnished had suggested \$1,000 a year as that which he was willing to pay.

#### 3. STATUTE OF LIMITATIONS—BAR OF, HOW REMOVED.

Under the Illinois statute of limitation, which bars a simple debt after five years, it is sufficient, in order to remove the bar, to show an express promise to pay, or a conditional promise, with a performance of the condition, or an unconditional admission of the justness of the debt.

#### 4. SAME—ACKNOWLEDGMENT—CONDITIONAL PROMISE TO PAY

An acknowledgment is only effective because of the promise to pay which is implied in it, and the same is true of a payment on account. Where, therefore, either is accompanied by an express promise as to how the debt is to be paid, there can be no implication outside of it. The

¶ 4. See Limitation of Actions, vol. 33, Cent. Dig. § 609.

debtor, in waiving the statute, is entitled to make his own terms, and by these alone is he to be bound. A conditional promise to pay is not sufficient, therefore, although accompanied with an express acknowledgment and a payment on account, without proof that the condition has been fulfilled.

5. SAME—PROMISE TO PAY OUT OF SPECIAL FUND.

An Illinois debtor, whose debt was barred by the statute, after acknowledging that he had promised the plaintiff, if she would let him have a home with her, and his board, room, and care, that he would pay her well when he got the property that was coming to him from his father's estate, promised payment of the debt in the following terms: "And now I am glad to say the time has come when I am about ready to do so, and I will be able to do it; for my father has died, and the estate is being divided. I will have my portion, and have it soon. If you will be perfectly satisfied with that, I will pay you \$10,000 from this money which is coming to me from my father's estate. I will pay you some of it now to go to Denver with, and the balance I feel sure that I will have by the time you get back, and I will pay it to you then." *Held* to be a conditional promise, on which the plaintiff was not entitled to recover, without proof that enough had been paid to him from his father's estate to make good his undertaking, or had at least been defined, if not actually set apart to him, by an account.

Rule for a New Trial. Also Rule for Judgment Non Obstante Veredicto on Reserved Point.

Jno. B. Chapman and A. C. Gettys, for plaintiff.

W. A. Way, for defendant.

ARCHBALD, District Judge.\* According to the Pennsylvania practice, it is largely for the trial judge to say what papers shall go out with the jury, and the sending out of a declaration, and of a mechanic's claim with a bill of particulars attached, which amounts to the same thing, have been expressly sanctioned. *Hall v. Rupley*, 10 Pa. 231; *Odd Fellows Hall v. Masser*, 24 Pa. 507, 64 Am. Dec. 675. This may not be controlling on the federal courts, but it is at least suggestive, particularly as it is sustained by the general practice. Thus, in *Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243, it was held permissible to allow the pleadings to go out; and in *Bluedorn v. Pacific Railway*, 121 Mo. 258, 25 S. W. 943, it was said to be within the discretion of the court to do so; while in *McGinty v. Keokuk*, 66 Iowa, 725, 24 N. W. 506, it was considered no error where the jury had been correctly instructed on the issues; and in *Smith v. Holcomb*, 99 Mass. 552, the sending out of an amendment to the writ increasing the damages claimed was allowed. In the present instance it was peculiarly important that the jury have the plaintiff's statement before them, not only because it showed the specific items of her claim, but because the charge of the court was directly based upon it. Going over it item by item, attention was called to the evidence bearing on each, and the discrepancies between the amounts proved and those claimed pointed out. Certain of them also were directed to be entirely disregarded, as being without evidence to sustain them. The statement was thus virtually incorporated into the charge, and it is difficult to see how the jury could have followed and applied their

\* Specially assigned.

instructions without having it before them. I am not convinced that the discretion of the court in allowing it was wrongly exercised.

The jury gave a verdict which aggregated \$6,000. This covered whatever was furnished by the plaintiff to the defendant in the way of board and services for a period of about 10 years, and on an average would amount to \$600 yearly—an estimate which no doubt guided the jury, to a certain extent, in the verdict rendered. The question is whether this was warranted by the evidence. It must be confessed that the items of claim as set out in the declaration are open to the criticism made of them by the defendant's counsel, and, if there was nothing more in the case than the direct proof with regard to their character, extent, and value, the verdict could hardly be sustained. But in addition to this, such as it was, we have the testimony of several witnesses that the decedent himself put an estimate on what the plaintiff had done for him considerably in excess of the verdict, speaking of \$1,000 per year, and inquiring of the plaintiff if that would be satisfactory. It is also to be remembered that the decedent had something more than his mere room and board; and, while it is shown that he did some little work at times as a waiter, it does not appear to have been very much, and the plaintiff meanwhile, with little hope of recompense, not only supplied him with the necessities of life, but gave him a home, nursing him and caring for him, whether able and inclined to work or not. If the witnesses are to be believed, the decedent intended that ultimately she should be paid for it, and paid well, and in the light of their testimony it cannot be said that the verdict is excessive. Six hundred dollars per year may be fully as much as the services rendered were worth, judged by what testimony we have with regard to them directly, but, taking all the evidence, I cannot see that it goes beyond all bounds. The amount was for the jury, and I do not feel called upon to disturb their verdict.

The rule for a new trial is discharged.

The real question in the case is raised by the reserved point. The action was brought July 5, 1902, and according to the law of Illinois, where the case arises, all of the plaintiff's claim over five years old was barred by the statute of limitations, unless the bar was removed by a new promise or a subsequent unambiguous acknowledgment or payment on account. Under the instructions of the court the jury separated that which they found due prior to July 5, 1897, from that which was subsequent, and their verdict as to the former was taken subject to the point reserved, whether as to that part of the claim there was any evidence sufficient to toll the statute. This question is to be determined by the local law, and the decisions of the Illinois courts are controlling. They are in a general way in line with those of other states, but by no means hold to the stringent rule which prevails in Pennsylvania. It is sufficient, in order to remove the bar, to show "an express promise to pay the money, or a conditional promise with a performance of the condition, or an unconditional admission of the justness of the debt." *Parsons v. Northern Illinois Coal & Iron Company*, 38 Ill. 430; *Carroll v. Forsyth*, 69 Ill. 127; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47. According to Wal-



dron v. Alexander, 136 Ill. 550, 27 N. E. 41, the acknowledgment and promise to pay, to be sufficient, must arise out of facts which identify the debt with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it. And in O'Hara v. Murphy, 196 Ill. 599, 63 N. E. 1081, it was said that a promise by the defendant to pay the plaintiff every cent he owed him sufficiently identifies the debt in the absence of proof that there is any debt or account between the parties other than the one sued on. So in Ditch v. Vollhardt, 82 Ill. 134, where the debtor admitted that he owed about \$1,500, but said he could not fix the precise amount until a settlement was had, and promised to pay a part at a date named, it was held sufficient. As to what is or is not to be regarded as a condition, the case of Horner v. Starkey, 27 Ill. 13 (s. c., sub nom. Sennott v. Horner, 30 Ill. 429), is instructive. It was there declared by the maker of certain promissory notes that if the payee would wait awhile he would pay them; that he was not in a condition to pay them then, but when he made a raise he would do so; and this was held to be an absolute promise. "If his language is properly reported," says Caton, C. J., "he meant to convey the idea that he would certainly pay the debt, but wanted further time to do so. \* \* \* He did not intend to convey the meaning that he would pay only upon the condition that his circumstances should subsequently so improve as to place in his hands the means to do so." On the other hand in Mullett v. Shrumph, 27 Ill. 107, where the defendant said he would settle as soon as he got the money for certain work: "This," says the same learned justice, "was a conditional promise, and could neither serve for the foundation of an action itself, nor waive the statute of limitations, without at least proving that the defendant had received the money." So, in Boone v. A'Hern, 98 Ill. App. 610, a declaration by the defendant that he would pay if he had the money, and that when he got it he would do so, is not good without proof that the latter condition has been fulfilled.

These views are in accord with the general trend of the authorities. Thus, in Philips v. Philips, 3 Hare, 281, it is said by Wigram, V. C.:

"If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay for it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by installments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

This is quoted with approval in Shepherd v. Thompson, 122 U. S. 231, 7 Sup. Ct. 1229, 30 L. Ed. 1156, where the pledge of a claim against the government to secure a debt barred by the statute was held to exclude any implication of a personal promise to pay, provision having been made for payment in a particular way. So, in Hanson v. Towle, 19 Kan. 273, where there was a promise to pay as soon as the money could be realized by the defendant, an administrator, out of the estate which he represented, it was held that he was not bound to pay until he had done so. And in Shown v. Hawkins, 85 Tenn. 214, 2 S. W. 34, a promise to pay when the debtor had collected the amount due him from a specified source was held conditional, and not enforceable until it appeared that the contingency expressed had

happened. Even in *Stowell v. Fowler*, 59 N. H. 585, on which the plaintiff relies, where the debtor declared that he expected his mother to die, and if she died he would settle up the matter, the promise was regarded as at least contingent on his being in funds.

Enlightened by these authorities, let us look at the case in hand. The testimony principally relied upon by the plaintiff is that of C. J. Waring. He states, in substance, that he was present at a conversation in which the decedent, Harry Munhall, in June, 1901, eight months before his death, declared that he had had his board, room, care, and clothing from Mrs. Tridell for about ten years, and proposed to her to pay at the rate of \$1,000 a year for it, if that would be satisfactory. In response to a question from the witness, he said that he had not paid her much during that time, because he had not been able to work, but that he had told her when they went into the house which she took on Paige street, Chicago, if she would let him have a home there, and his board and room and care, he would be able to pay her well for it, and would pay her when he got the property that was coming to him from his father's estate. "'And now,' [to use the words of the witness], he says, 'I have been promising you that all along during these years, and \* \* \* I am glad to say \* \* \* the time has come \* \* \* when I am about ready to do that, and will be able to do it, for my father has died and the estate is being divided. I will have my portion, and will have it very soon. \* \* \* If you will be perfectly satisfied with that, \* \* \* I will give you \$10,000 from this money that is coming to me from my father's estate. I will pay you some of it now to go to Denver with, and the balance I feel sure that I will have by the time that you will get back, and will pay it to you then.'" The witness further says that within a few days after that he saw Munhall pay Mrs. Tridell \$20, and a day or two later \$20 more, stating at the time that it was on account of what he owed her. As an acknowledgment, this was certainly sufficiently specific and positive. The debt was identified, both in character and amount, and the intention of ultimately paying it was asserted, and in proof of that intention there was an actual payment on account. And while it is no doubt true, as declared in *Hahn v. Gates*, 102 Ill. App. 385, that something more than a mere acknowledgment is necessary, if the case rested on the sufficiency of it in the present instance I should not hesitate to hold that the bar of the statute of limitations had been removed. But an acknowledgment is only effective because of the promise to pay which is to be implied from it; and the same is true of a payment on account. Where, therefore, either is accompanied by an express promise as to how the debt is to be paid, there can be no implication outside of it. The debtor in waiving the statute is entitled to his own terms, and by these alone is he bound. It was accordingly held in *Gillingham v. Brown*, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320, that, where the promise was to pay at the rate of \$10 a month, a subsequent payment of \$5 on account did not make the entire debt due, the creditor being confined to the installments as they accrued. It does not matter, therefore, in the present case how positive was the acknowledgment if there was a promise at the time expressing the intention of the decedent as to how

the debt was to be paid, and that there was, it seems to me, is clear. Manifestly the thing that prompted him to what he said and did was the death of his father and the inheritance which he expected from that source. Even the promise which he declared he had made to Mrs. Tridell when they moved into the Paige street house was that he would pay her well when he got the property that would be coming to him from his father's estate, and the same condition was reasserted in the conversation already detailed. "I have been promising you that all along during these years," he says, "and now I am glad to say \* \* \* the time has come \* \* \* when I am about ready to do that [not entirely so, be it noted]; for my father has died, and the estate is being divided. I will have my portion, and will have it very soon. \* \* \* If you will be perfectly satisfied with that [submitting the question to the plaintiff], I will give you \$10,000 from this money that is coming to me from my father's estate." This is not an absolute, but a contingent, promise, which cannot be enforced except upon proof that the contingency mentioned has happened. The reference to his father's estate is something more than an incident; it was his sole reliance, and his undertaking is made with express regard thereto. He promised to pay out of the money he was to receive from that source, and when he had received it. Neither his expectation of speedily getting it—as, for instance, by the time Mrs. Tridell had returned from Denver—nor the payment to her on account to assist her there, changes this phase of it. As reiterated by Waring at the very close of his testimony on cross-examination, it was to be paid when he got the money from his father's estate, and it could not be exacted from him, therefore, until he had. Were he living and suit were brought against him, he could well defend on this ground, and his administrator is not to be at any greater disadvantage; in fact, the evidence is to receive a stricter construction, if any, than if he were alive to deny or give his version of the transaction.

Nor is anything more favorable to be obtained from the plaintiff's other witnesses. According to Frank Wysox, her son, the decedent's declarations amounted to no more than an inflated expression of his intended gratuity when he succeeded to his expectations; while according to Mrs. Jenkins he merely said that "his father was dead, and he would soon come into his share, and would then pay her [the plaintiff] for all the care of the last ten years." This rather strengthens than relieves the contingent or conditional character of the promise relied upon, confirming the view to that effect derived from the testimony of the principal witness, Waring.

If, then, the promise was conditional, as the contingency upon which it was predicated has not happened, the plaintiff is not entitled to recover in this action. The decedent in his lifetime received but a small part of his inheritance, nor, so far as appears, has his administrator obtained any since his death, and until enough had come to one or the other to enable him to make good the undertaking neither he nor his estate could be held. It cannot be said that he got his money because in a general way it was due him or he had that expectancy. That was true in the same sense that it is now when he made the

promise, and yet it cannot be claimed that he intended to be then presently held. His share must at least be defined by an account, if not actually set apart to him or his legal representative before either can be charged with having got it, and this must be the case before suit is brought.

Judgment is therefore directed to be entered on the verdict in favor of the plaintiff for \$2,055, and in favor of the defendant non obstante veredicto on the reserved point as to all over and above that sum.

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McKEE et al. v. CHAUTAUQUA ASSEMBLY et al.

(Circuit Court, W. D. New York. July 20, 1903.)

No. 184.

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE—SUIT FOR INJUNCTION.

In a suit by a member of a nonstock corporation to restrain alleged illegal and ultra vires action by its governing body, the amount involved, for jurisdictional purposes, is the value of the rights sought to be protected; and a federal court has jurisdiction where it is shown by the bill that the mismanagement complained of, if not restrained, will result in the creation of debts, and may result in the loss of the corporation's property, which largely exceeds in value the jurisdictional amount.

2. CORPORATIONS—STOCKHOLDER'S SUIT—AMENDMENT OF CHARTER.

A legislature, under power reserved in the grant, may lawfully amend the charter of a corporation by enlarging its powers in harmony with the purpose of its organization, by consolidating other corporations with it and repealing their charters, and by changing the mode of electing its trustees; and a stockholder, or member where it is a nonstock corporation, cannot maintain a suit in equity, based on such legislation, or the action of the trustees in procuring and acting on the same, to restrain such action, where it is not shown that his contract or property rights are destroyed or impaired.

In Equity. On demurrer to bill.

S. Schoyer, Jr., Martin Carey, and Lyman M. Bass, for complainants.

Frank W. Stevens and John G. Milburn, for defendants.

HAZEL, District Judge. This is a suit in equity by a leaseholder of Chautauqua Institution, a nonstock corporation, originally organized as Chautauqua Assembly, pursuant to the New York statute passed April 12, 1848 (Laws 1848, p. 447, c. 319), against that corporation, now called Chautauqua Institution, the Chautauqua University, and the Chautauqua School of Theology. All of the corporations named are or were nonstock corporations, organized under the laws of the state of New York, and managed by boards of trustees. The suit is between citizens of different states, and is brought by complainant, in behalf of himself and other leaseholding members of Chautauqua Assembly, not residents of the state of New York, who are similarly situated, and who may wish to intervene or join the com-

¶ 1. Jurisdiction of circuit courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

plainant in this suit. No person, however, has intervened. The bill of complaint seeks, first, to have judicially declared unconstitutional and void an act of the Legislature passed March, 1902 (Laws 1902, p. 496, c. 196), changing the name of Chautauqua Assembly to Chautauqua Institution, widening its scope, expanding the powers of its trustees, terminating the separate existence of Chautauqua University and the Chautauqua School of Theology, and consolidating these corporations with Chautauqua Institution, and vesting in Chautauqua Institution the property of the constituent corporations. The complainant then asks protection against alleged ultra vires acts committed by the trustees of Chautauqua Assembly or Chautauqua Institution. Demurrers and pleas in abatement to the bill have been interposed by the defendants. The Chautauqua Assembly has demurred to the bill specially on the ground of want of jurisdiction, and generally that the complainant is not entitled to the relief demanded, on the facts pleaded. Pleas of the other defendants are before the court on a motion to overrule. Argument upon the demurrers and pleas was heard at the same time.

The special demurrer to the jurisdiction, upon which stress is laid, will be first considered. The argument of counsel for demurrant proceeded upon the theory that the bill fails to disclose an amount in dispute exceeding the sum of \$2,000, exclusive of interest and costs. The bill as originally filed did not allege specifically the amount involved, but an amendment to the bill, filed since the demurrer and pleas were interposed, asserts that the matter in dispute between the Chautauqua Assembly and the individual complainants exceeds in value the prescribed jurisdictional amount. It is contended, nevertheless, upon the authority of *Fishbeck v. Western Union Telegraph Company*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630, that the amended bill is not conclusive, but merely declaratory, and that the facts therein alleged, and admitted by the demurrer, establish the absence of any pecuniary value whatever in the subject-matter for which suit is brought. A brief narration of the salient averments of the bill is necessary to a better understanding of the questions in controversy. Chautauqua Assembly was organized, as heretofore stated, pursuant to the provisions of the general act of the Legislature passed in 1848, for the formation of nonstock corporations; and its object and purpose were to promote Sunday school interests at Fairpoint, in the county of Chautauqua, state of New York, and to promote the moral and religious welfare of its members. At the time of incorporation, it acquired a tract of land, subject to the leasehold interests of the members of another nonstock corporation, named the Chautauqua Lake Camp-Meeting Association. Subsequently Chautauqua Assembly acquired other lands and properties, situated at Point Chautauqua. Members of Chautauqua Assembly, by complying with its rules and by-laws, might obtain a perpetual leasehold interest in certain lots or parcels of land described in the lease. It was the custom for leaseholding members of Chautauqua Assembly to erect upon the lots cottages for temporary summer homes. Other rights and privileges were vested in the members by the rules and by-laws, among which was the right to vote for trustees annually.

In all respects the rights of the members were equal in the assets of the corporation. The objects and purposes of the Chautauqua School of Theology were to instruct its patrons in ecclesiastical, theological, philosophical, and kindred subjects. Chautauqua University was incorporated to teach the sciences, arts, languages, and literature, and its board of trustees was empowered to confer degrees. The bill sets forth that the trustees of Chautauqua Assembly for many years have arbitrarily deprived the complainant and other leaseholders of the right to vote for trustees; that such trustees perpetuated themselves in office, contrary to the by-laws, rules, and regulations of the assembly, no election having been held for many years. Numerous acts by the trustees are alleged to have been ultra vires. It is asserted that large sums of money have been expended annually in contravention of the objects of the assembly. Financial mismanagement by the trustees is charged, and generally that the original and primary purpose of Chautauqua Assembly has been departed from by the trustees, and its scope expanded, by the Legislature of the state of New York, without the assent of the corporate members, beyond the limits provided by the original charter. The bill proceeds to allege that the net income in the years 1898, 1899, and 1902 was \$11,150, \$6,700, and \$7,500, respectively, while the liabilities for the year current, of 1902, were \$80,000. To meet such liabilities and expenses incurred, owing to this illegal departure from the primary objects and purposes of the assembly, 20-year 5 per cent. interest-bearing bonds have been issued, secured by a mortgage upon the lands and assets of Chautauqua Institution, amounting to \$200,000. Out of this sum \$50,000 was used, without authority by the board of trustees, to purchase the capital stock of another corporation, known as the Chautauqua Press. The bill states that the business of printing and publishing has become an adjunct of the corporation, and that for the purpose of carrying out a plan of altering, modifying, substituting, and consolidating Chautauqua Assembly, under and by the name of Chautauqua Institution, with Chautauqua University and the Chautauqua School of Theology, the trustees of Chautauqua Assembly, who were also trustees of Chautauqua University and the Chautauqua School of Theology, secretly procured from the Legislature of the state of New York an act terminating the existence of the two last named corporations, and consolidating them in the manner hereinbefore stated. The demand for relief prays for discovery, that the consolidation and assumption of all debts and liabilities of Chautauqua Assembly (now Chautauqua Institution) be declared null and void, that its officers be restrained from assuming any of the debts and liabilities of either the Chautauqua School of Theology or Chautauqua University, that the records and properties be conveyed back by the trustees to the defendant corporations, that the election of trustees under the consolidation act be declared illegal, that the purchase of the capital stock of Chautauqua Press be set aside, that the issuance of bonds secured by mortgage be declared invalid, and for other relief. Such, in fact, are the salient features of the bill.

Is this court without jurisdiction because of the failure of the bill to set forth sufficient facts showing that a sum in excess of \$2,000

is involved? Does the broad rule contended for by demurrant apply to the case at bar? I am quite well satisfied that the authorities cited upon the point (*Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458, etc.) have no application here. It has frequently been held that the value in dispute in such an action as this is the object for which the suit is brought, and upon which issue is joined. This rule is firmly established by a line of cases. *Mississippi & Missouri R. Co. v. Ward*, 2 Black, 485, 17 L. Ed. 311; *Sharon v. Terry* (C. C.) 36 Fed. 347, 1 L. R. A. 572; *Whitman v. Hubbell* (C. C.) 30 Fed. 81; *American Fisheries Co. v. Lennen* (C. C.) 118 Fed. 872. A demand for a specific sum of money would seem to be unnecessary where the remedy sought invokes the restraining power of the court. The pecuniary amount involved depends upon the character and value of the relief which the court may deem proper to grant. The financial interest of the defendant personally, and of the corporation in whose behalf he brings this suit, in the affairs of the assembly, may be gathered from the averments of the bill. The mismanagement complained of, if unauthorized and illegal, may result in foreclosure proceedings, followed by dissolution of the corporation and forfeiture of its franchise. This is a sufficient showing that loss of property rights may be sustained, and that the corporation may be deprived of prospective financial gain. Hence the restraining power of a court of equity is properly invoked to enjoin resultant spoliation and damage, and the Circuit Court has jurisdiction of the subject-matter.

I come now to a consideration of the question presented by the general ground of demurrer: Is complainant entitled to relief from a court of adequate jurisdiction? This involves a consideration of the merits as presented by the bill. The grievances here complained of appear to be analogous to those which justify a stockholder in seeking redress because of improper acts by the board of directors of a stock corporation, where the directors wrongfully govern and control the affairs of the corporation. If the facts as shown by the bill disclose ultra vires acts by the trustees, causing the affairs of the corporation to be mismanaged, or furthering the individual interests of the trustees, this, manifestly, would be such a breach of the trust obligation as would give to the member suing in behalf of the corporation a right to invoke the aid of a court of equity. Such a proceeding would be properly commenced by a stockholder against the trustees of the corporation for which they presume to act, provided, however, the corporation expressly refused to proceed, or the directors by some overt act showed a disinclination to avail themselves of the remedy open to the corporation. *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Pomeroy on Eq. Juris.* vol. 3, §§ 1094-1095. Furthermore, the allegation of bad faith set forth in the bill must be tested to some extent, at least, by the legislative repeal of the charters of Chautauqua University and the Chautauqua School of Theology, by their merger by the act of con-

solidation, and by the amendment of the charter of Chautauqua Assembly. Complainant asserts broadly that, by virtue of the alleged unconstitutional legislation specifically referred to in the bill, contract rights are impaired, and his property rights invaded and destroyed. The consolidation act changes the name of Chautauqua Assembly, and enlarges its scope, without, however, depriving complainant of his rights and privileges of membership. Section 4 of the act passed March, 1902 (Laws 1902, p. 497, c. 196) expressly provides that the members of Chautauqua Institution shall be the persons named in the original and supplemental certificate of incorporation, and all persons owning one or more lots on the land of the corporation. Sections 5-7 provide for the election of 24 trustees, who are divided into Classes A and B. Annual meetings are specified. The manner of electing 20 trustees belonging to Class A, by the hold-over trustees, and 4 trustees belonging to Class B, by the members of the corporation, is provided for in the act. This right to expand and amend the charter of the Chautauqua Assembly by alteration or addition to its corporate scope cannot, in my view of this controversy, seriously be disputed. The right of reservation by the Legislature to amend and repeal corporate charters, in my opinion, is broader than is contended for by complainant. The terms employed in expressing the reserve power of the state include the right of consolidating corporations whose objects and purposes are similar. New obligations may be created; new duties may be prescribed for the trustees; investments may be made; and a stockholder cannot be heard to complain, unless such acts when done by the Legislature, impede, destroy, or impair a contract and property rights. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. The charter of Chautauqua Assembly was altered by inclusion and addition of privileges and features which were adapted to and supplemented those of the original charter. Such features seem to be in entire harmony with the purposes and objects which the original members had in view at the time of incorporation. The expansion of the general powers of Chautauqua Assembly by the maintenance of schools, proper facilities for recreation, maintenance of libraries and museums, and publication of books on the grounds of the corporation, has been undertaken, to more effectively carry out the original purposes and objects of the Chautauqua Assembly. These changes and developments do not, apparently, alter the pecuniary liability of complainant. His property rights are not impaired or destroyed. No contract relations or obligations are impaired or defeated. His status as a leaseholder remains undisturbed, with the right to enjoy the additional privileges of the institution. True, the manner of electing trustees to manage the affairs of the corporation is perceptibly altered; but this does not, in my opinion, operate to destroy the property rights of the minority leaseholders. The changes and amendments complained of with respect to the election of trustees were entirely within the power of the Legislature to enact. It is insisted, however, that no election of trustees has been held for many years, and that in that respect the trustees have exceeded their powers, and have perpetuated themselves in office from year to year. Such



acts of omission by the trustees, however, have been acquiesced in by the minority stockholders for many years. Furthermore, the act of consolidation and reorganization of Chautauqua Assembly, as heretofore pointed out, provides for a different mode of electing trustees. Since the passage of the act of March, 1902, an election of trustees in accordance with the charter of 1902 has been held. The regularity of such election in the manner provided by law cannot be successfully controverted, assuming the law to have been a valid enactment. It is undoubtedly the law, as contended for by the complainant, that personal and real property acquired by a corporation, together with contract rights and choses in action, cannot be destroyed or impaired by legislative interference, and hence, the rights of a shareholder of a corporation, repealed by special act of the Legislature, cannot be invaded and destroyed without adequate and complete compensation to him. *Greenwood v. Freight Co.*, supra; *People v. O'Brien*, supra. Such, however, are not the facts here presented. It appears that the corporate existence of Chautauqua University and the Chautauqua School of Theology were terminated by the state, by and with the assent of their members, who were also trustees of Chautauqua Assembly. The authority of the Legislature to repeal such charters, the legislative intent reserving the power so to do being expressed in the grant, cannot be seriously disputed, when no property rights are interfered with. Without deeming it necessary to pass upon the point, I may say that it is difficult to perceive, from the allegations of the bill—no actual fraud or conspiracy being charged—how Chautauqua University and Chautauqua School of Theology can be proceeded against. In view of the foregoing, it will serve no useful purpose to discuss any other questions involved in this controversy.

From the examination given to the questions argued and the authorities cited by counsel, I conclude, first, that the ground of demurrer that the court is without jurisdiction, is not well taken; second, that the bill lacks equity, in that it does not appear that any contract or property rights are invaded or destroyed by reason of any of the acts of omission or commission charged in the bill. The court having come to this conclusion, it is unnecessary to pass upon the questions raised by the plea. The bill must be dismissed.

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CENTRAL TRUST CO. OF NEW YORK v. WASHINGTON COUNTY R. CO.

(Circuit Court, D. Maine. July 6, 1903.)

No. 562.

1. RAILROADS—MORTGAGES—FORECLOSURE—PARTIES.

In a suit by the holder of a mortgage given by a corporation to foreclose the same, stockholders and bondholders of the corporation may be permitted to intervene. *Gregory v. Pike*, 67 Fed. 837, 845, 15 C. C. A. 33, 41, explained and applied.

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¶ 1. Foreclosure of mortgages in federal courts, see note to *Seattle, L. S. & E. Ry. Co. v. Union Trust Co.*, 24 C. C. A. 523.

**2. SAME—ANSWER BY CORPORATION—AUTHORITY OF COUNSEL.**

Where, in a suit to foreclose a corporation mortgage, the complainant would be entitled to a default and a decree pro confesso, if no answer had been filed, any question as to the authority of the executive officers of the corporation to employ a solicitor to answer, confessing the bill, is immaterial. It seems that, ordinarily, an answer under the seal of a corporation, by one of the principal officers, cannot be questioned.

**3. SAME—CONSTRUCTION OF RAILROAD—OVERPAYMENT—OBJECTION—ESTOPPEL.**

Where, at the time a railroad was constructed, no objection was made to the contract by which the company's stocks and bonds were issued in payment therefor, it could not subsequently be objected, after a long acquiescence, in a suit to foreclose a mortgage securing the bonds, that the actual cost of construction was only two-thirds of the par value of the bonds issued in payment therefor, and that the bonded indebtedness secured by the mortgage should therefore be scaled.

**4. SAME—ACQUISITION OF OTHER LINE—POWERS.**

Where the charter of a railroad company authorized it to construct its main line between certain termini, and also "to build branches or extend its line into one or more towns," the railroad was empowered to purchase a railroad already constructed, and appropriate as a branch line; and it was not limited to acquiring branch lines by building them.

**5. SAME—MORTGAGES—AFTER-ACQUIRED PROPERTY.**

Where a railroad mortgage, in describing the property, contained the language, "and also all rights, powers, privileges, and franchises relating to or useful for the said railroad or branch, including the right to operate and maintain the same, whether now held or acquired by the mortgagor," such mortgage covered a line subsequently purchased by the mortgagor, which was an appropriate branch for the main line mortgaged.

**6. SAME.**

Where, in a suit to foreclose a railroad mortgage, it appeared that the railroad at the time of foreclosure was capable of earning \$100,000 annually, applicable to interest or dividends, which would pay 4 per cent. on \$2,500,000, the upset price was fixed at \$2,300,000.

In Equity.

Butler, Notman, Joline & Mynderse, and Chase Eastman, for Central Trust Co.

Mr. Littlefield, for intervening petitioners.

Curran & Curran, N. & H. B. Cleaves, and S. C. Perry, for Washington County R. Co.

Heath, Andrews & Dutton, for county of Washington.

**PUTNAM, Circuit Judge.** This is a bill in equity brought by the trustee under a mortgage of the Washington County Railroad Company, executed on the 10th day of March, 1898, to foreclose the same by sale as provided in the deed. The entire amount of the bonds issued was \$2,320,000, bearing interest at 5 per cent. per annum. None of the coupons attached thereto have ever been paid, but no bill to foreclose was filed until this, on the 18th day of April, 1903.

The only parties to the bill are the complainant and the Washington County Railroad Company. The county of Washington, which holds all the preferred stock of the mortgagor corporation, amounting to the par of \$500,000, and James Mitchell, holder of something over \$70,000 of the mortgage bonds referred to, have severally asked leave to intervene. In *Gregory v. Pike*, 67 Fed. 837, 845, 15 C. C. A. 33, it was held that the chancellor has no power to make new parties defendant against the objection of the complainant. It was shown,

however, on page 846, 67 Fed., page 41, 15 C. C. A., that this rule does not apply to cases of the coming in of a cestui que trust, or a stockholder as stockholder, under circumstances like those at bar. It applies only where those who seek to intervene make issues which would not be disposed of so as to become *res adjudicata* provided they were not made parties. Under the circumstances, we deem it equitable to grant the petitions for intervention on special terms expediting the litigation, as set out in the orders in reference thereto which we will cause to be entered.

Previous to the petitions to intervene the Washington County Railroad Company had filed an answer admitting substantially all the allegations in the bill, so that, on the face of the pleadings as they thus stood, the complainant was undoubtedly entitled to a decree. It is claimed by the county of Washington that this answer was put in by the president and the general counsel of the defendant corporation without special authority to either so to do. Ordinarily, an answer under the seal of the corporation by one of the principal officers thereof cannot be questioned. However, it is not necessary for us to consider this contention, because, if the answer were invalid, as claimed by the county of Washington, the complainant would be entitled to a default and a decree *pro confesso*; also, being the answer of a corporation, it is, in effect, nothing more than a pleading, and cannot prejudice in any substantial manner whatever propositions may be made by the interveners. Therefore we leave the answer to stand.

Immediately on the filing of the answer, and before petitions for intervention were filed, the parties to the record submitted to the court a draft decree. Thereupon the petitions for intervention were presented to the court. The court postponed the consideration of the petitions until the coming in of the report of the special master, to whom the court referred the pleadings and the draft decree, with directions to hear the county of Washington, and Mitchell, as well as the parties to the record, and their proofs, and to include in his report his findings on the propositions which might be submitted by either of them to him, and to allow either of them to take exceptions, to be returned with his report. The report of the master has now been returned into court, with exceptions taken thereto by the county and by Mitchell, none coming from the parties to the record. Thereupon, as we have already said, we admitted the county of Washington and Mitchell as interveners, thus giving us proper jurisdiction over their exceptions.

It appears that the entire length of the railroad of the defendant corporation within the termini distinctly specified in its charter—that is, from a junction with the railroad of the Maine Central Railroad Company in Hancock county to its present terminus in the city of Calais, and its branch to Eastport, also expressly described in its charter—is 119 miles. Of this,  $3^{15}/_{100}$  miles, constituting its terminus in the city of Calais, were acquired as hereinafter stated. The balance of the railroad thus expressly described in its charter, namely, 119 miles, less  $3^{15}/_{100}$  miles spoken of, was constructed prior to the 30th day of June, 1899, by the parties who now hold all of the bonds secured by the mortgage in question, aside from those owned by

Mitchell, and others to the amount of the par of \$4,000, with accumulated interest. The entire issue of bonds was \$2,320,000, as already stated. In addition thereto, and to the preferred stock, there was an issue of 15,000 shares of the common stock of the defendant corporation of the par value of \$100 each. The parties who thus constructed the railroad received in payment for the cost of construction 14,974 shares of common stock and \$2,142,000 of the mortgage bonds in question, and on receipt of the same they entered into the control of the defendant corporation, and have ever since remained in control of it. No objection was ever made by the county of Washington, or by any person, to this arrangement, and the county, and every one concerned, acquiesced in reference thereto until the present bill was filed. It is now maintained by the county that the bonded indebtedness should be scaled down, because it is claimed that the actual cost of construction was only about two-thirds of the par of the bonds issued in payment therefor. If the court were compelled to pass on the issue, it would probably find, as a matter of fact, that the arrangement as described was in truth consented to by all the parties in interest and was satisfactory to them. However that may be, it is now too late to question the transaction in the federal courts. It is hardly necessary to cite authorities on this point, and therefore we will only refer to *Pittsburg Railway Company v. Keokuk Bridge Company*, 131 U. S. 371, 381, 9 Sup. Ct. 770, 33 L. Ed. 157. The transaction was neither unusual nor unreasonable. The parties constructing the railroad took their risk of gain and loss, and, apparently, if the court accepted the highest value which it has been suggested could be reasonably placed on the property, after making allowance for loss of interest, there has been neither the one nor the other to any substantial amount. Therefore there is no reason which would justify us in sustaining the proposition of the county of Washington in this respect.

In addition to the railroad, which was constructed as we have already said, the defendant corporation acquired a line, already in operation, extending from the present terminus of the defendant corporation in the city of Calais to Princeton. This was approximately 20 miles in length. Deducting the portion used by the defendant corporation for its line within its expressly chartered termini leaves the length of what was thus acquired approximately 17 miles.

The terms of this charter, followed, as it was, by the subscription to the preferred stock, shows, what is also a matter of common knowledge, that the purpose of the undertaking was to accommodate and develop the county of Washington. The whole line from Calais to Princeton is within that county, and it is a natural feeder to the main railroad of the defendant corporation, and is naturally served by it, and the connection of the two and their practical union are apparently results which would naturally follow the general purpose of the enterprise and aid what it sought to accomplish.

The acquisition of this line to Princeton, however, was subsequent to the execution of the mortgage in question. Therefore, as we have said, the county of Washington claims that it should not be covered by this decree of foreclosure. The master found otherwise,

and has put the case so clearly that we can hardly add anything to what has been said by him. We will, however, select *Pennock v. Coe*, 23 How. 117, 16 L. Ed. 436; *Branch v. Jesup*, 106 U. S. 468, 486, 1 Sup. Ct. 495, 27 L. Ed. 279; *Bear Lake Company v. Garland*, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. Ed. 327; *Pardee v. Aldridge*, 189 U. S. 429, 23 Sup. Ct. 514, 47 L. Ed. 883, and *Hamlin v. European & North American Railway Company*, 72 Me. 83—as illustrating how liberally the federal courts and the local courts in Maine support provisions in mortgages of franchises of railroad corporations with reference to property subsequently acquired, which is of appropriate use in connection with such franchises. These cases, among other things, settle that with reference to realties and lines of railway subsequently acquired, provided they are incidental to the purposes of the franchise, it is entirely unimportant whether they are obtained by purchase or construction or by condemnation or deed.

By the charter of the Washington County Railroad Company, it was not only authorized to construct a main line of road between the termini which we have named, with a branch to Eastport, but also “to build branches or extend its lines into one or more towns, and operate the same with steam or other motive power.” Of course, the words “one or more towns” leave the construction of this clause indefinite. It may well be said that it was not intended to permit correspondingly indefinite authority to “build branches,” or to “extend its lines,” for indefinite distances, including the possibility of paralleling other railroads. Considering the general purview of the charter, and especially the words “other motive power,” which undoubtedly contemplated what are known as “trolley lines,” which, at the date of the charter, extend ordinarily only short distances for local uses, it can hardly be questioned that the purpose of this provision was to enable this corporation to develop the county of Washington, as we have already suggested. Therefore, while we are not called on to determine, and it might be impossible to theoretically determine, the minimum or the maximum of the powers thus given to the Washington County Railroad Company, yet we can hardly doubt that the building of branches within the county, no longer than the line to Princeton, not injurious to other enterprises, and natural feeders to the main railroad, is within the purview of this provision of its charter. Neither, in view of the authorities to which we have referred, and especially in view of the broad expression, “extend its lines,” found in this extract from the charter, can we have any doubt that extension by purchase was authorized, as well as extension by construction, provided, in either case, that no detriment was done to any other existing enterprise. That there was any detriment in this case is not claimed, and it is a matter of common knowledge within this state and district that there was none such. Therefore we think the acquisition of this line to Princeton was an exercise of the franchises which the Washington County Railroad Company possessed at the time its mortgage was executed.

The mortgage, in describing what was embraced in it, contains the following language: “And also all rights, powers, privileges, and franchises, relating to or useful for the said railroad or branch, includ-

ing the right to operate and maintain the same, whether now held or hereafter acquired by the mortgagor." We have already shown that the acquisition of this line to Princeton was within the exercise of franchises possessed by the respondent corporation at the time the mortgage was executed; but a question is raised by Washington county arising out of the two words, "relating to or useful for the said railroad or branch." The word "branch," in this connection, undoubtedly means the main line between the specified termini in Hancock county and the city of Calais; but there can be no question, in view of the facts which we have stated, that the line to Princeton was, as we have already said, a feeder to the main line, and was served by it, and therefore came within the words, "relating to or useful for the said railroad." This is emphasized by the fact that a part thereof, some three miles in length, as we have already said, was properly, and we have no doubt economically, made a portion of the main line. Therefore we hold that the line to Princeton should be covered into the decree.

This disposes of all the exceptions taken by the county of Washington to the report of the master, and leaves for consideration only a single exception taken by Mitchell. The master fixed the upset price of the property to be sold under the decree of foreclosure at \$2,000,000. Mitchell claims that it should be \$2,500,000. By the terms of the mortgage the purchaser at a foreclosure sale has the right to make the major payment in bonds, and the decree as reported by the master provides therefor. Where there is nothing of that character in the mortgage or the statutes, and the court is appealed to by the parties to insert it, it may, of course, as incidental thereto, impose equitable conditions as to the upset price, or as to any other topic as to which conditions can reasonably be imposed; but in the present case there is nothing in this feature of the decree, nor in any other feature thereof, which gives this court at the present time jurisdiction, on the mere suggestion of either party, to fix an upset price. Nevertheless Mitchell appeals to us to do so, and the complainant consents that we should. The complainant, perhaps, is wise in this, because, in the absence of an upset price, the sale, being subject to confirmation, might be set aside on the ground that the bids were insufficient, and the final disposition of the property be embarrassed and delayed. Consequently it is proper for the parties to agree that the court should at the present time determine the upset price. Therefore we accept the jurisdiction in this respect which the parties desire us to exercise.

A careful examination of the facts satisfies us that the property at the present time is capable of earning at least \$100,000 annually, applicable, on conservative rules, to interest or dividends. The past history indicates that the future will show larger net returns, but we are not justified in speculating on this. Events may occur which will diminish the net income notwithstanding the expectation of its increase. We are, however, justified by the continuous growth which the past has developed in taking the present net earning capacity of the property as indicating the value which shall be set on it for an upset price. This is to be estimated in view of the fact that the property

can be made dividend earning as well as interest paying. As dividend earning, it would pay 4 per cent. on \$2,500,000, which, on a fair basis, would justify a valuation at that figure. We should, however, allow for the fact that a purchaser would be expected to make a reasonable profit, and that there are embarrassments and difficulties often met with in converting an enterprise like this into a dividend paying property.

We deduct for all that \$200,000, leaving the upset price to be fixed in the decree \$2,300,000.

This disposes of all the questions which were left for us to consider.

It is ordered that the upset price named in the decree for sale shall be \$2,300,000, instead of \$2,000,000, as reported by the master; that all other exceptions to the master's report are overruled; and that, subject to the modification as to the upset price, the master's report is confirmed; and a decree will be entered accordingly.

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#### NORTHERN LUMBER CO. v. O'BRIEN et al.

(Circuit Court, D. Minnesota, Fifth Division. August 19, 1903.)

##### 1. PUBLIC LAND—ACTIONS—COURTS—JURISDICTION.

Since the disposition of public lands under the acts of Congress is exclusively vested in the Land Department of the government, which must primarily determine the rights of claimants, courts have no jurisdiction to determine controversies between claimants of such land, the legal title to which has never passed from the United States by the issuance of a patent.

##### 2. SAME—CUTTING TIMBER—INJUNCTION.

Where, in an action to determine conflicting claims to public land, it appeared that the claims of both complainant and defendants to timber thereon were made in good faith and on colorable grounds, and that the defendants threatened and proposed to cut and remove the timber, it was proper for the court to restrain such removal until the land had been patented by the United States, though, by reason of the fact that it had not been patented, the court was without jurisdiction to determine the adverse claims of the parties thereto.

James B. Kerr and M. T. Sanders, for plaintiff.

J. N. Searles, for answering defendants.

LOCHREN, District Judge. This cause came on for final hearing June 15, 1903, upon the bill, the answer of defendants William O'Brien, Albert J. Lammers, and George A. Lammers, and the stipulation of facts on file; the complainant appearing by James B. Kerr, its solicitor, and the answering defendants by J. N. Searles, their solicitor. The defendant Mary E. Coffin, though duly served with the subpoena on the 3d day of January, 1903, has never appeared in the suit, and is in default.

From the admissions in the pleadings and the stipulated facts it appears that by an act of Congress of May 5, 1864 (13 Stat. 64, c. 79), there was granted to the state of Minnesota, to aid in the construction

¶ 1. See Public Lands, vol. 41, Cent. Dig. § 307.

of a railroad from St. Paul to the head of Lake Superior, every alternate section of public land of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof within said state. Other provisions of the act, and affecting the terms of the grant, do not affect the issues in this case. Said grant of land became vested in the Lake Superior & Mississippi Railroad Company, which on May 7, 1864, filed in the office of the Commissioner of the General Land Office a map or diagram showing the projected general route of its railroad from St. Paul to a point on Lake Superior. On May 26, 1864, the said Commissioner transmitted a copy of said map or diagram to the register and receiver of the United States Land Office at Duluth, Minn., with his letter informing them of the fact that the Secretary of the Interior had approved the withdrawal of the lands for the railroad, and directing them "to suspend from pre-emption settlement and sale, a body of lands about twenty miles in width as indicated on the enclosed diagram 'A' marked Lake Superior and Mississippi Railroad." The land in dispute, the south half of the southeast quarter of section twenty-seven (27), township fifty-two (52) north, of range fifteen (15) west, of the fourth principal meridian, was coterminous with and within 10 miles of the general route of said railroad, as shown by the said map or diagram. Afterwards, on the 25th day of September, 1866, said Lake Superior & Mississippi Railroad Company filed in the office of said Commissioner of the General Land Office its map of the definite location of its said railroad from St. Paul to Duluth on Lake Superior, whereby it appeared and became definitely settled that the land above described and here in dispute was and is beyond and outside of any lands which could pass to or be obtained by the said railroad company under any of the terms of said land grant.

The Northern Pacific Railroad Company was created by act of Congress of July 2, 1864 (13 Stat. 365, c. 217), and authorized to construct and operate a continuous railroad and telegraph line from a point on Lake Superior, in Minnesota or Wisconsin, westerly, within the United States and north of the forty-fifth parallel of latitude, to Puget Sound, with a branch by the valley of the Columbia river to Portland, Or. It was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of said railroad line, as the company might adopt, through territories of the United States, and 10 alternate sections per mile on each side of the railroad, whenever it passed through any state, "whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

The Northern Pacific Railroad Company afterwards definitely located its entire line from Ashland, on Lake Superior, in Wisconsin, to Puget Sound, and constructed and completed thereon its railroad and telegraph lines. In doing this, on July 6, 1882, it duly filed in the office of the Commissioner of the General Land Office a map or



plat, duly approved by the Secretary of the Interior, showing the line of definite location of its said railroad from Thompson Junction, in Minnesota, to Ashland. On that same date the land here in dispute was and is coterminous with and within 20 miles (10 alternate sections) of that portion of said railroad so definitely located between Thompson Junction and Ashland, and was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption, or other claims or rights, and nonmineral in character. The same land was also, at the date of said grant to the Northern Pacific Railroad Company, public land of the United States, and subject to that grant, unless the said withdrawal of lands by direction of the Secretary of the Interior, for the benefit of the Lake Superior & Mississippi Railroad Company, as above set forth, operated to take said lands out of the category of public lands so granted to the Northern Pacific Railroad Company.

On October 17, 1883, said Northern Pacific Railroad Company filed in the United States Land Office at Duluth its certain list, known as Duluth List No. 9, wherein, among other lands, was listed the land in dispute, to bring such lands before the officers of the Interior Department for examination and patenting to that railroad company, which had at the time of filing said list paid the selection fees and fees for surveying said land. On April 6, 1901, the Commissioner of the General Land Office refused to approve said list No. 9, and rejected the same, for the alleged reason that at the date of said grant to the Northern Pacific Railroad Company the lands described in said list were reserved for the Lake Superior & Mississippi Railroad Company by said order of withdrawal, and were therefore not included in the grant. Upon appeal to the Secretary of the Interior said ruling and decision of the Commissioner of the General Land Office was affirmed July 16, 1901.

In the year 1893 said Northern Pacific Railroad Company became insolvent; and in a suit in this court to foreclose mortgages upon its land, property, and franchises, and for the sequestration and distribution of its property for the benefit of its creditors, secured and unsecured, Edward H. McHenry and Frank G. Bigelow were by this court duly appointed receivers of all the property of said railroad company, and among other things authorized to sell the lands of said railroad company in Minnesota, and to make contracts and deeds therefor; and on November 4, 1898, said receivers sold and conveyed by deed to Frederick Weyerhauser and John A. Humbird all the right, title, and interest of the Northern Pacific Railroad Company in said land here in dispute; and the said Weyerhauser and Humbird on March 4, 1899, conveyed to the Northern Lumber Company, a Wisconsin corporation, the complainant herein, all their interest and estate thus acquired in and to all the timber standing and growing on the land in dispute, which timber is of the value of more than \$2,000.

All of section 27, township 57 north, range 15 west, being the section containing the land here in dispute, was on November 3, 1859, offered for sale to the public, under proclamation of the President, No. 643, and ever since has remained open to private sale or to entry, unless withdrawn by reason of the matters hereinbefore stated.

On October 2, 1901, defendant Mary E. Coffin applied at the United States Land office at Duluth to select the land here in dispute under the act of Congress of June 4, 1897, in lieu of lands relinquished by her within a forest reservation. Such selection was accepted by said register, and received and transmitted by them to the Commissioner of the General Land Office for his examination and approval for patenting such land to said Mary E. Coffin; and the matter of said selection is still pending before said Commissioner, awaiting such examination and approval.

The principal value of said land is the timber thereon. The defendants William O'Brien, Albert J. Lammers, and George A. Lammers have duly acquired from said Mary E. Coffin all her rights in and to that timber, and intend to cut and remove the same as charged in the bill.

It therefore appears that the title to the land here in dispute is still in the United States, and while the legal title remains in the United States it cannot be adjudged, in a suit to which the United States is not a party, that any one else has a valid equitable claim to the land. The disposition of the public lands, conformably to the acts of Congress, is vested exclusively in the Land Department of the government, which must incidentally determine the rights of claimants. So long as the land is not patented it remains under the jurisdiction of the Land Department, which has still the only power to correct any errors it may have made in respect to any application or contest concerning the lands. It is only after patent is issued, and the jurisdiction of the Land Department has become exhausted, that a court of equity will take any cognizance of the question of who is entitled to the land so patented, upon the facts found by the officers of the Land Department. *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Samson v. Smiley*, 13 Wall. 91, 20 L. Ed. 489; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800; *Humbird v. Avery* (C. C.) 110 Fed. 465, 471. Complainant's right to the timber on the land rests on the equitable claim of the Northern Pacific Railway Company to the land, and the right of the answering defendants rests on the equitable claim of Mary E. Coffin to the same land, and these are matters still within the sole jurisdiction of the Land Department to determine, and in respect to which this court can give no judgment.

It appearing, however, that the claims of the complainant and of the answering defendants to the timber upon the land in dispute are made in good faith and upon colorable grounds, and that such defendants have threatened and propose to cut and remove said timber, it is proper, in order to preserve the rights of complainant, that such defendants should be enjoined and restrained from cutting or removing such timber until patent for such land shall have been issued by the United States, and until the further order of this court.

Decree will be entered accordingly, but without costs.

## UNITED STATES, to Use of ROWLAND, v. GUERBER et al.

(Circuit Court, S. D. New York. June 9, 1903.)

## 1. CONTRACTS—PERFORMANCE—EXTENSIONS OF TIME—CONSENT—FINDINGS.

Plaintiff and defendant agreed jointly to perform certain work in the construction of a lighthouse for the United States and share profits and losses. Plaintiff was to contribute everything pertaining to the ironwork, and defendant agreed to furnish the concreting, masonry, carpentering, and painting. When the caisson was nearly in place it was destroyed by a derelict hurled against it by the waves, after which the lighthouse was constructed on another site. An extension of time to complete the contract was obtained, to which plaintiff consented and, after a second extension had been obtained by defendant, plaintiff continued his work with knowledge thereof. *Held*, that such facts warranted a finding that plaintiff also consented to the second extension.

## 2. SAME—PARTNERS.

Where plaintiff and defendant agreed to enter into a contract with the United States for the construction of a lighthouse, defendant agreeing to furnish the ironwork and plaintiff the concreting, masonry, carpentering, and painting, and it was agreed that if there was a profit over and above the cost defendant, in whose name the contract was taken, should pay plaintiff one-half of such profits, and if there was a loss plaintiff should be chargeable with one-half thereof, plaintiff and defendant were partners in the undertaking.

## 3. SAME—AGREEMENT—CONSTRUCTION—ACT OF GOD.

Where a contract between plaintiff and defendant for the construction of a lighthouse for the United States provided that they should share the profits and losses equally, and declared that each party should contribute particular parts of the work, a provision that each party should be responsible for any accident or damage resulting from his operation or neglect applied only to losses accruing to third parties, and did not include a loss of the entire work by an act of God.

Howard A. Sperry, for plaintiff.

John Brooks Leavitt and Nadal, Smyth & Carrere, for defendants.

PLATT, District Judge. This action is brought upon a bond executed by Guerber as principal, and Fidelity & Casualty Company of New York as surety, pursuant to chapter 280, Act Aug. 13, 1894, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], to recover for labor and materials furnished under a contract between Guerber and the United States, and, by stipulation, a trial by jury has been waived and the cause submitted to the court.

Upon the hearing the court finds the following facts: Shortly prior to September 13, 1898, Guerber suggested to Rowland that they go in for the contract together to build a lighthouse for the United States government, and to this Rowland assented. They worked over the figures during several weeks to determine what their bid should be. Having completed their figures, the bid, by agreement between them, was put in by Guerber. They agreed that Guerber was to contribute everything pertaining to the ironwork, and Rowland the concreting, masonry, carpentering work, and painting, and that if the contract was awarded they would share the profits or losses equally. The contract

¶ 2. See Partnership, vol. 38, Cent. Dig. § 27.

was awarded September 13, 1898. Guerber and Rowland then went to the Fidelity & Casualty Company to apply for a bond, and the bond was executed by Guerber as principal and the Fidelity & Casualty Company as surety on the same day. On the same date Guerber and Rowland, as parties of the first part, and the Fidelity and Casualty Company, as parties of the second part, executed an agreement, which recites:

"Whereas, at the request of the said parties of the first part, and in consideration of this agreement and of the security hereof, the company has executed, or is about to execute, as surety, a certain bond or application in the sum of \$6,000, to the United States of America," etc.

Then follows a description of the bond. Then follows an agreement that they (Guerber and Rowland) shall pay the company the sum of \$60 per annum for the bond, and shall indemnify and save harmless the company against all loss, damages, costs, etc., which "it may at any time sustain, incur, or be put to" by reason of said bond. On September 27, 1898, Guerber and Rowland entered into an agreement in writing, which practically coincided with their earlier verbal arrangement, and a copy thereof stipulated to be correct can be found in the pleadings. They went to work upon the lighthouse, and after part of the work had been done it was destroyed by a derelict, which was hurled against the caisson. The stipulated facts touching upon that point are as follows:

"The reason for the excess of expenditure over the estimates, on the basis of which the contract to erect the lighthouse in question was taken, was that on October 25, 1898, when the caisson was nearly in place, a storm came up and drove the men away from the work; and on the evening of the next day, the storm continuing meantime, a derelict was hurled by the waves against the caisson, destroyed it, and the work had to be done all over again. By the consent of the government the time for the completion of the lighthouse was extended, and its site changed to a more available spot near by. At the time of such destruction none of the concrete work had been begun, and the carpenter work, hardware, and painting could not be done or utilized until after the concrete work was begun."

The government gave two extensions of the date for finishing the contract—one of two months and another of fifteen days. The first extension was beyond question obtained with the knowledge and consent of both Rowland and Guerber. As to the second extension, it is clear to my mind from all the evidence, and I so find, that it was also obtained with the knowledge and consent of both Rowland and Guerber.

At the completion of the contract there was a loss, due to the destruction of the caisson by the derelict, which has been referred to above. A settlement was made upon the basis of each party's losing one-half. The plaintiff now claims that the defendant should bear the entire loss occasioned by the derelict. If his contention prevails, it is stipulated that the loss is \$1,653.12, with lawful interest.

The evidence does not support the contention of the plaintiff that an accident causing damage resulted from Guerber's operation, and I find, as fact, that it did not. Neither was Guerber negligent in selecting the time and manner of placing the caisson. An accident occurred,

and damage resulted, but the operation of Guerber in no sense contributed thereto.

The foregoing finding of facts practically eliminates any extended discussion of the law applying thereto, and what I shall say is, to some extent, a rather rough statement of my reasons for some of my findings.

1. Was the contract of indemnity which Rowland and Guerber made with the Fidelity Company abrogated, so far as Rowland is concerned, by the second extension of time granted by the government for the completion of the work? I have found as a fact that Rowland consented to that extension. He practically accepted the extension of time by going on and completing his work on the caisson during the extension. He knew of the extension, because he knew when the first extension expired, and Guerber discussed with him the second extension. From the outset he had gone into the entire matter jointly with Guerber. The accident occurred during the joint undertaking. It was for their joint benefit to have the time extended, and it is a very strained and contracted view of the situation for Rowland, at the end, to try to take advantage of the fact that he did not in so many words inform the Fidelity Company that he consented to the second extension. He admits that he consented to the first extension. What possible reason can exist which will explain his unwillingness to consent to a second extension without which the loss would have been very much larger than it actually was? In discussing this point I am looking at the matter from the standpoint that Rowland and Guerber were not partners in a joint undertaking. If they were partners, of course the consent of Guerber must be accepted as the consent of Rowland. In truth, if they were partners, and I think that without question they were, then there is nothing left of the case. From neither view of the matter, however, can I find any substantial footing for the plaintiff. He would have been no worse off if he had been standing on the caisson during its interview with the derelict.

2. Assuming that the relation of contractor and subcontractor existed between Guerber and Rowland, what meaning must be attached to the clause in their contract of September 27, 1898: "Each party shall be responsible for any accident or damage resulting from his operation or neglect." This is the contract under which must be measured the value of the labor and materials which Rowland furnished, and to arrive at that the last paragraph must be taken into account:

"Should there appear a profit over and above the cost, then Louis A. Guerber shall pay to John T. Rowland the balance of the amount proved to have been legitimately expended by John T. Rowland and one-half ( $\frac{1}{2}$ ) of the profits. Should there appear a loss, then Louis A. Guerber shall pay to John T. Rowland the balance of the amount proved to have been legitimately expended by John T. Rowland, less one-half ( $\frac{1}{2}$ ) of the loss."

Under Guerber's contract with the government Rowland has confessedly been paid in full, unless his rights are saved by the first clause quoted. The clause cannot mean that in arriving at the profit or loss under the government contract each party shall bear exclusively, as between themselves, the losses which arise from his operation or

neglect as affecting his individual work. It seems clear that it means that each should bear any loss which he should be compelled to pay to third parties.

The situation forces that meaning into the words. One understood the sinking of the caisson and the ironwork generally. The other was conversant with concreting, mason work, etc. When the caisson has been located, the mason work would follow. They were distinct undertakings, requiring different management, different experience, and different employes. Neither understood the other's work. It was for that reason that they pooled their issues in figuring on the contract. Each respected the other's capacity and competency in his own line of work. They were willing to speculate together, on the strictly business end of the proposition; but when it came to what each might have to pay by way of damage, either to his own employes or to outsiders, each was the best judge of that element of expense, and each was content to bear alone his own risk. It is exceptionally unfair to endeavor to read into that simple clause such a meaning as the plaintiff in the light of the developed facts, which were not at the time even suspected, much less contemplated, now contends for with abundant strenuousness. If the plaintiff were permitted to occupy every position essential to his safety until this one is reached, he would find here an impassable barrier. But, if we take the broadest possible construction of the clause, the accident was in no sense due to the operation or neglect of Guerber. He was guilty of no negligence in sinking the caisson when he did sink it. I have heretofore found this fact. Under the stipulated facts the destruction of the caisson was as surely due to an "Act of God" as if a thunderbolt from the skies had been hurled by an Omnipotent Power against the luckless endeavor.

The logical conclusion is that judgment should be entered for the defendants to recover their costs. It is so ordered.

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**TAYLOR et al. v. FALL RIVER IRONWORKS (two cases).**

(District Court, S. D. New York. September 10, 1903.)

**1. SHIPPING—DEMURRAGE—ASSUMPTION OF LIABILITY BY CONSIGNEE.**

Respondent contracted in England for two cargoes of coal, to be delivered alongside the vessels at New York, and discharged at the rate of 1,000 tons per day. The sellers chartered vessels for carrying the coal from libelants, the charter parties containing the usual cesser clauses providing that the charterers' liability should cease when the cargo was shipped, and that the owner should have a lien on the cargo for demurrage, and also requiring the cargoes to be discharged by the consignees. Bills of lading were issued, which provided that all the terms and conditions of the charter parties were incorporated therein, and drafts for the price of the coal, with bills attached, were presented to and paid by respondent before the arrival of the vessels. *Held* that, while not bound thereto by the contract of purchase, respondent, by paying the drafts and accepting the coal under the bills of lading, was bound, as between itself and libelant, by the provisions of the charter parties, and

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¶ 1. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

became responsible for the discharge of the vessels and for demurrage, where such discharge was not made at the stipulated rate.

2. **SALE—CONSTRUCTION OF CONTRACT—PASSING OF TITLE.**

A contract made by cable for the purchase of a specified number of tons of coal to be shipped by the sellers from England is not one of absolute sale of any specified coal, so as to pass the title at once, but is executory, and the title did not pass in any event until the coal was laden for shipment.

3. **SHIPPING—DEMURRAGE—AUTHORITY TO BIND CARGO.**

Where, by a contract for the purchase of coal, it was to be shipped by the sellers from England, and delivered to the purchaser at New York, the sellers were authorized to contract for the carriage of the coal either as owners from whom the title had not passed or as agents for the purchaser, and by such contracts to subject the coal to a lien for demurrage.

4. **SAME—ESTOPPEL TO DENY LIABILITY.**

Where, pending the discharge of cargoes of coal, the consignees admitted their liability for demurrage, provided any was due, which, however, they denied, and the shipowners, in reliance thereon, allowed the cargoes to be discharged without asserting their lien, the consignees were estopped to defend a suit for demurrage on the ground that another was the proper party to be sued therefor.

5. **SAME—EVIDENCE CONSIDERED—RESPONSIBILITY FOR DELAY IN DISCHARGING.**

Evidence held to show that delay in the discharge of cargoes was not due to any fault or lack of equipment on the part of the vessels, but to causes which entitled them to recover demurrage therefor.

In Admiralty. Suit for demurrage.

Butler, Notman, Joline & Mynderse (Frederick M. Brown, of counsel), for libelants.

Wilson & Wallis (William G. Wilson, of counsel), for respondent.

HOLT, District Judge. These are two suits, brought by the firm of Charles M. Taylor's Sons against the Fall River Ironworks, to recover demurrage for delay in unloading two cargoes of coal shipped from Cardiff to New York on the steamers North Point and Montauk Point. In the early part of October, 1902, the Fall River Ironworks purchased by cable from Mann, George & Co., of London, 11,000 tons of Welsh coal. The contract provided that the coal should be delivered free alongside at New York. The Fall River Ironworks, therefore, under its contract with Mann, George & Co., was under no obligation to discharge the cargo. All it had to do was to receive it. After making this contract, Mann, George & Co. chartered from Charles M. Taylor's Sons, the libelants, two steamships, the North Point and the Montauk Point, to transport the coal to New York. The charter parties provided that the consignees should effect the discharge of the cargo. The charter parties also contained the usual cesser clauses providing that the charterers' liability should cease as soon as the cargo was shipped, and that the owner should have a lien on the cargo for demurrage or other claims arising at the port of discharge. The steamers were loaded at Cardiff with the coal, and a bill of lading was issued for each cargo, which provided that all the terms and conditions contained in the charter party were incorporated in the bill of lading. The two steamers, after being loaded, proceeded to the port of New York. Mann, George & Co. drew drafts, accompanied by the bills of lading, for the price of the coal, which were duly paid before the representatives at New York

of the Fall River Ironworks saw a copy of the charter parties. As soon as they saw a copy, they wrote to the representatives at New York of the Messrs. Taylor, declining to accept the clause of the charter parties requiring the consignees to effect the discharge of the cargo. Considerable correspondence ensued, the substance of which was that the representatives of the Fall River Ironworks insisted that by the contract with Mann, George & Co. the Fall River Ironworks was not obligated to select a berth, or employ stevedores, or do anything in relation to the discharge of the cargoes, while the representatives of the Messrs. Taylor claimed that by the provisions of the charter parties the consignees were to attend to the discharge of the cargo. The controversy having been brought to the attention of Mann, George & Co., they directed an agent at New York to obtain berths, employ stevedores, and do whatever was necessary to discharge the cargo, and the agent thereupon proceeded to do so. The North Point was sent to Pier 19, East River, New York, and the Montauk Point to the foot of Forty-Second street, South Brooklyn. The cargoes were there unloaded into barges provided by the Fall River Ironworks. The Fall River Ironworks made the application for the entry of the coal at the custom house, and in the papers filed there asserted that it owned the coal under the bills of lading. It paid the duties on the coal, and, as the owner of the coal under the bills of lading, received the custom-house permit under which the coal was discharged from the steamers. Neither of the cargoes was unloaded at the rate of 1,000 tons per day, and these actions are brought to recover demurrage for the delay.

The contract under which the Fall River Ironworks purchased the coal provided that the coal should be discharged at the rate of 1,000 tons a day, but it imposed no duty on the Fall River Ironworks to obtain berths for the steamers, employ stevedores, or have anything to do with discharging the cargo, except to receive it alongside the steamers. It consistently refused to effect the discharge. The charter parties, however, provided that the consignee should effect the discharge of the cargo, and the terms and conditions of the charter parties were incorporated into the bills of lading. The effect of these provisions in the charter parties and the bills of lading was, in my opinion, that, as between the Messrs. Taylor and the Fall River Ironworks, the Fall River Ironworks was bound, if it received the coal under the bills of lading, to be responsible for demurrage under the provisions of the charter parties. The Messrs. Taylor were not obliged, under the charter parties, to attend to obtaining berths for the steamers, or to have anything to do with discharging the cargo, except to furnish the necessary steam, and the winches and other standing appliances for unloading, and to allow 25 cents a ton towards the expense. Undoubtedly, the Fall River Ironworks had not agreed to attend to the discharge, and was not under any obligation to do it, but, if it chose to accept the coal under the bills of lading, it was bound to comply with the provisions of the bills of lading. *Neilsen v. Jesup* (D. C.) 30 Fed. 138.

The respondent's counsel argues that the respondent never agreed to discharge the cargo; that it persistently refused to have anything



to do with discharging it; that Mann, George & Co. did discharge it; and that, therefore, Mann, George & Co. are the parties liable for any demurrage due for delay in discharging. But the libelants, by the cesser clause in the charter parties, had agreed not to hold Mann, George & Co. for demurrage on unloading at New York, but to hold the consignee, through the lien on the cargo provided for in the charter parties. It is true that the respondent did not know the contents of the charter parties until after it paid for the coal; but it received the bills of lading when it paid for the coal, and knew from them that by the terms of the bills of lading it took the coal bound by any conditions in the charter parties. Moreover, the cable contract between the Fall River Ironworks and Mann, George & Co. provided that the coal should be discharged at the rate of 1,000 tons a day. The respondent, therefore, would naturally expect that the charter parties would contain such a condition, with the usual provisions for demurrage and the usual cesser clause giving a lien on the cargo for demurrage. The respondent, therefore, in my opinion, took the risk of being bound by any conditions of the charter parties when it paid for the coal, and took the risk of being held liable for any demurrage when it received the coal.

On the merits, the evidence satisfies me that the steamers were fitted with all the necessary appliances, and that each could have discharged at least 1,000 tons a day, even without breasting out the vessel, and without night work. The facts that the berths where the cargoes were discharged were narrow, that the barges employed were of an inconvenient size and were decked over, that frequently the work was necessarily interrupted to enable other vessels to use the slip, and that only a part of the hatches which could have been worked at one time were worked, sufficiently account, in my opinion, for the result that much less than 1,000 tons a day were discharged. If the steamers had been breasted out, and night gangs had worked, 1,000 tons a day could certainly have been discharged; and, if that was necessary to be done, and was not done, demurrage is due. *Egan v. Barclay Fibre Co.* (D. C.) 61 Fed. 527; *McCaldin v. Cargo of Iron* (D. C.) 111 Fed. 411.

The respondent's counsel argues that this was an absolute sale of specific property, so that the title to the coal passed to the Fall River Ironworks as soon as the contract was completed by cable; that, therefore, Mann, George & Co. had no right to subsequently impose any lien on the coal without its authority; that no such authority was conferred by the contract of purchase or in any other manner; and therefore that the provisions in the charter party attempting to impose a lien for demurrage were a nullity. I am not able to concur in this reasoning. In the first place, I think that this was not a purchase of any specific property. It was a general purchase of a quantity of coal, to be selected out of a mass of similar coal. The coal which was shipped may not have been even mined when the contract was made. Although the contract of purchase by cable was complete, the contract was executory, and no title passed until the specific goods to be delivered to the vendee were set apart and appropriated to that purpose. *Benjamin on Sales*, § 352 et seq. I think, therefore,

that no title to the coal in question passed to the Fall River Ironworks before its delivery on board the steamers at Cardiff; and, in view of the facts that the contract provided that the coal was to be delivered in New York, and that Mann, George & Co. transported it to New York, on steamers which they chartered, instead of delivering it to a common carrier for transportation, and thereby retained possession until delivery at New York, I think it doubtful whether any title passed until the delivery of the coal in New York. But it seems to me that the question when the title passed is immaterial. If it remained in Mann, George & Co. until the coal was delivered on board the steamers at Cardiff, the Messrs. Taylor had a right to make any agreement with Mann, George & Co. in relation to its transportation that they saw fit. Even if it should be held that the title to the coal passed before it was delivered on board the steamers, I think that, under the circumstances of the case, Mann, George & Co. would be held to have been agents of the purchasers for the purpose of making arrangements for the transportation of the coal to New York, and that the Messrs. Taylor had a right to make any agreement with them as such agents which they deemed necessary in regard to the terms and conditions of affreightment. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438, 28 N. E. 394. Mann, George & Co. would have had, as such agents, apparent general authority, and the fact that their authority was restricted by the terms of their contract with the Fall River Ironworks could not bind the Messrs. Taylor. The Messrs. Taylor apparently knew nothing about the contract between the Fall River Ironworks and Mann, George & Co., and in chartering their vessels to Mann, George & Co. they of course had a right to insert such provisions in the charter parties and the bills of lading as they saw fit to require.

If, however, for any reason, any party other than the Fall River Ironworks was liable for demurrage before the correspondence which took place between it and the libelants' counsel I think that by that correspondence it is now estopped from denying that it is liable, provided demurrage was justly due from anybody. The situation, when that correspondence took place, was this: Messrs. Taylor, by the cesser clause in the charter parties, had given up any claim on the charterers for demurrage, but they retained a lien for demurrage on the cargo, which, but for the provision in the charter parties, they would not have had; for the law gives no lien on cargo for demurrage. *Abb. on Shipping* (14th Ed.) 346. When the first steamer was partly unloaded the libelants' counsel wrote to the respondent, offering, in substance, not to subject it to the inconvenience which would result from the arrest of the cargo, and asking it to agree to appear in any action which might be brought for demurrage, and to admit that, if any demurrage were due, it was the proper party to be sued. The respondent answered that it was the proper party. In the reply to the second letter, to the same effect, in relation to the cargo of the second steamer, the respondent said, "We do not admit in any way that we are responsible for demurrage, because, according to our understanding, should there be any demurrage, it is the fault of the steamer discharging." In reliance upon these letters, the libelants allowed the

cargo to be discharged, and their lien on it for demurrage lost, and I think that the respondent is estopped by them from now defending on the ground that some other party is liable for the demurrage. The respondent is entitled to defend on the ground that no demurrage is due from anybody, and particularly, as they stated in the second letter, on the ground that the delay was the fault of the steamer discharging; but it is not entitled, in my opinion, to defend the claim on the ground that the demurrage, although justly due, is due from some other party than the respondent.

My conclusion is that the libelants are entitled to a decree for the amount demanded in the libel, unless the respondent wishes to contest the amount due for demurrage, in which case the usual reference to ascertain the amount will be ordered.

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### UNITED STATES v. HILLS.

(District Court, W. D. New York. July 8, 1903.)

#### 1. ALIENS—CHINESE—EXCLUSION—CRIMINAL LAW—INDICTMENT—DEPORTATION DECREE—EVIDENCE.

A deportation decree rendered by the United States commissioner in proceedings instituted before him to determine the status of a Chinese person alleged to have been illegally brought into the United States is relevant and competent evidence of the status of such person, and was sufficient to justify a grand jury in finding an indictment against defendant for willfully bringing such person into the United States, in violation of Chinese Exclusion Act May 6, 1882, c. 126, 22 Stat. 61 [U. S. Comp. St. 1901, p. 1307], as amended by Act July 5, 1884, c. 220, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1310.]

Charles H. Brown, for the United States.

Eugene L. Falk, for defendant.

HAZEL, District Judge. This is a motion to quash an indictment found by the grand jury accusing the defendant of a violation of section 11 of the Chinese Exclusion Act of 1882 (Act May 6, 1882, c. 126, 22 Stat. 61 [U. S. Comp. St. 1901, p. 1307]), as amended in 1884 (Act July 5, 1884, c. 220, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1310]). That section prohibits a person from knowingly bringing into, or causing to be brought into, the United States by land any Chinese person not lawfully entitled to enter the United States; and from aiding or abetting such unlawful entry. It was admitted on argument on behalf of the government that the sole evidence before the grand jury tending to prove that the Chinese persons alleged to have been brought into the United States by the defendant were not entitled to enter or remain in the United States was a judgment and decree of deportation rendered by the United States commissioner before whom the proceedings were instituted. The competency and relevancy of this evidence upon which the indictment was found, and its competency and relevancy upon the trial of the accused to establish

¶ 1. Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

that such Chinese persons were unlawfully in the United States, is challenged by the accused. Other material evidence was considered by the grand jury tending to show that the accused knowingly brought into the United States the Chinese persons specifically named in the judgment of the commissioner, or aided and abetted their unlawful entry. The sole question, therefore, to be decided is whether the adjudication of the United States commissioner declaring the persons therein named to be Chinese laborers, and not entitled to enter or remain in the United States, is competent and relevant evidence of the facts therein found. The theory of the attorney for the government is that a judgment or decree of deportation defines and establishes the status of a Chinese person alleged to be unlawfully in the United States, and therefore the adjudication is in rem, founded upon a proceeding instituted to establish the status or condition of the persons proceeded against. I quite agree with the District Attorney, although my attention is not called to any case where the precise point raised is expressly decided. The effect of a proceeding before a United States commissioner under the exclusion act is to establish that a Chinese person, who has unlawfully entered the United States, belongs to a class of persons whose entry into the United States is forbidden by law, and that such person shall be deported or removed therefrom. The judgment of the commissioner authorized to hear the evidence establishes the status or relations between the United States and the person found to be unlawfully within its territory. It is not insisted here, as I understand it, that it has been established that the accused was in direct privity with the parties to that proceeding. The argument solely proceeded upon the ground of the admissibility in evidence of the judgment of the commissioner defining the status of the Chinese persons therein named, irrespective of any theory or proof of privity. No inference of the commission of any wrongful act by the defendant can be deduced from such decree and judgment alone. The accused was not a party to that proceeding. The evidence, however, was properly received by the grand jury as some evidence of the relationship or status between the persons named in the judgment and the United States. The judgment of the commissioner, as shown by his record, is a public document, which, in effect, recited a transaction had with others in the course of his official duties. It is an independent item of evidence, which may be controverted by the defendant. As to whether the evidence introduced by the government is sufficient to establish the purport of the judgment, and the relation therein decreed between the persons therein named and the United States, is entirely for the jury to decide. Corroborative circumstances may be shown upon the trial which may, by their character, be sufficient to constitute conclusive proof, or which may show privity of the defendant to this determination. Such records, decrees, and judgments may, therefore, be received in evidence on the trial of the accused as prima facie establishing the status of relationship between the United States government and the Chinese persons whom the defendant is charged to have assisted in entering the United States. The Government is required to establish satisfactorily, first, the status of the Chinese persons who were

brought into the United States by the defendant, or whose unlawful entry was aided or abetted by him; second, that the accused knowingly brought, or caused to be brought, such persons into the United States, or knowingly aided or abetted the landing in the United States of Chinese persons not entitled to enter the United States. The generally accepted rule is that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that precise question in another suit between the same parties and their privies. *Patterson v. Gaines*, 6 How. 550, 12 L. Ed. 553. These rules have application, not alone to civil actions in rem, but are also controlling in actions of a criminal nature, where a judgment of a court of competent jurisdiction is rendered as to the status of some particular matter. It has been applied, for instance, where the issues relate to questions of marriage and divorce (see *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Wottrich v. Freeman*, 71 N. Y. 601), and in civil actions for criminal conversation, and where the freedom of a slave was involved (*Vigel v. Naylor*, 24 How. 208, 16 L. Ed. 646; *Railroad Equipment Co. v. Blair*, 145 N. Y. 607, 39 N. E. 962), or in decrees against habitual drunkards (*Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Greenleaf on Evidence*, § 528). A proceeding charging Chinese persons with being unlawfully in the United States is not a criminal proceeding. *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905. It is an authorized inquiry under the forms of law, to ascertain whether a Chinese person has a legal right to remain in the United States. Such an inquiry involves evidence of birth, citizenship, and whether the person proceeded against is a Chinese laborer. The burden is upon the Chinese person to establish his rights to remain, and not upon the government to show its right to exclude him. The judgment or decree of the commissioner, although not conclusive evidence of the facts found, may, nevertheless, in the absence of better evidence, be received in the case at bar for the purpose stated, and as material and competent to establish the relations between the parties to the former proceeding; for how otherwise could the nativity of Chinese persons and their status to the United States be established, assuming the order of deportation to have been obeyed, as in this case? In the absence of the party to the proceeding, the record alone in numerous cases can furnish the evidence of unlawful entry. To hold otherwise would probably render the statute forbidding the offense, and providing punishment for the commission thereof, entirely nugatory, for in many cases the persons excluded are deported before a trial under an indictment, such as this, can be had. The exclusion act requires deportation of the contraband Chinese. The effect of the enunciated rules applied by Chief Justice Marshal in *Davis v. Wood*, 1 Wheat. 6, 4 L. Ed. 22, cited by counsel for defendant, does not strictly apply here. In that case it seems to have been broadly held that verdicts are evidence between parties and their privies only. The facts of that case disclose that a judgment in favor of a mother, establishing her freedom, could not be given in evidence in a case against Swan, a third person, by the child of that mother, as tending to prove its freedom. The status

of the freedom of the mother of the child as to Swan is attempted to be established by this judgment. The court held that a judgment which established the relations between the slave and the master in the former suit could not be admitted to prove the relation existing between a descendant of that slave and a third party. A different state of facts here presents itself. The status of the Chinese persons named in the indictment as to their rights in the United States is fixed by the commissioner's judgments. Those judgments are now offered as evidence of their status in the United States, and no relation of these Chinamen to Hills is proven, or sought to be proven, by their reception in evidence. In a later case decided in the Supreme Court of the United States (*Vigel v. Naylor*, *supra*) the Davis Case is distinguished and explained. In the Naylor Case the petitioners also sought to establish their freedom. Petitioner proved that one Kirby had emancipated all his slaves by will. It was then attempted to be shown upon the trial that the petitioner had been the slave of one Kirby, and that her brother, mother, and sister had obtained their freedom under the will of Kirby by a suit against George Naylor, whose administrator was Henry Naylor, the defendant in the suit on trial, and that it was unusual to separate from the mother a child so young as the petitioner was at the time of Kirby's death. The Supreme Court held that the recoveries of the mother and sister against George Naylor were properly received in evidence. True, the court based its decision upon the ground that these judgments for petitioner, establishing freedom, were not *res inter alios acta*, but it is generally stated in the opinion that "the record could have proved the existence of the verdict and judgment as a fact and the legal consequences flowing from the fact. \* \* \* This record evidence may be used in any suit by a third person where the evidence is pertinent, of which the court must judge from facts and circumstances appearing on the trial." And at the end of the opinion the court says: "In the next place, the record operates on the status of the person; it sets him free or pronounces him a slave, and binds him by the verdict either way."

There are numerous exceptions to the general rule that a judgment binds only parties and privies. The principle enunciated in *Railroad Equipment Co. v. Blair*, *supra*, holds that the exceptions to the general rule are as firmly established as the rule itself. The language of the court in that case clearly states the exception to the general rule, and I think the exception applies to the question under consideration. The language of the court follows:

"A general and well-settled rule that a judgment binds only parties and privies is unquestioned. But there is an exception to this rule, as firmly settled as the rule itself, and that is that a former judgment establishing rights and relations between the parties to that judgment, while it is never admissible to defeat or devert any right existing in a person not a party or privy thereto, is admissible against such person for the purpose of proving that the plaintiff in the former judgment sustained to the defendant therein the relation established thereby."

It would seem that the constitutional provision securing to the defendant the right to be confronted with the witnesses against him does not apply where the facts in controversy are such as have been

established by the proof objected to here. *People v. Jones*, 24 Mich. 215; *U. S. v. Bonner*, 1 Bald. 234, Fed. Cas. No. 14,568; *U. S. v. Liddle*, 2 Wash. C. C. 205, Fed. Cas. No. 15,598; *U. S. v. Ortega*, 4 Wash. C. C. 531, Fed. Cas. No. 15,971; *Cooley on Constitutional Limitations*, p. 387.

I conclude that the evidence considered by the grand jury, and to which exception is now taken, was properly considered, and was sufficient upon which to base the indictment.

Motion denied.

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KERR et al. v. UNION MARINE INS. CO., Limited.

(District Court, S. D. New York. September 3, 1903.)

1. MARINE INSURANCE—ACTION ON BINDING SLIP—JURISDICTION OF COURT OF ADMIRALTY.

An accepted application for marine insurance, or binding slip, constitutes a contract of insurance which will support an action at law, and a court of admiralty has jurisdiction of an action thereon to recover for a loss.

2. SAME—REPRESENTATIONS AVOIDING CONTRACT—CHANGE IN DATE OF APPLICATION.

An application for marine insurance on a cargo, made on a printed form of the company, contained a provision that the insurance was subject to the conditions of the printed forms of policy then in use by the company, which, among other provisions, insured ships "lost or not lost." The application was dated November 4th, and presented to the company on that day by a broker representing the applicants, and left for inquiry respecting rates. It contained a statement that the ship had not sailed. December 12th, applicants having received a letter dated December 3d, stating that the ship would clear on that day, their broker applied to have the insurance made binding; and the company's representative changed the date of the application to December 12th and signed the binding slip. The ship sailed December 4th, and was wrecked and the cargo lost on the 7th, but such fact was not known to the insured. *Held*, that the statement in the application that the ship had not sailed was not a warranty or representation that she had not sailed on December 12th, but that she had not on November 4th, when the application was dated and presented to the company, and that, having made no inquiry whether she had since sailed, the company must be deemed to have regarded the fact as immaterial, in view of the form of policy used, and was bound by the contract, the ship not being at the time overdue.

In Admiralty. Action on contract of marine insurance.

Butler, Notman, Joline & Mynderse (Wilhelmus Mynderse, of counsel), for libelants.

Albert A. Wray, for respondent.

HOLT, District Judge. This is an action upon a contract of marine insurance. On November 4, 1901, the libelants, John E. Kerr & Co., merchants, of New York, applied to the respondent, the Union Marine Insurance Company, Limited, for insurance on a cargo of logwood on the brigantine A. Elida, from Black River,

¶ 1. See Insurance, vol. 28, Cent. Dig. § 210.

Jamaica, to New York. The application was made on a printed form used by the respondent. It contained a provision that the insurance was subject to the conditions of the printed form of policy used by the company at its New York agency at that date, which form, among other provisions, insured ships "lost or not lost." The application, when filled out, stated the usual particulars of the vessel, cargo, and voyage. In the space opposite the printed words "Time of Sailing" were inserted the written words "Not sailed." The date "Nov. 4th, 1901," was also written on the application. This application, so filled out, was submitted to an officer of the insurance company by Mr. Woore, a member of the firm of McDowall, Carroll & Co., insurance brokers, representing Kerr & Co. Certain immaterial provisions in the application were changed. Mr. Woore then asked the rates of insurance, which were given, and written upon the application. Mr. Woore then wrote upon the application "Inquiry," to indicate that it was not a complete application, and left it with a representative of the insurance company, who placed it upon a file of pending inquiries. Mr. Woore reported the rates and terms to Kerr & Co., who thereupon endeavored to secure more favorable rates from other companies, and, among other inquiries, cabled to England. While these inquiries were being made, the matter slipped along until the 12th of December, 1901, when Kerr & Co. received a letter from Black River, dated the 3d of December, which stated that "the Elida clears to-day." Kerr & Co. immediately telephoned to McDowall, Carroll & Co. to close the insurance at once. Mr. Woore went to the office of the insurance company, and ascertained from Mr. Whitlock, the representative of the company, that the insurance company was ready to complete the insurance on the terms stated. He reported to Kerr & Co., and was directed by them to close the insurance regardless of rates. Mr. Woore thereupon returned to Mr. Whitlock, and told him that he wanted to make the risk binding, and Mr. Whitlock said that he would bind it for him. Mr. Whitlock then put his initials on the application, under the word "Binding," struck out the word "Inquiry," and struck out the date "Nov. 4th, 1901," and inserted over it the date "Dec. 12/01." Thereupon McDowall, Carroll & Co. notified Kerr & Co. that the insurance was taken. This was about 5 p. m. on the 12th of December. The next morning, December 13th, Kerr & Co. heard that the Elida and her cargo had been lost. She sailed from Black River December 4th, and was wrecked on December 7th on the south coast of Cuba, about 18 miles from Cape Corrientes. The ship and cargo were a total loss. The captain and crew made their way in a small boat around the west end of Cuba until they finally found a fishing vessel, which took them to Havana, a journey occupying five days. The captain reached Havana on December 12th, about 6 p. m. Until he reached there he had no means of communication with New York. He immediately cabled to the agents of the vessel at New York. The cablegram reached New York at 7:04 p. m. on the 12th of December. It was not delivered to the agents until the following morning, and the news reached Kerr & Co., through the agents, that forenoon. Kerr & Co. thereafter duly tendered the pre-



mium, filed proofs of loss, and demanded payment of the insurance, which was refused.

This action is brought upon the binding slip to recover the insurance. The answer alleges three grounds of defense: That the libelants concealed the sailing and the loss, that the vessel was unseaworthy, and that the statement in the binding slip, "not sailed," was a warranty or a representation that the vessel had not sailed on December 12th, which vitiated the insurance. On the trial the respondent's counsel suggested another defense—that this court has no jurisdiction.

In my opinion, there is no evidence that the libelants knew of the loss or concealed it. The evidence is clear and entirely uncontradicted that they did not know and could not have learned that the vessel had been lost until the day after the binding slip was initialed. The defense that the vessel was not seaworthy is also, in my opinion, unsupported by any satisfactory evidence. The defense that this court has no jurisdiction is based on the claim that an action at law cannot be maintained on the binding slip, but only an action in equity to procure the execution of a policy, and therefore, as a court of admiralty has no purely equitable jurisdiction, that this action cannot be maintained. Some of the earlier cases went upon the theory that such a binding slip was merely an agreement to issue a policy, and that the remedy in such a case was a bill in equity, praying to have a policy issued. But it has long since been established that such a binding slip is itself a contract of insurance, and that a direct action at law will lie upon it, as well as a suit in equity. *Ellis v. Albany Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford Co.*, 59 N. Y. 171, 17 Am. Rep. 322. A court of admiralty, of course, has general jurisdiction of suits on contracts of marine insurance. *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90. I think, therefore, that this court has jurisdiction.

The serious question in this case is whether the statement on the application that the vessel had not sailed constitutes a warranty or a representation which makes the contract void. When the application was filed, on November 4th, the vessel had not sailed. When the binding slip was initialed, on December 12th, she had sailed. The information whether a vessel has or has not sailed is usually material (*Johnson v. Phoenix Ins. Co.*, Fed. Cas. No. 7,405); and if this application had been originally filed on December 12th, and had contained the statement that the vessel had not sailed, I think it would have vitiated the contract, for a contract of marine insurance is one of the strictest good faith, and a material statement in the application which is incorrect vitiates it, whether the person who made it knew that it was incorrect or not. But in this case the statement was true on November 4th, when it was made. If Mr. Woore had presented the application on December 12th, and had stated in it that the vessel had not sailed on November 4th, the statement would have been correct, and I think that that was the legal meaning of the statement in the application as finally accepted. That was the original statement, as Mr. Whitlock knew. No one in behalf of the libelants ever stated that on December 12th the *Elida* had not sailed. It was Mr. Whit-

lock, and not Mr. Woore, who changed the date. Mr. Whitlock knew that the vessel would sail some time, and as the binding slip provided that the insurance was subject to the conditions of the printed form of policy used by the company, and the form then used insured ships "lost or not lost," I think that the inference to be drawn from the act of Mr. Whitlock in initialing the binding slip as it stood, without inquiring whether the *Elida* had sailed since the application was filed, is that he did not care whether the ship had sailed or not. If he had cared, it was his duty, in my opinion, under the circumstances, to have inquired. *Insurance Co. v. Higginbotham*, 95 U. S. 380, 24 L. Ed. 499. The ship at that time had not been out long enough to make her an overdue ship. She sailed on December 4th. The binding slip was signed 8 days after, and the ordinary period for such a voyage from Jamaica to New York was about 20 days. It would appear, therefore, to be in fact an immaterial consideration whether she had sailed or not, to a company issuing a policy insuring the ship lost or not lost. The especial importance of information of sailing is in the case of overdue vessels. *Johnson v. Phoenix Ins. Co.*, Fed. Cas. No. 7,405.

I have examined the cases cited by the respondent. They establish the general principle that any concealment of a material fact vitiates a contract of marine insurance. None of them presents the peculiar features of this case. In the case of *Insurance Co. v. Higginbotham*, 95 U. S. 380, 24 L. Ed. 499, a written statement of the health of a person insured under a policy of life insurance, which was correct when made, was delivered to the company some time after, and a policy issued on the faith of it. It was claimed that the statement when delivered was false. The court held that it was a question of fact for the jury whether the company understood the statement to refer to the date it was made, or to the date it was delivered. I think that that principle applies to this case, and as, in my opinion, the respondent understood the statement that the *Elida* had not sailed to refer to November 4th, and not to December 12th, the fact that she had sailed on December 12th did not vitiate the contract of insurance.

My conclusion is that there should be a decree in favor of the libelants for the amount demanded in the libel, with costs, unless the respondent disputes the amount due, in which case the usual reference will be ordered to ascertain the damage.

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BURRILL et al. v. CROSSMAN et al.

(District Court, S. D. New York. July 2, 1903.)

1. SHIPPING—DEMURRAGE—DEFENSE OF VIS MAJOR.

The answer of a charterer pleaded the defense of vis major to a libel to recover demurrage for the detention of the vessel for discharging in the port of Rio Janeiro, alleging the existence of a state of war in that city, and that the firing between certain vessels of war in the harbor

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¶ 1. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

and forts on the shore made it impossible to discharge or receive the cargo any sooner than it was discharged or received. *Held*, that such defense was not sustained by evidence which failed to establish that there was any firing in the vicinity where the vessel lay for discharging which directly prevented such discharge, at least until after the time when, under the charter party, the discharge should have been completed, and where it was shown without contradiction that during such time some portion of the cargo was discharged nearly every day.

In Admiralty. Action against charterers to recover demurrage.

Black & Kneeland, for libellants.

Wheeler, Cortis & Haight, for respondents.

ADAMS, District Judge. This is an action which was brought by the libellants, the owners of the bark Kate Burrill, to recover 53 days' demurrage at the rate of \$59.46 per day amounting to \$3,151.38, under a charter party dated March 7, 1893, from the respondents as charterers of that vessel. The provisions of the charter party with respect to demurrage, were:

"Cargo to be furnished at port of loading at the average rate of not less than (20M) twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at port of destination at the average rate of not less than (20M) twenty thousand superficial feet per running day, Sundays excepted.

Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, (\$59.46) fifty-nine  $\frac{46}{100}$  dollars U. S. gold, (or its equivalent), per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

The cargo to be received at the port of loading, within reach of ship's tackles, and to be delivered at port of discharge, according to the custom of said port.

Vessel to discharge at safe anchorage around in Rio bay designated by charterers."

The delay occurred between September 4th and November 28th, 1893, in discharging the vessel, at Rio de Janeiro, and the defence to be considered is that it was owing to vis major, arising from a state of war which prevailed in Brazil at the time and directly prevented the discharge in conformity with the contract.

A history of the case will be found stated in *Burrill v. Crossman* (D. C.) 111 Fed. 192, decided October 21, 1901, on a question of an amendment to the answer. Since that time, some further testimony has been taken and it remains to be determined whether the defence has been established.

The allegations in the answer, which it is incumbent upon the respondents to sustain, are:

"Fifteenth. And further answering respondents allege upon information and belief that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libellants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the Government of Brazil, and that the firing between said

vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received. That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libelants, acquiesced in said delay and recognized the necessity therefor."

It is not urged by the respondents that there was any acquiescence on the part of the master of the vessel or the libelants' agents in Rio in the delay or recognition of the necessity therefor, and any consideration of such questions may be dispensed with. The contention of the respondents, as stated in their brief, is as follows:

"The case made for the respondents is that owing to the revolution which was going on in Brazil at the time, and of the constant firing which was taking place in the harbor, it was impossible for the vendees of the cargo to get men to work, or to do anything more than they did in the matter of discharging cargo. The place where the ship lay was in the part of Rio Janeiro called Gamboa, and in the immediate vicinity of the flour mills. It is proven distinctly that the revolutionists occupied the harbor with their iron-clads, and got possession of some of the forts in the harbor, including Fort Villegaignon; that the Brazilian Government, in order to protect the city, fortified the heights to the west of it, and made barricades along the shore at the foot of the various streets leading to the water, that the insurgent launches and steam vessels were engaged in firing from time to time at these barricades, and that the Brazilian Government was replying, not merely from behind the barricades with smaller artillery, but from the forts upon the hills, that frequently they impressed workmen on the piers into the military service, and that for this reason it was almost impossible to get men to work. In short there can be no question, and it is proven and not denied, that the whole city was in a state of war. It cannot be denied that this directly or indirectly prevented the consignees from doing more than they did to take away the cargo."

The testimony shows beyond a doubt that a state of demoralization prevailed in Rio during the time of the detention owing to a revolution having been attempted there, by certain insurgents who obtained control of several of the Brazilian Government's war vessels and turned their guns upon different points in the harbor, but the indirect effect of such a state of affairs is not available to the respondents.

It was said by Mr. Justice Gray, writing for the Supreme Court in this case (179 U. S. 111, 113, 114, 21 Sup. Ct. 41, 42, 45 L. Ed. 106):

"It is to be remembered that by the terms of this charter-party it is only for 'detention by default of' the charterers or their agent, that they agree to pay the amount of demurrage specified in the charter.

A detention which is caused, not by any act of the ship owners or of the charterers, but wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible, cannot be considered as caused by 'default' of the charterers, in any just sense of the word.

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In the case at bar, the defence of vis major, as pleaded in the answer, was that the ship owners were prevented from discharging the cargo, and the charterers were prevented from receiving it, any sooner than they did, by reason of acts of the public enemy, to wit, certain vessels of war, then in the harbor of Rio Janeiro, were engaged in firing upon the forts in the harbor and in making war upon the Government of Brazil; that the firing between those vessels and those forts made it impossible to discharge or to re-

ceive the cargo from the vessel any sooner than it was discharged or received; and that the detention alleged in the libel was caused by those acts of the public enemy, and not by any default of the charterers.

The vis major, so pleaded, was, in the words of opinions above cited, a 'superior force, acting directly upon the discharge of the cargo,' 'a direct and immediate vis major,' and 'unusual and extraordinary interruption that could not have been anticipated when the contract was made,' 'a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers,' and an 'interference on the part of an armed force, preventing the handling or moving of the cargo.' "

The inquiry is, therefore, confined to the result of the firing in the vicinity of this vessel, which directly affected the discharge of her cargo.

The libellants' evidence in this connection consists of the testimony of the master of the Burrill, who testified that the revolution broke out after his arrival but that there was no firing or acts of hostility which prevented the discharge of the cargo or its receipt by the consignees, that the wharf where the vessel lay was several miles from the scene of hostilities and was protected by foreign shipping and men of war which lay outside. He also proved the log book of the vessel which shows discharges of cargo: September 6th, 9th, 11th, 12th, 13th, 15th, 16th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th, 26th, 27th, 28th, 29th, 30th, October 16th, 17th, 23rd, 25th, 27th, November 6th, 16th, 17th, 20th, 24th and 28th.

On the other hand, the respondents have produced witnesses who testified to a state of war in Rio and say this particular locality was affected by the hostilities but the testimony is very general in its character, uncertain as to its dates and does not seem to establish any firing in the vicinity in question which directly prevented the discharge of the cargo. And this is especially true of the time during which the vessel should have been discharged, which, in the absence of vis major, expired on the 6th of October. Fort Villegaignon, for example, especially referred to in the respondents' brief, and the fort most likely from its position to have affected Gamboa, was neutral until the 9th of October, when it went over to the insurgents and afterwards participated in the firing against the city.

It is not disputed that discharging went on during September. On Wednesday, September 6th, some discharging took place although it was cloudy and rainy. The 7th was cloudy and rainy and no discharging took place. The 8th was suitable for discharging but nothing was done. The 9th a small quantity was discharged. The 10th being Sunday, nothing was done. The 11th, 12th and 13th were partly employed in discharging. Up to the 13th, the vessel lay away from the wharf and lighters were employed. There was no log book record of the 14th, but it would seem from the master's testimony, that the discharging was continued that day. After this date, some discharging took place every day, excepting Sundays, up to the 30th, when the discharging was suspended until October 16th, after which it proceeded irregularly until the cargo was finally discharged. All this time, however, it appears that the ship had a full crew and was every day in readiness to perform its part of the discharging. It also appears that the regular work of the ship went on every day with-

out interruption from the hostilities and that at least one other vessel was at the wharf when the Burrill reached it and was being discharged. It may be that after the time expired in which the vessel should have been discharged, the particular locality was so affected at times by the insurrection, that the discharge of the cargo was prevented by a superior force, but before that time the respondents apparently had a full opportunity to fulfill the requirements of their contract free from vis major, as defined by the Supreme Court, and what occurred after their default, arose from their neglect and does not constitute any defence. *Lindsay v. Cusimano* (C. C.) 12 Fed. 503, 504.

The evidence does not show a detention caused "wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible" and I conclude that the libellants should recover.

A question of the allowance of interest has been raised in the event of a decision in favor of the libellants, and it is urged that as the Circuit Court of Appeals disallowed interest—91 Fed. 543, 545, 33 C. C. A. 663—this court should also do so. The situation, however, is quite different from that which the case was in when presented on appeal. It was then decided upon exceptions and it was assumed that the merits were with the respondents though the law was against them and that they should not be made to suffer unduly. But now, it is found that the merits are with the libellants and, if such decision is correct, the libellants should not be deprived of the ordinary legal compensation for being kept out of the money which was due them.

Decree for the libellants with interest from November 28, 1893

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### THE ENERGIA.

(District Court, N. D. Washington. August 13, 1903.)

No. 1,720.

#### 1. MARITIME LIENS—BREACH OF EXECUTORY CHARTER—WASHINGTON STATUTE.

While by the general maritime law there is no lien on a ship for breach of a charter party which is wholly executory, yet under the statute of Washington (Ballinger's Ann. Codes & St. §§ 5953, 5954), which provides that all vessels shall be liable for nonperformance of any contract for the transportation of persons or property between places within the state, or to or from places within the state, a charterer of a vessel to carry a cargo from a Washington port has a lien thereon for her failure or refusal to load such cargo, which may be enforced by a suit in rem in a court of admiralty.

#### 2. SAME—VALIDITY OF STATE STATUTES—FOREIGN VESSELS.

Ballinger's Ann. Codes & St. Wash. §§ 5953, 5954, in so far as they give a lien on all vessels for nonperformance of a charter to carry cargoes to or from ports of the state, are reasonable and just provisions to secure the performance of maritime contracts, which a court of admiralty may properly recognize and enforce against both foreign and

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¶ 1. Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.

domestic vessels, or vessels engaged in either domestic or interstate or foreign commerce, in the absence of legislation by Congress on the subject.

3. SAME.

The owners of vessels, in making contracts for their employment, must be presumed to depend to some extent for their protection on the local laws of the countries or states to which they are sent, and also to subject themselves to such laws, where they do not discriminate to the prejudice of foreign ships.

In Admiralty.

Suit in rem against the steamship *Energia*, to recover damages for breach of an executory contract, entered into at San Francisco, by which the steamship was chartered to libellant by her owners to carry a cargo of lumber from Puget Sound to Australia. Heard on exceptions, alleging that the facts set forth in the libel are insufficient to entitle the libellant to a lien upon the steamship upon which to maintain a suit in rem. Exceptions overruled.

Struve, Hughes & McMicken, for libellant.  
Gorham, Brown & Gorham, for claimants.

HANFORD, District Judge. The libel sets forth that a charter party was executed at San Francisco by the owners of the steamship *Energia* in favor of the libellant, which is a California corporation, whereby said steamship was chartered to take a cargo of lumber from one or more ports on Puget Sound, to be designated by the libellant, and to be delivered at a port of Australia, to be designated; that the steamship came to Puget Sound pursuant to the charter party; that the charterer was able, ready, and willing to furnish a cargo as provided in the contract, but the owners and master of the steamship broke the contract by refusing to accept the cargo, and thereby caused a loss to the libellant of \$15,000. The claimants dispute the right of the libellant to maintain a suit in rem, on the ground that, as they say, the vessel did not become subject to a lien for the performance of the contract.

By the general maritime law there is no lien in favor of either the shipowner or the shipper for the breach of a contract wholly executory. Such lien does not attach until the cargo, or a part thereof, has been loaded upon the ship, or delivered into the custody of the master, or some other person who is rightfully acting as the agent of the owner. 7 Am. & Eng. Encyc. L. (2d Ed.) 279; *The Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341; *Vandewater v. Mills*, 19 How. 82, 15 L. Ed. 554; *King v. The Lady Franklin*, 8 Wall. 325, 19 L. Ed. 455; *The Keokuk v. Robson*, 9 Wall. 517, 19 L. Ed. 744; *The Eugene* (D. C.) 83 Fed. 222; *Id.*, 87 Fed. 1001, 31 C. C. A. 345; *The Bella* (D. C.) 91 Fed. 540; *The S. L. Watson*, 118 Fed. 945, 55 C. C. A. 439.

As the libellant has no lien under the general maritime law, this suit cannot be maintained, unless the lien statute of this state may be applied. The libellant insists, however, that the contract is maritime in its nature, and cognizable in admiralty, and that the court has jurisdiction to enforce a lien given by a statute enacted by the Legislature of Washington territory, and continued in force as a law of this state. This proposition did not receive attention in the case of

The *Eugene*, supra, nor in other cases more recently decided by this court. The statute which is now invoked is contained in sections 5953 and 5954 of Ballinger's Ann. Codes & St. Wash., and provides that:

"Section 5953. All steamers, vessels, and boats, their tackle, apparel and furniture, are liable,— \* \* \* (5) For non-performance or mal-performance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by their respective owners, masters, agents, or consignees. \* \* \*

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued.

"Section 5954. Such liens may be enforced, in all cases of maritime contracts or services, by a suit in admiralty, in rem, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime by a civil action in any district court of this territory."

The allegations of the libel make a case within the law of this state, for nonperformance of a contract for the transportation of property from a place within this state, made by the owners of the vessel, is charged. This statute cannot be fairly construed so as to exclude executory contracts, because a lien is given for nonperformance of any contract for transportation of persons or property as well as for malperformance, and a total failure to perform such a contract by refusing to receive a cargo which the carrier has agreed to receive, at the place designated in the contract, certainly constitutes nonperformance. For the true interpretation of section 5954 it is necessary to have in mind that the statute was originally enacted by the Legislature of Washington territory; that the district courts of the territory had jurisdiction of admiralty and maritime causes (see *The City of Panama v. Phelps*, 101 U. S. 453, 25 L. Ed. 1061); that the practice and forms of procedure of those courts in admiralty suits conformed to the practice and forms of procedure in admiralty causes of United States District Courts, and that in other civil actions the procedure was as prescribed by statutes enacted by the Legislature. Section 5954 has reference to those differences in practice and modes of procedure, and was not intended to prescribe a rule of interpretation which would nullify in part the preceding section by restricting the right to sue in rem to such cases only as by the general maritime law are cognizable by suits in rem. Section 5953 gives a lien for nonperformance of any contract for the carriage on a vessel of passengers or property, and the plain intent of section 5954 is to provide that such liens shall be enforceable by suits in rem. The facts alleged are similar in all essential particulars to the facts in the case of *The J. F. Warner* (D. C.) 22 Fed. 342, in which case the court enforced a lien given by a statute of Michigan for nonperformance of an executory contract made in New York for the carriage of a cargo from a port of Michigan to Buffalo.

In the argument in behalf of the claimants it is urged that the libel does not allege that the *Energia* is a domestic vessel, and that in fact she is a foreign vessel, and according to the recent decision of



the Supreme Court in the case of *The Roanoke*, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770, liens given by state laws do not attach to foreign ships. That was a suit in rem to recover compensation for work and labor performed in this state by subcontractors in making repairs and alterations upon the steamship *Roanoke*, a vessel owned by an Illinois corporation. By the opinion it appears that the Supreme Court gave particular consideration to the fact that—

"Neither the owner nor master nor other officers of the vessel had given an order for the material and labor set forth in the libel, which were furnished upon the order of a contractor, who, before the filing of the libel, and without any knowledge by the owner of these unpaid claims, had been paid in full for these claims."

And the court said:

"The injustice of permitting such claims to be set up is plainly apparent. \* \* \* The statute of Washington, however, provides for an absolute lien upon the ship for work done or material furnished at the request of the contractor or subcontractor, and makes no provision for the protection of the owner in case the contractor has been paid in full the amount of his bill before notice of the claim of the subcontractor is received. The finding in this case is that the contractor, who had agreed, in consonance with the usual course of business, to make the repairs upon the vessel, had been paid in full by the claimant. The injustice of holding the ship under the circumstances is plainly manifest."

The concluding part of the opinion is as follows:

"Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the federal courts, which are thereby made judges of the scope of such jurisdiction, subject, of course, to congressional legislation, the statute of the state of Washington, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void."

The decision, as I understand it, is an assertion of the independence of the national courts in the exercise of the admiralty jurisdiction conferred by the Constitution, and of their authority to refuse to give effect to unreasonable state laws in cases where the application of such laws will work an injustice. The opinion plainly indicates an intention to not lay down any dogmatic rule denying the power of state legislatures to create liens to secure the just performance of maritime contracts which may be enforced against foreign vessels by courts having admiralty and maritime jurisdiction. With respect to the question whether liens created by state statutes may, in any case, attach to foreign vessels, the opinion contains only a suggestion that "the right to extend these liens to foreign vessels in any case is open to grave doubt." This leaves the question undetermined by the Supreme Court. Therefore other courts are left free to decide according to their own sense of right in each particular case.

In the opinion of this court in the case of *The Robert Dollar* (D. C.) 115 Fed. 218, I pointed out that the Supreme Court has in numerous instances upheld statutes enacted by state legislatures creating liens incidental to maritime contracts, not limited in their ap-

plication to vessels employed only in local traffic upon waters wholly within the boundaries of a single state; and other statutes imposing burdens upon foreign vessels, although conceded to be statutes prescribing regulations of interstate and foreign commerce; and other statutes subjecting imported merchandise within a state, but owned by nonresidents, to liens and judicial process, for the protection of creditors, which statutes would necessarily have been condemned as unconstitutional if it were true that the subjects and carriers of interstate and foreign commerce were held to be, like the property and agencies of the national government, exempt from the exactions and burdens of state statutes, or if the grant to Congress of specified powers is exclusive, and effective to nullify every state law which trenches upon the domain of congressional power. *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109; *Walworth v. Harris*, 129 U. S. 355, 9 Sup. Ct. 340, 32 L. Ed. 712; *Ex parte McNeil*, 13 Wall. 236, 20 L. Ed. 624; *The China v. Walsh*, 7 Wall. 53, 19 L. Ed. 67; *Homer Ramsdell Transp. Co. v. Compagnie Générale Transatlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; *Huus v. Steamship Co.*, 182 U. S. 392, 21 Sup. Ct. 827, 45 L. Ed. 1146; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.

Mr. Justice Story, in the case of *The Chusan*, Fed. Cas. No. 2,717, took an advanced position, which the Supreme Court has not sustained otherwise than by referring to it with commendation, as was done in the opinion of the court written by Mr. Justice Brown in the *Roanoke Case*. In the *Chusan Case* the Circuit Court for the District of Massachusetts held a statute of the state of New York, limiting the right to enforce a maritime lien, to be unconstitutional. The opinion was written by Mr. Justice Story, and therein he stoutly maintained that the power of Congress to regulate interstate and foreign commerce is exclusive, and he denied the proposition that state laws prescribing regulations affecting interstate and foreign commerce are valid until superseded by an act of Congress relating to the same subject. If his opinion on this subject prevailed, there would be no doubt of the unconstitutionality of all state statutes creating liens upon vessels employed in carrying on interstate and foreign commerce. But the decisions of the Supreme Court have established a different rule. At a very early period in the history of the jurisprudence of this country Chief Justice Marshall concisely stated the principle which has since controlled the decisions of the Supreme Court on this subject, as follows: "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." *Sturges v. Crowninshield*, 4 Wheat. 196, 4 L. Ed. 548. This is the identical proposition which was controverted by Mr. Justice Story in the *Chusan Case*, and the same proposition was expressly affirmed by the Supreme Court, in an opinion written by Mr. Justice Curtis, in the case of *Cooley v. Board of Wardens*, *supra*. The Supreme Court has in a number of later cases steadfastly adhered to the rule supported by these deci-

sions rendered by Marshall and by Curtis, and quite recently Mr. Justice Brown, in the case of *Huus v. Steamship Co.*, supra, said:

"Conceding it to be within the power of Congress to assume control of and regulate the whole system of pilotage, as applied to vessels engaged in foreign or interstate commerce, it has, for obvious reasons, left to the several states the power to legislate upon this subject, and to prescribe rules for the licensing and government of pilots, the collection of their fees, and such other incidental matters as the nature of their services in the particular localities may require. The power to do this was recognized by this court in *Cooley v. Board of Wardens*, 12 How. 299 [13 L. Ed. 996], though it was subsequently said to be subject to such restrictions as Congress might see fit to impose. *Sprague v. Thompson*, 118 U. S. 90 [6 Sup. Ct. 988, 30 L. Ed. 115]."

And, after quoting portions of sections 4235, 4237, 4401, and 4444, Rev. St. [U. S. Comp. St. 1901, pp. 2903, 3016, 3037], the learned justice makes the following observation:

"The general object of these provisions seems to be to license pilots upon steam vessels engaged in the coastwise or interior commerce of the country, and at the same time to leave to the states the regulation of pilots upon all vessels engaged in foreign commerce."

The Supreme Court has not yet marked the boundary limiting the power of state legislatures to enact laws relating to subjects over which Congress has supreme authority to legislate, but they do recognize the right and authority of the states to legislate for the protection of creditors, and to provide security for the enforcement of commercial contracts so long as Congress postpones the enactment of national laws covering those subjects.

In this case the facts alleged in the libel afford no basis for a refusal to give effect to the state lien law by assuming that an injustice would be done, and in that respect the case differs from the *Roanoke Case*; for, until the allegations of the libel shall be answered, the respondents will appear before the court as willful violators of a valid contract, and the libellant will appear to have suffered a pecuniary loss in consequence of their default. It is my opinion, also, that there is a good answer to the suggestion that the contract sued upon was not entered into within this state. Ships are built to be wanderers, and in making contracts for their employment the owners must be presumed to depend to a certain extent for their protection upon the laws and customs of the different states and countries to which they are sent; and, on the other hand, the rule which requires travelers and sojourners to observe and obey the laws and customs of the countries and states which they visit for their own profit or pleasure may be applied to visiting ships without affording any ground for the owners to complain of ill usage. This is especially true with respect to laws intended to insure performance of commercial contracts which do not discriminate to the prejudice of foreign ships. In the case of *The Merrimac*, 14 Wall. 203, 20 L. Ed. 873, the Supreme Court expressly decided that:

"Port regulations are supposed to be known to the shipowner before he sends his vessel on the voyage, and the general rule is that in sending her to any particular port he elects to submit to lawful regulations established at that port. \* \* \*"

If the local regulations of a particular port are supposed to be known to the owners of ships in all parts of the world, knowledge of the general laws of a state prescribing regulations of commerce for all the ports of that state should also be presumed, and a contract of affreightment, although made elsewhere, should be presumed to have been made in contemplation of the laws of the state in which the cargo is to be obtained.

The case of *The J. F. Warner*, *supra*, appears to me to be a sound decision, and for the reasons given by Mr. Justice Brown for his decision in that case I overrule the exceptions.

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### THE PECONIC.

### THE LIGURIA.

(District Court, S. D. New York. July 27, 1903.)

#### 1. COLLISION—STEAMSHIPS MEETING—VIOLATION OF RULES AND INATTENTION TO SIGNALS.

Two steamships, the *Peconic*, outward bound, and the *Liguria*, coming in, both held in fault for a collision when meeting in New York Bay, in the daytime: The *Peconic* (1) for undertaking to pass starboard and starboard, and signaling to that effect, when she was required by pilot rule 1 to pass on the port hand; (2) for continuing such course without diminution of speed after her signal was unanswered, and when it was apparent that the *Liguria* was not directing her course to port; (3) for not hearing the first signal of the *Liguria*; and (4) for not reversing when danger of collision became apparent. The *Liguria* (1) for failing to hear the *Peconic's* first signal; (2) for insisting upon a cross-signal course after it was apparent that the *Peconic* was going to port, and there was manifest danger of collision; and (3) for not sooner stopping and reversing.

In Admiralty. Cross-libels for collision.

Wing, Putnam & Burlingham (Charles C. Burlingham, of counsel), for the *Liguria*.

Butler, Notman, Joline & Mynderse (Lorenzo Ullo and Wilhelmus Mynderse, of counsel), for the *Peconic*.

ADAMS, District Judge. On the 27th day of August, 1902, about 4:30 o'clock in the afternoon, a collision occurred in New York Bay, a little below the Narrows between Fort Wadsworth and Fort Lafayette, between the steamships *Peconic*, bound out, and the *Liguria*, bound in, and libels were filed by the respective owners, to recover the resulting damages, claimed to amount altogether to over \$100,000.

The weather was clear, the wind light from the southward and the tide had just commenced to ebb. Each vessel was fully manned and was in charge of a Sandy Hook Pilot. The *Liguria* was 403 feet long and was proceeding at her full speed of 12 knots per hour. The

¶ 1. Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.

Peconic was 277.5 feet long and was proceeding at her full speed, which on this occasion was about 8 knots per hour. The point of contact was the stern of the Peconic with the port bow of the Liguria, about 75 feet from the stern. The angle of collision was from thirty to forty-five degrees.

The claim on the part of the Liguria with respect to the main facts of the collision and the faults of the Peconic, are stated in the libel against the Peconic, as follows:

"As the Liguria approached the Narrows two steamships were seen coming down to the southward bound out to sea. One was the steamship Antilla, which was a little on the Liguria's starboard bow. The other proved to be the steamship Peconic, which was on the Liguria's port bow. The Liguria's course would have taken her between the Antilla and the Peconic. The Antilla, which was a little ahead of the Peconic, passed the Liguria starboard to starboard at a distance of a ship's length or more.

When the Liguria and the Peconic were half a mile or more apart, the Peconic appearing to change her course somewhat to the eastward, the Liguria gave her a signal of one whistle and put her engines at slow. The Peconic replied with two blasts, and undertook to cross the course of the Liguria. As soon as the Peconic blew, the Liguria repeated her signal of one blast and followed it immediately by three blasts and reversed full speed astern. When the Peconic blew her two blasts the Antilla was already abeam of the Liguria.

The Liguria responded to the reversed engines and her stem swung to starboard. The Peconic came on and struck the Liguria a violent blow just forward of the fore rigging on the port side, staving a hole into the Liguria's side 20 feet by 25. She then raked the Liguria's port side, striking her at No. 2 bulkhead and again abaft the engine-room.

The Liguria continued backing until the Peconic had got clear of her, when the Liguria's engines were stopped, and after an examination of the damage had been made she proceeded to Quarantine; thence to her pier at the foot of 34th Street, N. R."

\* \* \* \* \*

"Said collision was not caused or contributed to by any negligence on the part of the libellant or those in charge of the Liguria, but was due solely to the negligence of those in charge of the Peconic in the following respects, among others: She did not keep a good lookout; did not answer the signals of the Liguria and keep to the right, blew a cross signal and attempted to cross the Liguria's course, did not stop and reverse in time to avoid a collision, and did nothing to avoid a collision."

The claim on the part of the Peconic, in the same respect, and the faults of the Liguria, are stated in the libel against the Liguria, as follows:

"When in the Narrows those on the bridge of the Peconic sighted an Italian steamer which proved to be the Liguria which was then distant about one and one half mile someway off Craven's Shoal bell-buoy. As soon as the Liguria turned round said bell-buoy, she headed northward and showed her starboard bow to the Peconic's starboard, and while so heading and pointing at a distance of still over a mile the Peconic signalled with two blasts of her steam whistle, meaning thereby that she was directing her course to port, and did therefore starboard slightly her helm to keep widening the respective courses, but no answer was heard or came from the Liguria in return. When the Liguria still heading and pointing as aforesaid was about three-quarters of a mile distant, the Peconic again signalled with two more blasts of her steam whistle, but the Liguria again gave no answer, whereupon those on board the Peconic assumed that the Liguria would keep her intended course towards the Quarantine Headquarters to which point she

was bound. When at a distance of about five ships' lengths from each other, seeing that the Liguria was not opening out as much as expected, again the Peconic gave two blasts of her steam whistle and starboarded more, but the Liguria gave immediately one blast of her whistle and threw herself across the Peconic's bow, whereupon the Peconic immediately stopped and reversed the engines full speed astern, but as both steamers were then very close to each other a collision was unavoidable and the port stem of the Peconic glanced about forty-two feet aft of the Liguria and both steamers were greatly damaged."

\* \* \* \* \*

"The collision was entirely due to the carelessness and negligence of those on board the S. S. Liguria who were in charge of the navigation, command and control thereof, principally among others for the reasons that

- 1st. She did not keep a good lookout.
  - 2nd. She did not answer the signals of the Peconic.
  - 3rd. She did not keep to the left so as to pass starboard to starboard in accordance with the signals given by the Peconic.
  - 4th. She blew a cross signal when a change of course would inevitably cause a collision.
  - 5th. She attempted to cross the bows of the Peconic.
  - 6th. She did not slow, stop or reverse in time to avoid a collision.
  - 7th. She stopped and reversed at a time when such stopping and reversing made a collision inevitable.
  - 8th. She omitted due precautions to avoid the collision.
- In no way did those on board the Peconic contribute to the causes of said collision."

I find from the evidence that the Peconic blew the first signal of two blasts when she was in the Narrows, indicating her intention to pass to the right of the Liguria which was then in the vicinity of Craven's Shoal. The Peconic did this upon a supposition that as the Liguria would naturally be bound for the vicinity of the Quarantine station, which is situated on the Staten Island shore, about a half a mile above Fort Wadsworth, she would, after she had passed the Craven's Shoal, about a mile below Fort Wadsworth, change her course to the port and approach the Staten Island shore. The signal was not heard on the Liguria and the Peconic kept on, still upon the same assumption, notwithstanding the fact that the Liguria was not opening on the Peconic's course and had not responded to her signal. The Peconic's course was South by East, but she was proceeding a little to the eastward of such course under a slight starboard helm. The Liguria was not steering by compass, according to her pilot. She had come in by the Swash Channel and after turning into the Main Channel, her regular course up the channel was North by East  $\frac{1}{4}$  East to the Craven's Shoal Buoy. Such course would have carried her 1500 to 1800 feet to the eastward of that buoy, where it appears she went, and she could not have deviated much from that course. Those on the Liguria say that she did not change at the buoy but kept on the same course she had been on below, but I have no doubt she did change towards the regular course up the channel, which was North by West, because the collision happened to the westward of a prolongation of the North by East  $\frac{1}{4}$  East course. Her change at the buoy, however, was not sufficient to justify the pilot of the Peconic in assuming that she was then going to Quarantine. If such had been the case, she would have opened her starboard side at once, and perceptibly, whereas she did not

open it, and although many of those who testified for the Peconic persisted in saying that the Liguria was always showing her starboard side, till the last, when she changed across the Peconic's bow and showed her port side, I doubt if at any time before she showed more of her starboard side than was due to the Peconic's going slightly to the eastward under a starboard helm. In any event, the fact remained that the Liguria kept approaching the Peconic, notwithstanding the latter's change to the eastward from her regular course down the channel of South by East, which should have been a warning of danger to those on the Peconic before it was recognized by them. It was evident from the Liguria's approach to the Peconic, that she was not taking the expected course to Quarantine, which would have been North by West  $\frac{1}{2}$  West. The Peconic, under these circumstances, blew two more signals of two blasts each and then, according to her story, getting a cross signal, her engines were stopped and reversed, but it was too late.

It is obvious that the Peconic was in fault for the collision, and primarily so, for undertaking a two whistle course. The Liguria's course after she made the turn, was the one the vessels were bound to navigate by. The *Velocity*, L. R. Privy Council Appeals, vol. 3, p. 44; The *John S. Darcy* (D. C.) 29 Fed. 644, 647. They were then within the provisions of Pilot Rule 1 (Act June 7, 1897, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2881]), requiring them to give signals of one blast and to pass on the port side of each other. She was also in fault for continuing such course, without diminution of speed, until the cross signal of the Liguria. There was clearly a risk of collision when the bearing of the Liguria did not change appreciably, requiring the Peconic to check her speed or stop. The *Maverick* (D. C.) 75 Fed. 845, 847; *Id.*, 84 Fed. 906, 908-909, 28 C. C. A. 562. She was also in fault for not hearing the first signal given by the Liguria and for not reversing her engines when danger of collision appeared.

The Liguria's claim is that there was about a quarter of mile of space between the Peconic and the Antilla, giving her ample room to go between them, and that she consequently blew a signal of one blast to the Peconic, to secure a port to port course, under the rule. In fact, there were but about 200 feet between those vessels and without a change of course on the part of the Peconic to the starboard under a port helm, navigation between them was attended with considerable risk. Apart, however, from the narrow margin for safety, the difficulty with the Liguria's position is, that before she blew her first single blast, the Peconic had already initiated, and commenced to navigate upon, a two blast starboard to starboard course, and the proposed course of the Liguria was a dangerous one. The Liguria not only failed to hear the Peconic's first signal, which was an indication of danger, in view of the Liguria's course, but after she blew her one whistle signal, porting slightly, and the Peconic responded with a signal of two blasts, she again blew a one blast cross signal. At this time, the vessels were only a few lengths apart and were coming together at a combined speed of 2,000 feet per minute, rendering an avoidance of a collision by any movement of the helms of the vessels

impossible. I have very little confidence in the testimony of the navigator of the Liguria. It was said by him that when the Liguria first signalled, the Peconic was three points on her port bow. This was evidently never the case after the vessels came in view of each other. Probably before the Liguria changed to the westward at the Craven's Shoal Buoy, the Peconic was about two points on her port bow, but after that, the Peconic bore almost directly ahead, doubtless at first showing her starboard side to the Liguria somewhat more than the port. The actual turn of the Liguria at the Craven's Shoal Buoy probably brought her nearly upon her proper course, of North by West, up the channel and the Peconic remained slightly to the port of the Liguria, but this bearing was only temporary, owing to the Peconic's starboard helm, and towards the last, the latter was more on the Liguria's starboard than port bow, until both vessels stopped and reversed, throwing their heads to starboard, when the Peconic was again on the Liguria's port. The testimony is so confused and conflicting that it is almost impossible to work out exactly what the Liguria did and much is left for inference. The original determination of the Liguria's pilot to go to the right was correct but he was wrong in persisting after the Peconic's action was, or should have been observed. It is clear that the Liguria must be held for failing to hear the Peconic's first signal, for insisting upon a cross signal course, and for not stopping and reversing when it became evident that the Peconic was endeavoring to cross her bow, in opposition to her signals.

Decrees dividing the damages, with orders of reference.

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In re DELLING.

(District Court, N. D. New York. June 29, 1903.)

No. 1,307.

1. BANKRUPTCY—ALLOWANCE OF CLAIMS—PREFERENCES WHICH MUST BE SURRENDERED.

Under the law as it stood prior to the amendment of February 5, 1903, all of the indebtedness of a bankrupt to a particular creditor existing at the beginning of the four-months period preceding his bankruptcy is to be treated as one claim, and any payment made and received during such period, and while the debtor was insolvent, even in good faith by both parties, constitutes a preference, and must be surrendered before the balance of the claim or any part of it can be allowed.

2. SAME.

In cases arising since such amendment, the rule will be different.

In Bankruptcy. On appeal by the Third National Bank of Syracuse from the decision of C. L. Stone, referee, disallowing its claim or claims, unless it shall first pay to the trustee certain alleged preferences, amounting to the sum of \$4,100.

Wilson, Cobb & Ryan, for appellant bank.  
Haight & Darling, for trustee.



RAY, District Judge. Myron C. Delling was adjudicated a bankrupt on the 9th day of January, 1903. The facts are agreed upon, and are as follows:

(1) That Myron C. Delling, the bankrupt herein, was insolvent on the 9th day of September, 1902, and continued to be insolvent from that date until and including the 9th day of January, 1903.

(2) That on the 9th day of September, 1902, the said Myron C. Delling was indebted to said Third National Bank by reason of several distinct loans of money made by said Third National Bank to said Delling prior to September 9, 1902, each loan being secured by a distinct promissory note made by said Delling to said Third National Bank, or to L. H. Groesbeck, its cashier, which notes aggregated in amount, exclusive of interest, the sum of \$9,500, and which are described as follows:

| Amount.               | Date.              | When Due.           |
|-----------------------|--------------------|---------------------|
| Note "A," \$1,000 00. | May 19, 1902.      | September 21, 1902. |
| Note "B," \$1,000 00. | June 2, 1902.      | October 5, 1902.    |
| Note "C," \$1,000 00. | June 13, 1902.     | October 20, 1902.   |
| Note "D," \$1,000 00. | June 20, 1902.     | November 5, 1902.   |
| Note "E," \$1,000 00. | June 30, 1902.     | October 30, 1902.   |
| Note "F," \$1,000 00. | July 8, 1902.      | November 20, 1902.  |
| Note "G," \$1,000 00. | August 21, 1902.   | December 5, 1902.   |
| Note "H," \$1,000 00. | September 3, 1902. | December 15, 1902.  |
| Note "I," \$1,500 00. | September 3, 1902. | December 31, 1902.  |

(3) That on the respective dates hereinafter set forth certain of said loans were paid, and the notes representing the same were surrendered, as follows: Note "A" was paid September 22, 1902; note "B" was paid on October 6, 1902; note "D" was paid November 5, 1902; note "E" was paid October 30, 1902; note "F" was paid November 20, 1902; note "G" was paid to the extent of \$600 on December 5, 1902; and a new note for \$400 given for the balance due upon the original note, said \$400 note being included in the claim filed by the Third National Bank.

(4) The notes marked "H" and "I," respectively, in paragraph 2, were not paid, and are included in the claim filed by the Third National Bank. The note marked "C," in paragraph 2, was not paid, but on October 20, 1902, when it became due, a new note for \$1,000, due December 22, 1902, payable to the order of L. H. Groesbeck, cashier of the Third National Bank, was given as renewal of said note marked "C," and said renewal note is included in the claim filed herein by the Third National Bank.

(5) That on November 17, 1902, said Myron C. Delling became indebted to the Third National Bank of Syracuse in the sum of \$1,000, the same being for money loaned by said bank to said Delling on that date, and for which the said Delling gave the said bank his promissory note, payable to the order of L. H. Groesbeck, cashier, due one month after date thereof, which note is included in the claim filed by said Third National Bank of Syracuse, and on the 10th day of December, 1902, said Myron C. Delling became indebted to the Third National Bank in the sum of \$500, being for money loaned to him by said bank on that date, and for which he gave his promissory note, payable to the order of L. H. Groesbeck, cashier of said bank, dated December 27, 1902, which note is included in the claim of said bank filed herein.

(6) The following is a summary of the facts covered by the foregoing paragraphs: On September 9, 1902, Myron C. Delling, the bankrupt, was indebted to the Third National Bank of Syracuse, N. Y., for money loaned, which was evidenced by nine promissory notes, each representing a distinct loan and debt, the sum of \$9,500, exclusive of interest. Between September 9, 1902, and January 9, 1903, the said Delling paid, in settlement of five of said notes, each being for the sum of \$1,000, and \$600 in part settlement of another note, the sum of \$5,600, exclusive of interest. Of the loans made by said bank to said Delling, and the notes given therefor, prior to September 9,

1902, one of \$1,500 and one of \$1,000 were not paid or renewed—\$2,500. One note of \$1,000 was renewed and one to the extent of \$400 was renewed—\$1,400. Between September 9, 1902, and January 9, 1903, two loans of \$1,000 and \$500, respectively, were made by said bank to said Delling, for which notes were given—\$1,500. Total indebtedness owing by Myron C. Delling, bankrupt, to Third National Bank of Syracuse, N. Y., on January 9, 1903, \$5,400, exclusive of interest.

(7) That the foregoing payments, and all of them, were received by the Third National Bank, and made by said Myron C. Delling, in the due and ordinary course of business, in the belief on the part of said bank and its officers and said Delling that said Delling was solvent, and without any intention on the part of either of said parties to create a preference in behalf of said Third National Bank, or to secure a greater percentage of the debts of said Third National Bank than other creditors, and were received and paid without knowledge or reason to believe on the part of either of said parties that said payments were preferences, nor were they intended as such.

The case of *Pirie v. Chicago Title & Trust Company*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, must be considered as decisive of this case. In that case Mr. Justice McKenna, in giving the opinion of the court, says:

"The question presented by this record is whether payments in money made by an insolvent debtor to a creditor, the debtor not intending to give a preference, and the creditor not having reasonable cause to believe a preference was intended, did nevertheless constitute a preference, within the meaning of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and were required to be surrendered as a condition of proving the balance of the debt or other claims of the creditor."

Later on in the same opinion, and at page 447, 182 U. S., at page 909, 21 Sup. Ct., and 45 L. Ed. 1171, the court says:

"What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back. If not so taken, it may be kept or surrendered. Unless surrendered, he who received it cannot prove his debt or other debts."

The holding of the Supreme Court is plain, that where a creditor of the bankrupt during the period of insolvency held one or more claims against the bankrupt, and received payment of one or more, in whole or in part, such payment constitutes a preference, and such preference must be returned, or the particular claim upon which the payment was made cannot be allowed, nor can other independent and distinct claims be allowed upon which no payment whatever was made. The holding is, in substance, that all of the indebtedness of the bankrupt to the particular creditor existing during the period of insolvency is to be treated as one claim, and any payment made and received, even in good faith by both parties during the period of insolvency, is to be treated as a preference, and must be surrendered before the balance of the claim or any part of it can be allowed.

Applying that decision, which this court is bound to follow, to the case at bar, it must hold that all of the notes mentioned in the conceded statement of facts constituted the claim of the bank against the bankrupt, and that the payment of certain of such notes at the times mentioned constituted a preference, and that such preference, deducting the amount of notes given for moneys borrowed after such pay-

ment, must be returned before the bank can be allowed the notes held at the time of the adjudication in bankruptcy. That this construction of the bankruptcy law works injustice was generally conceded, and by the amendments of February 5, 1903, c. 487, 32 Stat. 797, subdivision "g" of section 57 has been amended to read as follows:

"(g) The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision c, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

This case must, however, be decided under the law as it stood before the amendment, as it is provided that the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July 1, 1898.

The result is that the decision of the referee must be affirmed, and the claim of the bank disallowed, unless it shall refund the amounts held to be preferences, and which are specified in the decision of the referee.

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BRITISH & FOREIGN MARINE INS. CO., Limited, v. PORTLAND FLOUR-  
ING MILLS CO.

(District Court, D. Oregon. July 30, 1903.)

No. 4,624.

1. SHIPPING—LIABILITY FOR FREIGHT—CONSIGNMENT "TO ORDER."

Respondent shipped a cargo of flour, consigned "to order," by bills of lading providing that freight should be deemed earned, vessel lost or not lost. The flour was shipped under contracts of sale, and was insured by respondent in its own name for sufficient to cover the invoice price and freight. Respondent then indorsed the bills of lading and policies in blank, and attached them to drafts drawn on the purchasers for the selling price and cost of insurance. *Held*, the vessel having been lost, that respondent was liable for the freight, whether its interest in the cargo after it was loaded was that of owner or whether it merely retained a lien, since the purchasers were to have possession only on payment of the drafts.

2. SAME—DEFENSES.

The fact that the master on the wrecking of the vessel surrendered the cargo to the insurer without notice to respondent did not relieve the latter of liability for the freight; the insurer being responsible under its policy for the freight, as well as the value of the cargo.

In Admiralty. Action to recover freight.

Snow & McCamant, for libelant.

Williams, Wood & Linthicum, for respondent.

BELLINGER, District Judge. In this case the Portland Flouring Mills Company shipped by the Knight Companion, one of the vessels of the Portland & Asiatic Company, in 1901, certain freight consigned "to order,"—that is, to the order of the consignor, the

mills company. The Knight Companion was wrecked early in February, 1902, on the coast of Japan, and the cargo lost, except that there was salvage of the cargo to the value of about 62,000 yen, the equivalent of about \$30,000 in our money. This salvage was undertaken by the underwriters, and the proceeds of the cargo were deposited with Samuel Samuel & Co. and one Playfair, as trustees for such underwriters. The Portland & Asiatic Company insured the freight on this cargo in the British & Foreign Marine Insurance Company, Limited, which company now brings this libel, in the right of the Portland & Asiatic Company, to recover the freight contracted to be paid on the cargo so shipped. All the flour of certain brands shipped to Hongkong by the respondent is handled by a Chinese syndicate. The sales are confined to the company's agent at Hongkong, through whom orders are made. The members of the syndicate receive the flour in certain fixed proportions, designated by shares; one firm having three shares, another two, and the third one. The shipments are divided into six parts, and distributed in proportion to the shares held. On August 29, 1901, the Portland Flouring Mills Company received from its Hongkong agent what the president of the company characterizes as "a cable confirmation of a contract for an amount of flour, a portion of which, amounting to 129,868 quarter sacks, was shipped on the Knight Companion." This is explained to mean a cable offer for flour, understood from the course of dealing to be intended for the members of the syndicate, with a request that the offer be confirmed, which was done, according to the shares of each. The flour was placed on board the Knight Companion. Bills of lading were issued by the carrier, and accepted by the mills company; by which it was stipulated that the flour shipped was to be delivered "at the vessel's tackle unto the Portland Flouring Mills Company, or to his or their assigns, freight on same as per margin, to be collected in United States gold coin or its equivalent; the several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit." On the margin of each of the bills of lading were the letters "N' f' y" or the word "Notify," followed by the name of the firm on whose account the shipment is alleged to have been made. Policies of insurance in the name of the respondent were taken out at the invoice price, and 40 per cent., which included freight, and drafts drawn at 60 days' sight on the members of the syndicate, in the proportion of their shares, for the selling price of the flour plus cost of insurance. These policies, one for each member of the syndicate, although in the name of the mills company, and the several bills of lading, were indorsed in blank, so that they were available to the holder. The drafts, with the policies and bills of lading so indorsed, were delivered to Ladd & Tilton, bankers of respondent, and the amount placed to the latter's credit.

It is contended in behalf of the respondent that it was not the shipper of the flour in question; that it was sold, in pursuance of the course of business adopted by the mills company, prior to shipment f. o. b. at Portland; that the shipment, therefore, was not on

account of the mills company, but of the purchasers at Hongkong; that, notwithstanding the terms of the bills of lading, the facts of the shipment were known to the Portland & Asiatic Company; that that company knew that the shipment was not in fact being made by the Portland Flouring Mills Company, but was made by purchasers of the cargo in Hongkong, and was being shipped on their account. The president of the respondent company testifies that the flour stood as security for the drafts. Whether the interest of the respondent was that of ownership or lien, the parties for whom the flour was intended were to have it when paid for, and not before. In whatever light the transaction is viewed, this is what it comes to. The consignment in the bills of lading to the respondent's order and the insurance in its name were to this end, and the conclusion is unavoidable that the respondent was the shipper, and to it the carrier's service, whether for receiving the freight and agreeing to carry it, or for in fact carrying it, was rendered; and, as the case stands, the respondent is responsible for the freight agreed to be paid.

The respondent complains that the master of the vessel abandoned the wreck to the underwriters without endeavoring to save the cargo, and without communicating with the respondent, as he should have done, if the respondent was the owner of the cargo; that the loss of more than enough flour to pay the entire freight is due to the master's failure either to save the flour for account of the respondent, or, at the least, to notify it, so that it could protect itself; that the insurance is a matter wholly between the owner and the insurer, and the master had no right to dispose of the insured cargo to the underwriters. But the respondent has not been prejudiced by any of the matters complained of. The insurers stood in its place. They were responsible to the latter for the price of the flour and freight charges, and for more, since the 40 per cent. insurance above the invoice price covers more than freight. They assumed to answer for the entire shipment, salvaged or otherwise, for the freight charges, and for such profits as were included in the 40 per cent. after paying such charges. The respondent had no interest to be served by notice of the wreck or other act on the master's part. It was assured of all its interests and responsibilities in the flour shipped. If the freight covered by the insurance has been paid to the firms upon whom the drafts were drawn, it has been done through the respondent's act, and it is the respondent who must have recourse to that fund for indemnity for the obligation it is under to the carrier, whose service it contracted for and received.

The libellant is entitled to the relief prayed for, and there must be a decree accordingly.

## THE ENDSLEIGH.

(District Court, S. D. New York, June 16, 1903.)

## 1. SHIPPING—TIME CHARTER—LIABILITY OF SHIP TO CHARTERER FOR ACTS OF OFFICERS.

Under a time charter which provides that the owners shall provide and pay the officers and crew, and the charterer shall provide and pay for the coal, and that the captain, although appointed by the owners, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, the charterer has no right of action against the vessel for the value of coal paid for by it as having been bought by the master, but alleged not to have been delivered to the vessel, or to have been misappropriated by the vessel's officers. In their dealings with respect to the coal, the master, engineer, and crew are to be regarded as agents of the charterer.

In Admiralty. Suit by charterer to recover the value of coal supplied for the vessel's use.

This was a libel by the charterer of the steamship Endsleigh to recover from the vessel's owners the value of certain quantities of coal supposed to have been supplied to the steamer during the pendency of the charter party, and actually paid for by the charterer, but which it claimed were either never delivered on board the vessel, or else were misappropriated by the vessel's officers after delivery on the steamer. There was an alternative claim that the steamer was able, when maintained in a fit condition, to make her maximum speed on a coal consumption of 12 tons a day, but that, notwithstanding, she actually consumed over 14 tons a day for a considerable portion of the charter, according to the reports of the vessel's officers. If all the coal paid for by the charterer was delivered to the vessel, the charterer claimed to be entitled to recover the value of the coal consumed by the vessel in excess of 12 tons per day.

The charter party was for a period of twelve months. The material provisions of the charter were:

"(1) That the owners shall provide and pay for all the provisions and wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew, shall pay for the insurance of the vessel; also, for all engine room stores and deck stores, and maintain her in a thoroughly efficient state, in hull and machinery for the service.

"(2) That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions and all other charges whatsoever, except those before stated, and shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall, on expiration of this charter party, pay for all coal left in the bunkers, each, at the current market price at the respective ports when she is delivered to them. \* \* \*

"(8) That the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangement; and the charterers hereby agree to indemnify the owners from all consequences of liabilities that may arise from the captain signing bills of lading, or in otherwise complying with the same.

"(9) That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

"(10) That the master shall be furnished, from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages which are to be patent to charterers or their agents, and to furnish the charterers, their agent or supercargo, when required, a true daily copy of log, showing the course of the steamer and distance run, and the consumption of coal, and to take every advantage of

wind by using the sails, with a view to economize the expenditure of coal."

"(12) That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service; and should she in consequence put into any other port other than that to which she is bound, the port charges and pilotages at such port shall be borne by the steamer's owners, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense."

Wheeler, Cortis & Haight, for libelants.

Convers & Kirlin, for the Endsleigh.

HOLT, District Judge. I have examined the briefs submitted for the libelants in this case. I see no reason to change the opinion expressed at the conclusion of the trial. It was the charterers' duty to furnish the coal to the ship. They left that duty to the master. Therefore the master, in buying the coal, was the agent of the charterers. The coal when bought was the property of the charterers, and it was the duty of the charterers to use it in the navigation of the ship, and the master, engineer and crew, being authorized to use it, acted in respect to whatever they did or omitted to do about the coal as the agents of the charterers. If, therefore, untruthful reports were made to the charterers as to the amount purchased, or coal actually purchased was misappropriated, those were fraudulent acts perpetrated by an agent against his own principal, for which he is responsible to the principal, but which, in my opinion, imposed no liability on the owners of the ship, and no maritime lien on the ship. I think it proper to add that no inference should be drawn from this decision that, in my opinion, there is any evidence establishing that the master or engineer or any of the crew were guilty of any misappropriation of the coal, or misconduct of any kind in relation to it. I put the decision on the legal proposition that the libelants have no ground of recovery, on the evidence, against the ship.

I think that the libel should be dismissed, with costs.

**DENISON v. SHAWMUT MIN. CO.**

(Circuit Court, W. D. New York. August 6, 1903.)

No. 62.

**1. REMOVAL OF CAUSES—PROCEEDINGS AFTER REMOVAL—REVIEW OF RULINGS OF STATE COURT.**

A federal court to which a cause has been removed will not review any interlocutory question which was determined in the state court before removal, at least unless such a showing is made as would entitle the party applying to a rehearing under the state practice.

On Motion for Rehearing of a Motion to Set Aside an Attachment.

Rogers, Locke & Milburn (John G. Milburn, of counsel), for plaintiff.

Bissell, Carey & Cooke (James McCormick Mitchell, of counsel), for defendant.

HAZEL, District Judge. This is a motion for rehearing upon a decision of the state court setting aside an attachment prior to removal of the cause to this court. It is uniformly held that the Circuit Court of the United States to which a cause is transferred from the state court will not review any questions determined by that court before removal; nor, indeed, will it listen to a motion for rehearing of a similar motion in the state court, as such hearing is held to be merely another name for an appeal. *Loomis v. Carrington* (C. C.) 18 Fed. 97-99; *Cleaver v. Traders' Ins. Co.* (C. C.) 40 Fed. 711. All interlocutory questions decided while the cause was in the state court are *res adjudicata* so far as this court is concerned. *Brooks v. Farwell* (C. C.) 4 Fed. 166, 2 McCrary, 220; *Milligan v. Lalance & Grosjean Mfg. Co.* (C. C.) 17 Fed. 465, 21 Blatchf. 407; *Lookout Mountain R. Co. v. Houston* (C. C.) 44 Fed. 449; *Allmark v. Platte S. S. Co.* (C. C.) 76 Fed. 615. It is undoubtedly true that the power to entertain a motion for rehearing may be exercised by this court after a transfer of the cause from the state court (*Garden City Mfg. Co. v. Smith*, Fed. Cas. No. 5,217, 1 Dill. 305), but such power should only be exercised in strict conformity with prevailing practice of the state court from which the cause was removed. Now it is quite clear from the preliminary discussion had upon this motion for leave to reargue that an exhaustive hearing was had upon the merits before Judge Childs. No new facts are disclosed here. The entire claim to the right of rehearing is based upon the erroneous disposition of the motion in the state court. The prevailing practice in that court is not to allow a rehearing unless it is manifest that all the facts were not presented to the court upon the decision of the original motion, or unless some facts were overlooked which through inadvertence or mistake led the court into error. *Van Wagener v. Royce* (Sup.) 21 N. Y. Supp. 191; *The Matter of Crane*, 81 Hun, 96, 30 N. Y. Supp. 616.

No ground is here shown which would justify this court in granting a rehearing. The motion is therefore denied.



## THE JUNIATA.

## THE SOVEREIGN OF THE SEAS.

(District Court, E. D. Virginia. August 1, 1903.)

1. COLLISION—VESSELS AT ANCHOR—IMPROPER ANCHORAGE.

A vessel anchoring when light in a part of the anchorage grounds allotted to loaded vessels, which fact, however, was unknown to her captain, who was new to the port, is not thereby precluded from recovering damages for a collision which occurred without other fault on her part, where the anchorage grounds were not crowded, and she was permitted to remain in the same place for 10 days without objection from any one.

2. SAME.

The duty is imposed on a vessel last anchoring to give another, previously anchored, safe anchorage room; and, if a collision results from her failure to do so, she is liable for the damages caused.

3. SAME—SAFE BERTH.

A safe berth for anchorage, which a later vessel is required to allow to one previously anchored, should be construed to mean one in which, taking into consideration all the exigencies likely to arise, either by reason of the character of the harbor, the condition of the weather, or the season of the year, there should be no danger of collision, and all doubts should be resolved with a view of securing safety, having in view the possible contingencies which might arise; and especially so where there was ample anchorage space.

4. SAME.

A vessel anchoring without necessity in too close proximity to one previously anchored is not in position to require the latter to incur extraordinary risks during a storm in order to avoid a collision.

5. SAME—EVIDENCE CONSIDERED.

Evidence considered, and held to establish that a collision between two vessels at anchor, one of which was light and the other loaded, was due solely to the fault of the latter in anchoring and remaining during a high wind in too close proximity to the other, which was previously anchored, when there was ample space within the anchorage grounds.

In Admiralty. Cross-libels for collision.

Whitehurst & Hughes, for the Juniata.

Bickford & Stewart, for the Sovereign of the Seas.

WADDILL, District Judge. These are cross-libels filed by the owners of the respective vessels—Messrs. Bartlett & Shepherd for the Juniata, and Lewis Luckenbach for the Sovereign of the Seas. The Juniata and the Sovereign of the Seas are each ocean-going barges, engaged in the coal trade, from the port of Newport News, Va., and on the night of the 17th of February, 1900, while anchored in the harbor of the said port, were in collision, and sustained the injuries for which they respectively sue. The Juniata is a barge of 1,244 tons burden, gross, 260 feet long, 34 feet beam, 16½ feet draft; the Sovereign of the Seas, of the burden of 1,300 tons, 200 feet long, 40 feet beam, 24 feet draft. On the night in question the Juniata, being light, was, and had been for some 10 days previously, anchored about opposite to pier No. 8 of the Chesapeake & Ohio Railway,

and some 700 or 800 feet out from the pier; and the Sovereign of the Seas, being loaded, was anchored, as she had been for three days, a short distance down the river, slightly further out in the stream, on the port quarter of the Juniata.

The case of the Juniata is that the Sovereign of the Seas anchored in too close proximity to her, and that upon the night in question a sudden and violent storm arose, the wind blowing from the northwest, and the course of the river being at that point northwest and southeast; and the Juniata being light, and the Sovereign of the Seas loaded, the Juniata became wind-rodé, and the Sovereign of the Seas tide-rodé; that is, the Juniata held against the tide by the wind, and the Sovereign of the Seas, by reason of its improper anchorage, and the fact that it was heavily laden, and more susceptible to the influence of the tide, and less to the wind, was swept around by the flood tide, with her head to the tide, and into the Juniata, the two vessels coming into collision starboard to starboard, whereby the damage sued for was sustained. On the other hand, the Sovereign of the Seas claims that she was properly anchored, and a safe distance from the Juniata; that the latter was improperly anchored within a space allotted by the harbor master of Newport News to loaded vessels, and, being light, did not have sufficient anchor to hold her against the violence of the wind then prevailing, and that she dragged her anchor and collided with the Sovereign of the Seas, causing the damage sued for.

A mass of evidence was taken in the cause, some before the court orally, and a great deal by way of depositions; and the case turns almost entirely upon a correct determination of the facts, though two questions of law were presented and argued at length on the trial—one as to the effect of the Juniata being anchored in the space allotted to loaded vessels; and the other, the duty of the Sovereign of the Seas, it being the last vessel to anchor, to see that proper anchorage space was given to the Juniata. The Juniata was confessedly anchored in the space allotted to loaded, instead of light, vessels, but it cannot be said that her place of anchorage was the proximate cause of the collision. It does not appear that the master knew the harbor limits. It was his first trip to the port, and his vessel had been allowed to remain at this anchorage ground for 10 days without disturbance or molestation on the part of any one; and the Sovereign of the Seas selected its anchorage ground with full knowledge of this fact, and that the Juniata was light. The latter vessel should not, in the absence of other fault on her part, be held disentitled to recover by reason of her anchorage in this location, particularly in view of the fact that the harbor was not crowded, and the lax manner in which the harbor rules and regulations seem to have been enforced and observed at that port. *The James Gray*, 21 How. 184, 188, 16 L. Ed. 106; *The Clara*, 23 Wall. 1, 14, 23 L. Ed. 146; *The Severn* (D. C.) 113 Fed. 578, 580; *The Northern Queen* (D. C.) 117 Fed. 906, 914, 915.

In passing, it may be said that it would be better to abolish the harbor rules and regulations, if they are not to be reasonably observed by those who prescribe them. To give literal effect to them, remain-

ing as they do in a dormant state, inevitably tends to catch the unwary, and give advantage to those more favorably circumstanced as to the information of their existence.

As to the berth room allowed, it may be conceded that, the Sovereign of the Seas having last anchored, the duty was imposed upon her of giving to the Juniata safe anchorage room, and that, if the damage resulted from failure so to do, the loss should fall on the vessel failing in its duty in that regard. *The Beaver*, 2 Ben. 118, Fed. Cas. No. 1,199; *The Queen of the East*, 4 Ben. 103, Fed. Cas. No. 11,506; *The Lincoln*, 1 Low. 46, Fed. Cas. No. 8,353; *The Wallace* (D. C.) 41 Fed. 894; *Humphreys v. Chas. Warner Co.* (D. C.) 45 Fed. 270, 272; *Spencer on Collisions*, 254; *The Vivid*, 42 L. J. 57, 28 L. T. 375, 1 Asp. M. C. 601; *The Northampton*, 1 Spinks, 152; *The Volcano*, 2 W. Rob. 337.

A "safe berth" should not be construed to mean one from which probable accident might not arise, but ample space; that is, taking into consideration all the exigencies likely to arise, either by reason of the character of the harbor, the conditions of the weather, and the season of the year, no danger of collision would arise, and close calculations should not be made, and risks run in giving room; doubts should be solved with a view of securing safety, having in view the possible contingencies that might arise, making it necessary for each vessel to take greater space than was apparently required at the moment; and particularly is this true where ample anchorage space existed, as it did on this occasion.

The evidence taken in the cause is very voluminous, and covers many questions and theories on different phases of the case, all of which will not be necessary to be passed upon in detail, further than to say that the same have been fully considered, and the conclusion reached by the court is that the facts as contended for by the Juniata are established by a great preponderance of the evidence, and, indeed, with far greater certainty and clearness than is usual in collision cases. It is quite apparent from the evidence that, whatever may have been the precise distance at which the Sovereign of the Seas anchored from the Juniata—whether from 200 to 300 feet, as claimed by the latter vessel, or 900 feet, as claimed by the former—at least the anchorage as made by the Sovereign of the Seas was an unsafe one, and that her master failed to take into account the danger of collision likely to arise from the possible contingency of a storm coming against the tide, which reasonably might have been expected at that point and at that season of the year, and in which a northwest wind would hold a light vessel in one direction, and a flood tide sweep a loaded vessel in the opposite direction, and that this was the real cause of the collision here, and the same did not occur by reason of the dragging of the anchor of the Juniata, as claimed. The facts and circumstances all tend to support the theory of the Juniata, rather than that of the Sovereign of the Seas, and in this the entire crew of the Juniata concur, whereas only the master of the Sovereign of the Seas, and his wife, who was on ship-board, were examined to support the claim of the latter vessel. Moreover, in the most material questions affecting the collision the evi-

dence of witnesses from the two other vessels lying in the immediate vicinity, who saw the vessels in collision, as well as the master of a tugboat which was at the pier at the time the collision occurred, and whose business required him constantly to pass in and out between the two vessels during the daytime, and who also observed the vessels in collision, fully corroborates the witnesses for the Juniata as to when, how, and under what circumstances the collision occurred.

The contention of the Sovereign of the Seas that the accident should have been avoided by the Juniata shortening her anchor, and that it was her duty to do so, instead of the former tripping its anchor and dropping down river, is not well taken, under the circumstances of this case, as it is quite clear from the evidence that it would have been very imprudent for the Juniata to have attempted this expedient at the time, and that it would have been practicable for the Sovereign of the Seas to have removed from her dangerous location; and it may be said that the evidence utterly fails to establish the claim of the master of the Sovereign of the Seas that there was any vessel below the Sovereign of the Seas, and on her port quarter, that made it impracticable for him to have moved his vessel. And besides the Sovereign of the Seas was not in a position—having herself made an improper anchorage—to call upon the Juniata to incur extraordinary risks in order for the Sovereign of the Seas to avoid the collision. *The Vivid*, supra; *Marsden's Dig. Ship. Cas.* 694.

It follows from what has been said that the collision occurred solely by the negligence of the Sovereign of the Seas, and a decree will be entered so determining.

## SCHURMEIER et al. v. CONNECTICUT MUT. LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1903.)

No. 1,855

**1. FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—ACTION AGAINST EXECUTORS.**

An action by a citizen of another state against executors in Minnesota, to enforce a claim against the estate of the decedent, cannot be maintained in a federal court after the time limited by the state statute for presenting claims to the probate court for allowance has expired, where the claim was not so presented, and no excuse is alleged for the failure to present it.

In Error to the Circuit Court of the United States for the District of Minnesota.

This cause comes here upon writ of error to review a judgment of the Circuit Court for the District of Minnesota in favor of the defendant in error, which was the plaintiff below, upon an order sustaining its demurrer to the answer of the defendants. This action, which was commenced February 7, 1902, was brought to recover a balance due upon a promissory note given by the testator of plaintiffs in error to defendant in error, dated July 2, 1894, and due July 2, 1899. He died July 16, 1900. His will was admitted to probate and letters testamentary issued thereon December 27, 1900, and on that day an order was made allowing six months from that date for the presentation of claims against his estate, and fixing the first Monday in July, 1901, as the date of hearing thereon in the probate court. The state statute provides that at the time of granting letters testamentary or of administration the probate court shall fix a time within which claims may be presented, which shall not be less than six nor more than eighteen months. The answer alleged that no claim was presented there, by or on behalf of the defendant in error; nor any application made for leave to file, or for any extension of time within which to file, a claim; and that no ground existed for such extension. A demurrer was interposed to this answer, and was sustained, and judgment was entered thereon, from which plaintiffs in error appealed to this court.

Hiram F. Stevens (John D. O'Brien, Haydn S. Cole, and Armand Albrecht, on the brief), for plaintiffs in error.

George W. Markham (James E. Markham, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

PER CURIAM. It was claimed upon argument by counsel for defendant in error that, although the complaint failed to so state, the maturity of the note sued upon had been extended, during the lifetime of the testator, to a date subsequent to the expiration of the time allowed by the state court for the presentation of claims, and that the complaint was drawn in reliance upon the prior decision of this court in the case of *Security Trust Company v. Dent*, 43 C. C. A. 594, 104 Fed. 380, wherein it was held that an action might be maintained against an executor or administrator in the federal court, notwithstanding the fact that the time for presentation of claims in the state court had ex-

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. White*, 29 C. C. A. 553.

pired prior to the commencement of the action, without alleging any excuse for not bringing the action within the time so limited. That judgment was reversed by the Supreme Court by a decision filed December 1, 1902 (*Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147), after the trial of this action in the Circuit Court and the entry of judgment therein.

As the record now stands, upon the authority of that case the judgment of the court below must be reversed, and the demurrer overruled, but with leave to the plaintiff to reply to the answer or to amend its complaint, stating its cause of action at law or in equity, as it may be advised, and with leave to the defendants to answer or otherwise plead to such amended complaint.

The judgment of the Circuit Court is reversed, with costs, and the cause remanded for further proceedings in accordance herewith.

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**AMERICAN BONDING & TRUST CO. v. BALTIMORE & O. S. W. R. CO.**

(Circuit Court of Appeals, Sixth Circuit. July 29, 1903.)

No. 1,125.

**1. ASSIGNMENTS—VALIDITY—CONTRACTS ASSIGNABLE.**

The rule settled by the decisions of the Supreme Court is that a contract by which one party became obligated to the other is assignable by the latter unless there is something in the terms or nature of the contract which evidences an intention of the parties that it should not be assignable.

**2. SAME—CONTRACT WITH RECEIVERS.**

Receivers for railroad property, appointed pending the foreclosure of mortgages thereon, under authority from the court entered into a contract for certain betterments to be paid for from the proceeds of receivers' certificates, which were made a first lien on the property and its earnings, and the contractor gave bond with a surety for the due performance of the contract. Pending the work the property was sold under the foreclosure decree, and conveyed to the purchaser, subject to all contracts made and liabilities incurred by the receivers, for the protection of which the court reserved jurisdiction over the property. The contract and bond were also assigned by the receivers to the purchaser, which performed the contract on its part until the work was abandoned by the contractor. *Held*, that there was nothing in the nature of the contract indicating an intention that it should not be assignable by the receivers, but that, in view of the fact that they were known to be officers of the court temporarily in charge of the property, which was likely to be sold at any time, and that the court had power to protect the rights of the contractor, as it in fact did, it must be presumed, in the absence of any provision to the contrary in the contract itself, that it was the intention that it should be assignable in case of a sale of the property; that the assignment was, therefore, valid, and vested the assignee with the right to maintain an action on the bond given by the contractor.

**3. SAME.**

A clause of such contract, giving the receivers the right to cancel the same at any time at their option, did not indicate an intention that it should not be assignable, but should be canceled in case of a sale of the property.

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¶ 1. See Assignments, vol. 4, Cent. Dig. § 25.

## 4. SAME—GUARANTY CONTRACT.

The fact that the bond of the contractor was a contract of guaranty did not render its assignment by the obligees invalid, since it was a guaranty of performance of a contract already in existence, and the terms of the obligation were not changed, nor the surety's liability increased by the assignment.

## 5. SAME.

The fact that such bond was executed by a bonding company engaged in the business of making guaranty obligations for profit, and that such contracts are held to be in a certain sense insurance contracts, did not render it nonassignable by the obligee.

## 6. CONTRACTS—REMEDY FOR BREACH—PROVISION GIVING OPTION TO CANCEL.

A provision of a contract for the construction of railroad work, giving the engineer in charge power to annul the contract by giving notice in case the work was not performed by the contractor as required thereby, and that in such case the contract should become null and void, and any sums due the contractor should be forfeited as liquidated damages, does not provide an exclusive remedy for breach of the contract by the contractor; and especially where a bond for the faithful performance of the work was also required and given, and where the power was not exercised, but the work was abandoned by the contractor, such provision does not preclude an action on the bond to recover damages.

## 7. SAME—ACTIONS FOR BREACH—QUESTIONS FOR JURY.

The question whether a change in the plans and specifications of railroad work to be performed by a contractor under a right reserved to make changes was a material one, not within the contemplation of the parties when the contract was made, and one which so increased the burden of the contract as to justify the contractor in refusing to perform it, is one of fact, and not of law, and its decision was not involved in a ruling of the court refusing to direct a verdict for defendant in an action to recover damages for breach of the contract by the contractor, nor in one refusing to exclude evidence relating to that portion of the work.

## 8. SAME—RAILROAD WORK—CONSTRUCTION.

Where a contract for railroad work provided that the engineer in charge might, in his discretion, annul the same "as to any one or more sections of the work without releasing the contractor from his contract on other portions of the work," a change by the engineer in the plans and specifications for the work on a certain section, which was of such a radical character as to be outside the power reserved in the contract, and as to justify the contractor in refusing to do the work on such section, did not release him from the obligation to do the other portions of the work.

## 9. SAME—ACTION FOR BREACH—EVIDENCE.

In an action against a contractor for damages for failure to perform a contract for railroad work, which provided that estimates of the work done should be made by the "engineer in charge of construction," subject to revision by the engineer "of maintenance of way," estimates made by a resident engineer in immediate charge of the work under direction of the engineer of construction, and as such approved by the engineer of maintenance of way, were, in effect, those contemplated, and are admissible in evidence.

## 10. SAME—CONSTRUCTION—AGREEMENT FOR CARRIAGE OF MATERIALS.

A provision of a contract for railroad work, by which the company agreed to transport all materials used by the contractor at a specified rate of charge, in the absence of any express provision otherwise must be construed to require the carriage of such materials only to the nearest station to the place where used.

## 11. SAME—ACTION FOR BREACH—INSTRUCTIONS.

Instructions and rulings of the court on the admission of evidence in an action to recover damages for breach of contract considered and approved.

## 12. APPEAL—REVIEW—INSTRUCTIONS.

Where the charge of the court on a particular matter was not excepted to, and no further instruction was requested, it cannot be assigned for error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

W. L. Granger and J. W. O'Hara, for plaintiff in error.

Judson Harmon, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This writ of error is to a judgment of the lower court in an action brought therein by the defendant in error against the plaintiff in error to recover on a guaranty bond executed by the latter April 18, 1899. At that date a suit was pending in said court, brought by the Farmers' Loan & Trust Company against the Baltimore & Ohio Southwestern Railway Company, to foreclose certain mortgages on the latter's railroad, extending from Belpre, Ohio, through that state and the states of Indiana and Illinois, to East St. Louis, Ill., and its branches, one of which extended to Louisville, Ky., and suits ancillary thereto were pending in the Circuit Courts of the United States for the districts of Indiana and Kentucky and the Southern District of Illinois. In those suits Judson Harmon and Joseph Robinson had been appointed receivers of said railroad and its branches, and they had taken possession thereof, and were then engaged in operating them. Prior to the institution of said suits said railway company had made beneficial contracts for the purchase of a large number of cars, locomotives, steel rails, continuous rail points, and bridges, some of which cars and bridges had been delivered, in pursuance to plans which contemplated also the laying of a second track from Cochran to Milan, in the state of Indiana, and a change of grade at Skillet Fork Creek, near Iuka, in the state of Illinois. After their appointment, and prior to the date of the execution of said guaranty bond, said receivers, with the consent of the holders of about 90 per cent. of the bonds secured by said mortgage, had been authorized by said courts to carry out said contracts, to make said improvements, to borrow sufficient money for those purposes, and to issue certificates therefor, which should be a first lien on the property in their possession and its earnings. In pursuance of this authority, on said date, to wit, April 18, 1899, they entered into a contract with the Globe Construction Company, whereby said company promised to do the grading, masonry, and track-laying for said second track, and to change said grade, and prepare it for metal viaducts, bridges, and ballasting, the work to be done under the immediate supervision of an employé of the receivers, called "engineer in charge of construction," in many particulars according to his directions, and in a few according to the directions of a superior employé, called "engineer of maintenance of way," to be estimated monthly by the former, whose estimates were subject to revision and alteration by the latter, but were otherwise final and conclusive, to be begun in 10 days thereafter, and to be completed December 1, 1899; and whereby, further,



said receivers promised to pay said company certain prices for said work according to a certain classification, 90 per cent. whereof, according to said monthly estimates, was to be paid monthly, and the remainder at the completion of the work. At the same time, and in consideration thereof, said Globe Construction Company and the American Bonding & Trust Company, plaintiff in error, and defendant in the lower court, executed to them a joint and several bond in the sum of \$45,000, whereby they guarantied the faithful performance by said construction company of its part of said contract, which bond is the bond to recover on which the action in the lower court was brought. Subsequent thereto, on May 27, 1899, a decree of foreclosure and sale was entered in said suits, whereby the property covered by said mortgages and in the possession of said receivers was ordered to be sold to pay the indebtedness secured thereby, subject to the payment by the purchaser of any indebtedness incurred by the receivers properly chargeable against said property, and such other claims as the court had theretofore or might thereafter decree to be prior and superior to said mortgages, or either of them, on said property, or any part thereof, to enforce payment of which jurisdiction over the property was reserved, and the purchaser to assume and carry out any contracts made by the receivers. A special master commissioner was appointed to make the sale. In pursuance of this decree sale was made of said property July 10, 1899, to Edward R. Bacon, George Hoadly, Jr., and J. Chauncey Hoffman, which sale was reported July 11, 1899, and confirmed July 20, 1899. The decree of confirmation provided that the purchasers should have the right to assign their interest as an entirety or in parcels, and upon payment of the purchase price the commissioner of sale should execute deeds of conveyance to the purchasers or the persons or corporations to whom they should assign their interest, and the receivers should deliver to them possession of the property and business in their possession and control, the purchasers or their assigns to take title and possession of the property subject to all liens and charges which might thereafter be found and adjudged against it, and to the jurisdiction and power of the court at any time to retake and resell said property in case future orders for the payment of money by said purchasers or their assigns in discharge of said liens and charges should not be complied with. Said individual purchasers did not purchase said property in their own right, but in pursuance of a plan of reorganization formed by the bondholders of said railway company, and as a committee acting for them, which plan contemplated the vesting of said property in a new corporation to operate it. The machinery by which this portion of the plan was carried out was this: Separate corporations were formed in the states of Ohio, Indiana, and Illinois. Said purchasers assigned their interest in so much of said property as lay in the state of Illinois to the Illinois corporation, and in so much thereof as lay in the states of Indiana and Kentucky to the Indiana corporation. The commissioner of sale made deeds of conveyance in accordance with said assignments, and for so much of said property as lay in the state of Ohio, to said purchasers. The Illinois corporation conveyed the property so conveyed to it to the Indiana cor-

poration and the purchasers that so conveyed to them to the Ohio corporation; and the Indiana and Ohio corporations consolidated and became a single corporation under the name of the Baltimore & Ohio Southwestern Railroad Company, plaintiff below, which thereby acquired title to the entire property. All this was accomplished by July 31, 1899, and thereupon said receivers delivered possession of said property and all the business in their possession and control, including said contract and bond, to said railroad company. August 1, 1899, the receivers executed a formal written assignment of the contract and bond to the company. It is by virtue of these proceedings and this assignment that plaintiff asserted title to said bond and the right to sue on it.

Before this, to wit, on May 28, 1899, the day after the entry of the decree of foreclosure and sale, the construction company began the Indiana work, and at the time when said railroad company acquired title and possession of the property and said assignment was made it had done about 10 per cent. of that work. It continued to work there after said transfer the same as if no change had taken place. The persons who had been in the employ of the receivers as engineer in charge of construction and engineer of maintenance of way, respectively, were employed by plaintiff in said positions, and so continued during the times hereinafter mentioned. The work on said second track progressed, and monthly payments were made to and on account of the construction company until about January 18, 1900. At that date the Indiana work was still uncompleted, and the Illinois work had never been begun, though the time when said company had promised to complete the work at both places, to wit, December 1, 1899, had passed. The failure so to do was due largely to the fault of the construction company, but also to an increase in the amount of work to be done over that in contemplation when the contract was made, but within its terms. A little over 50 per cent. of the Indiana work so contemplated was then done. In this condition of things the construction company abandoned the work, and plaintiff, by reason thereof, was compelled to and did complete it at both places. The action brought by it against the defendant on the guaranty bond was to recover the damages sustained by it because of the failure of the construction company to comply with its contract, to wit, the increased cost of doing the work contracted for over the contract price. Plaintiff claimed that the increased cost thereof exceeded the amount of the bond, and it therefore sued for the whole amount. The case was tried by a jury. It returned a verdict in favor of plaintiff for the sum of \$36,427.98, upon which the judgment complained of herein was entered. Other provisions of said contract and other facts in relation to what was done under it will be stated further on.

Plaintiff in error assigns as error quite a number of rulings of the lower court, and they may be conveniently classified as those which involved questions affecting plaintiff's right to recover at all and those which involved questions affecting the amount which it had a right to recover.

1. Of the first class the principal one is the refusal of the court to give a peremptory instruction to the jury to find for the defendant

asked at the close of all the evidence, and it is unnecessary to refer to other rulings which involved the same question, or questions which it raised. It involved two questions.

(a) One of these related to the assignability of the bond sued on. Plaintiff in error contends that it was not assignable, and that, therefore, defendant in error had no right to sue on it. It is not contended by it that the proceedings in said suit subsequent to the execution of said bond and said written assignment did not have the effect of assigning it to defendant in error, if it was assignable at all. Indeed, there is no room for such a contention. Nor is it contended by it that, if such was the case, the defendant in error did not have a right to bring the action in the lower court in its own name as plaintiff. At common law it is true it would not have had such a right. *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790. But in the state of Ohio, where the assignment took place, if at all, and where the action was brought, it is provided by statute that every action must be prosecuted in the name of the real party in interest. 2 Rev. St. Ohio (6th Ed.) § 4993. And it is the settled interpretation of this provision by the Supreme Court of Ohio that whenever a thing in action is assignable the assignee may sue on it in his own name. *Allen v. Miller*, 11 Ohio St. 374. This being so, defendant in error had the right to maintain the action in the lower court, though a federal court, in its own name, if the bond sued on was assignable. *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; *Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; *Glenn v. Marbury*, supra. The contention of counsel for plaintiff in error relates solely to the assignability of said bond.

In *Pollock on Contracts*, p. 201, it is stated that the origin of the rule that the benefit of a contract—i. e., the right of one party thereto to have the other perform an obligation on his part arising therefrom—could not be assigned at common law, so as to enable the assignee to sue in his own name for a breach thereof, was attributed by Coke to the “wisdom and policy of the founders of our law” in discouraging maintenance and litigation. In opposition to this the author states:

“But there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor.”

According to this conception of a contract, the relation created by it cannot be severed by either party thereto, the creditor or debtor, without the consent of the other. It is as impossible for either to substitute another in his place as it is for him to change any other term of the contract. This primitive view of a contract prevails no longer. The treatment by courts of equity of such assignments, the judicial cognizance by courts of law of the usage of merchants in relation to bills of exchange rendering it a part of the common law, the passage of statutes making certain contracts assignable, the construction placed upon the statutes enacted in numerous jurisdictions requiring actions to be brought in the name of the real party in interest, and the conception of such rights as property and the possession thereof as ownership, account for its passing away. But, notwithstanding

ing this, it is still possible that a certain contract may create such a relation between the parties thereto—a relation that cannot be severed by the creditor assigning to another his right to have the debtor perform his obligation. It will do so if it contains an express stipulation prohibiting such an assignment. In the case of *Devlin v. Mayor, etc.*, of New York, 63 N. Y. 8, Judge Allen said:

"Parties may, in terms, prohibit the assignment of any contract, and declare that neither personal representatives nor assignees shall succeed to any right in virtue of it, or be bound by its obligations."

Such a stipulation in a contract with the state of Texas for the erection of its capitol building was upheld and enforced in the case of *Burck v. Taylor*, 152 U. S. 635, 14 Sup. Ct. 696, 38 L. Ed. 578. It was contended in that case, according to Mr. Justice Brewer, as follows:

"The contract in the possession of the contractor was his property, and the profits arising therefrom and any interest therein were as much the subject of disposal as any other property, and the only limitation was one for the benefit of the state, and could not be claimed by any subsequent assignee from the contractor."

In response to this contention he said:

"That contract, however, was as binding on the one party as on the other. The contractor assented to its terms precisely as did the state, and his promise was not to assign the contract in whole or in part, without the consent in writing of the state authorities. It was a promise which entered into and became one of the terms of the contract, and one which was binding, not only upon the parties, but upon all others who sought to acquire rights in it. It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interest in the contract it had no previous knowledge, and to the acquisition of whose interest it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract, and binding upon the contractor, and equally binding upon all who dealt with him."

It will also do it if it is a bilateral contract, and the counter obligation on the part of the creditor to the debtor is of such a nature that the reasonable inference therefrom is that it was the intention of the parties that it should be performed by the creditor, and no one else. Perhaps a more careful statement would be that in such a case the right cannot be assigned so as to compel the debtor to accept performance of that obligation from the assignee, and, if an attempt is made to so assign it, the assignment will be invalid. It is so stated in *Bishop on Contracts*, § 1182, where he says:

"An agreement involving personal trust in the party, or to be carried out by his personal skill, cannot be so assigned as to compel the other party to accept performance by the assignee, and pay him therefor."

If the rule here goes no further than this, there is nothing in the existence of such a counter obligation to prevent an assignment by a creditor of his right after he has performed that obligation, and thus

perfected his right, or, even before, if no attempt is made to shift the duty of performing it from himself to the assignee. Instances of where the counter obligation involved personal skill on the part of the creditor, and because of this it was held that the reasonable inference was that it was the intention of the parties that it be performed by him alone, and therefore he could not assign his right to another so as to compel the debtor to accept performance from the assignee, may be found in the recent cases of *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; *Edison v. Babka*, 111 Mich. 235, 69 N. W. 499; *Eastern Advertising Co. v. McGaw*, 89 Md. 72, 42 Atl. 923. An instance of where it involved personal credit, and the same significance and effect was given to it, may be found in the case of *Arkansas Valley Smelting Co. v. Belden Mining Co.*, supra. There a company engaged in the business of mining carbonate lead ore at Red Cliff, Colo., entered into a contract with two individuals engaged as partners in the smelting business at Leadville, in said state, whereby it agreed to sell and deliver to said individuals 10,000 tons of ore at their works in Leadville, at the rate of at least 50 tons a day, beginning on completion of a railroad from Leadville to Red Cliff, the ore upon delivery to become at once the property of the purchasers, and whereby further the latter agreed to pay certain prices therefor at Leadville as each 100 tons of said ore so delivered was assayed by a disinterested and competent party, if the parties could not agree as to the proper assay thereof. Thereafter said railroad was completed, and said company began to and did make deliveries of ore under said contract, and, when not one-tenth of the amount agreed to be delivered had been delivered, one of said individuals—the other having theretofore withdrawn from the partnership—sold and conveyed the smelting works, and assigned the right under said contract to further deliveries to a corporation organized to carry on the smelting business at said works. Thereupon the mining company refused to make further deliveries to the smelting company under said contract, and an action was brought by the latter against the former to recover damages. It was held that no recovery could be had. Mr. Justice Gray, in delivering the opinion of the court, said:

"During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price the defendant had no security for its payment, except in the character and solvency of Billings and Eller. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted."

And again:

"The cause of action set forth in the complaint is not for any failure to deliver ore to Billings before his assignment to the plaintiff (which might perhaps be an assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract is all that is alleged. There is no allegation that Billings is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into shoes of Billings, and substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party with whom it never contracted, as entitled to demand further deliveries of ore."

It is apparent that the ground upon which the assignment was held invalid in this case was that it attempted not only to transfer the right to future deliveries of ore, but to shift the duty of paying therefor to the assignee. As to the right of assignment by a creditor of an agreement to pay money and deliver goods, Mr. Justice Gray stated generally:

"At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another thrust upon him without his consent."

Another case in which the Supreme Court of the United States has held that an assignment was contrary to the intent of the parties to the contract, and therefore invalid, is that of *Delaware County v. Diebold Safe & Lock Company*, *supra*. That was the case of a partial assignment; but in Indiana, where the transaction took place and the suit was brought, the assignee, by valid assignment of a part of a contract, may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer or answer to the misjoinder of the assignor. The question, therefore, was whether there had been a valid partial assignment. Meyers & Son had a contract with the board of commissioners of Delaware county, in said state, for the construction of a jail for said county, for which they were to be paid the sum of \$20,000 in monthly payments, on the architect's certificate, reserving on each payment 20 per cent., to be paid on the completion and acceptance of the building. It was expressly agreed that the county should not in any manner be answerable or accountable for any materials used in the work, and that, if the contractors should fail to finish the work by the time agreed on, they should pay to the commissioners, as and for liquidated damages, the sum of \$25 for every day the work should remain unfinished. The statutes of Indiana required the contractor in such a case to give bond, with sureties, for the faithful performance of his contract, and payment of all debts incurred by him in the prosecution of the work, and provided that any laborer or materialman having a claim against the contractor might sue upon the bond, which suit, or one against the contractor alone, was the only remedy they had according to the holding of the Supreme Court of Indiana. Meyers & Son executed such a bond. Thereafter they made a subcontract with the Diebold Safe & Lock Company, to do the ironwork necessary in the construction of the jail, and assigned to it \$7,700 of the sum coming to them under the contract. Having done that work according to contract, said company brought an action against the board of commissioners to recover said sum, and one of the questions considered and determined by the Supreme Court of the United States when the case came before it was as to the validity of said assignment. It was held to be invalid. Mr. Justice Gray said:

"This case does not require us to consider whether an assignment of the entire contract for the construction of the jail would have been consistent

with the intention of the parties as apparent upon the face of the contract, or with the intention of the Legislature as manifested by the statutes under which the contract was made. The plaintiff claims under no such assignment. Those statutes and the judicial exposition of them by the Supreme Court of the state are quite inconsistent with the theory that the original contractors can, at their pleasure, and without the consent of the county commissioners, split up the contract, and assign it in parts, so as to transfer to different persons or corporations the duty of furnishing different kinds of material and labor, and the right of recovering compensation for such material and labor from the county commissioners."

As to assignment of contracts to pay money, he said generally:

"A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But where rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract."

These decisions of the Supreme Court of the United States are sufficient to furnish us with a rule as to the assignability by a creditor of his right to have the obligation of his debtor arising out of a binding contract between them, which can be applied to this case in determining whether the guaranty bond in question herein was assignable. That rule is that such a right is assignable unless there is something in the terms or nature of the contract, considered from the standpoint of the situation as it existed when the contract was made, that evidences that it was the intention of the parties thereto that it should not be assignable. For such a right to be assignable, absence of evidence of an intention that it should not be is sufficient. If there is no evidence of such intention, it is to be presumed that it was the intention of the parties to the contract that it should be assignable—i. e. that the creditor could substitute another in his place in the right to the performance of the obligation by the debtor—and that in this way, and to this extent, at least, the relation thereby created between them could be severed. If, on the other hand, there is evidence in the terms or nature of the contract so considered which evidences that it was within the contemplation and the intention of the parties that it should be assignable, so much the greater reason for holding that it was.

It remains to apply this rule to this case. It must be conceded at the outset that, if the application of this rule to the principal contract—i. e., the contract of construction—results in the conclusion that the right to have the construction company perform the work which it thereby promised to do was not assignable, then neither was the guaranty bond assignable. There would be enough in this alone to show that it was the intent of the parties thereto that it also should not be assignable. It is in order, therefore, first to apply the rule so deduced to that contract. It is certain that it contained no express stipulation prohibiting the receivers from assigning the right which they had to have the construction company perform its obligations arising therefrom. There is, however, a similarity between that contract and the

one involved in the case of Arkansas Valley Smelting Co. v. Belden Mining Co., in this: that in said contract of construction there was a counter obligation on the part of the receivers to pay for the work which the construction company promised to do after it was done. That obligation may be said, therefore, to have involved credit; whether personal or not will be indicated further on. Besides, the receiver's employes had much to do with regulating and determining the details of the work, and all to do with adding to or taking from that in contemplation when the contract was made, and with estimating the quality and quantity of that done as a basis of payment therefor. The possession of this power by the receiver's employes, and of the right to select the persons who should wield it by the receivers, may be regarded as involving considerable trust on the part of the construction company that neither would be exercised unfairly. But, on the other hand, there are facts which tend to show that, notwithstanding these evidences of personal confidence in the receivers, it was the intent of the parties to the contract that the receivers should have the right to assign the obligation of the construction company to do the work promised to be done by it, and the privilege of naming the persons who should occupy those positions, and at the same time of shifting to the assignee from themselves the duty of performing the counter obligation of paying therefor. In the first place, it was expressly provided in the contract that the construction company should perform the work itself, and that no subcontractors relieving it of the responsibility of a proper performance of the contract would be permitted, unless by the written consent of the engineer of maintenance of way; and, further, that the amounts of the monthly estimates should not in any manner be assignable or transferable, either by the act of the company or by operation of law, as a subsisting debt or liability of the receivers, until the final estimate should be made and become payable as therein provided.

The presence in the contract of these limited prohibitions against the company having the right to shift the duty of performing its contract to others, and of assigning its right to payment of the monthly estimates, makes the absence therefrom of a provision prohibiting an assignment by the receiver of said right and privilege, and a shifting of its duty to pay to another, quite significant. It shows that the parties' minds were directed to the matter of severance, in whole or in part, of the relation between them growing out of the contract, and such severance was prohibited only to the extent stated. In addition to this is the fact that, when the contract was entered into the possession and control of the property by the court was only temporary; i. e., until it should be in position and might deem it proper to sell and deliver possession thereof to the purchaser. It must have then been within the contemplation of the parties at that time that it was possible, if not probable, that long before the time for completion of the work agreed to be done (as in fact turned out to be the case) the property would be sold, and possession and control thereof delivered to the purchaser; or in other words, that the property with which the contract had to do would pass into other hands pending its completion. This, in connection with the absence of a stipu-



lation prohibiting an assignment heretofore referred to, must be regarded as sufficient to show that it was the intention of the parties that, if that event should happen before that time, the right to have the contract completed, with the privilege of naming the employés having such powers, if it would not pass with the property without more, should be assignable along with it to the purchaser, and to require that the elements of personal confidence heretofore referred to be denied the significance that might otherwise in a different state of case be given to them. It is at least sufficient to show that it was the intention of the parties that said right should be assignable to the purchaser, if no attempt was made, in connection with the assignment, to take away from the construction company that upon which it relied for payment when it entered into the contract. Or, coming to the actual requirements of this case, it cannot be said that it was the intention of the parties that, if no such attempt was made, said right should not be assignable to the purchaser. No such attempt was made. The contract on the part of the receiver was in reality the contract of the court. Judge Love, in the case of *Farmers' L. & T. Co. v. Central R. of Iowa* (C. C.) 7 Fed. 537, said:

"Receivers are like public officers who are not individually responsible upon their official contracts, nor for torts committed by their subordinates, but only for torts committed by themselves, or contracts on which they assume to bind themselves personally."

Mr. Justice Brown, in the case of *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796, said:

"Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands."

The proper attitude of a court towards receiver's obligations, duly authorized, is thus stated by Judge Brewer in the case of *Farmers' L. & T. Co. v. Burlington S. W. Ry. Co.* (C. C.) 32 Fed. 805. He said:

"The court should be chary of promise, but eager of performance; careful not to burden property in its possession with obligations, and equally careful to see that every obligation is discharged before possession is fully surrendered."

This was the attitude which the lower court in said suits maintained toward said contract of construction. In its decree of sale and order of confirmation it is provided that the purchaser and his assignee should carry out and perform said contract, and, not only this, but it reserved the power to thereafter order a compliance with said contract on their part, and to retake and resell the property for that purpose, and the purchasers and their assignees took the property subject to such reservation. As to the effect of such reservation, Judge Love said, in *Farmers' L. & T. Co. v. Central R. of Iowa*, supra:

"If the receiver had been discharged, and the property turned over to the new company unconditionally and without reservation, I am at a loss to see what legal remedy claimants, without established liens, would have. But the court did not in this case so turn over the property. It would have been a most unwise and unjust proceeding to have done so, leaving just claims and liabilities incurred by a receiver of its own appointment, without any provision whatever to enforce them. On the contrary, this court, in the final

decree of May 20, 1879, retained here the case of the Farmers' Loan & Trust Company against the Central Railroad Company of Iowa and others, and in express terms reserved its jurisdiction of said cause to enforce the payment of debts and liabilities incurred by its receivers. For this purpose, at least, that suit has never been dismissed. It is still pending, and any claimant with a demand against the receiver, which he has a right by law to have established as a lien against the railway property, may, by leave of the court, intervene in the foreclosure cause and assert his claim. It is not necessary that the plaintiff should make new parties to his petition. He intervenes in the old chancery case, which is still pending. He asserts his right to a lien upon the property which the court turned over with a reservation of jurisdiction to hear and determine his cause."

It follows from this that, after the sale of the property and delivery thereof, and assignment of said contract to the defendant in error, assignee and vendee of the purchasers, the construction company had the same security for payment of the moneys which would become due to it under the contract that it had before. The assignment of the contract of construction to the defendant in error amounted, therefore, to no more than an assignment of the right to have the construction company perform its obligations arising therefrom, and to recover damages for failure to do so, and of the privilege of having its said employés supervise and estimate the work as stated.

The contract contained a clause by which it was provided that the receivers might at any time, without fault on the part of the construction company, and for any reason that might appear sufficient to them, upon 10 days' notice to it, cancel the contract, in which event it should be entitled to the full amount of the estimate for the work done by it up to that time, without deduction, and not be entitled to any damages on account of the cancelment. Counsel for plaintiff in error contend that this clause evidences an intention of the parties that the right to have the contract completed should not be assignable by the receivers to the purchasers, in the event of a change in the title and possession of the property, because of a sale before its completion. We do not think that any such effect can be given to it. It did not provide that upon a sale the contract, though uncompleted, should be annulled. It simply conferred upon the receivers the right, for any reason appearing to them sufficient, to annul the contract in the course of its execution. If they did not see fit to exercise that right, the contract was to be completed. There is no ground for saying that a sale of the property was to have any special bearing upon the exercise of this right.

The conclusion in regard to the construction contract must, therefore, be that it certainly does not evidence an intention that the right which it conferred on the receivers to have the work provided in it performed by the construction company should not be assignable to the purchaser in the event of sale before its completion, and that there is strong reason for holding that it shows affirmatively that it was within the contemplation of the parties thereto, and their intention, that it should be so assignable. If, then, there was any intention on the part of the parties to the guaranty bond that the right of the receivers to have the obligation created by it performed should not be assignable, it must be found in its terms or nature, considered as stated aforesaid. It is certain that it was their intention that it should not

be assignable apart from the construction contract. Was it their intention that it should not be assignable along with the right to have that contract performed in the event of a sale of the property with which it had to do before its completion? There was no express stipulation that it should not be. Was there anything in the nature of the bond which evidenced such intention? Upon the idea that there was, counsel for plaintiff in error cite a number of cases in which guaranties have been held not to be assignable. They involve mostly guaranties, which are often termed letters of credit and guaranty payment of future advances, credits, sales, or payments. The following cases cited by them involve guaranties of this kind, to wit, *Holmes v. Small*, 157 Mass. 221, 32 N. E. 3; *Daube v. Philadelphia C. & I. Co.*, 77 Fed. 713, 23 C. C. A. 420; *Penoyer v. Watson*, 16 Johns. 101; *Evansville Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204; *Crane Co. v. Specht*, 39 Neb. 123, 57 N. W. 1015, 42 Am. St. Rep. 562. To this class of cases belongs the case of *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13, not cited by them. The ground upon which such guaranties are held nonassignable is thus stated by Judge Potter, who delivered the opinion of the court:

"Ordinarily a guaranty is not negotiable. It may, indeed, be made so, if such appears to be the intention of the guarantor. It may not be addressed to any particular person. It may be an offer addressed to all the world, as in case of a reward offered. But, if addressed to a particular person, as in this case, we think it cannot be transferred so as to enable another to sue upon it in his own name. There may be good reasons why the guarantor should be willing to deal with one person, and not with another; there may be equities or other dealings between the guarantor and guarantee which the former may desire to provide for."

He said further:

"But when the contract is such as to imply peculiar confidence in the honesty, pecuniary ability, knowledge, or skill of the person to whom the guaranty is addressed, there is good reason for holding it to be strictly personal, unless its language implies the contrary."

They cite other cases involving guaranty bonds or contracts of that nature that were held not to be assignable, because, for them to have been so would have permitted one party to the contract to change a term thereof other than the person who is entitled to performance as well as that term. They are the cases of *Thompson v. Young*, 2 Ohio, 334; *Bensinger v. Wren*, 100 Pa. 500; *Burgett v. Paxton*, 15 Ill. App. 379.

In *Thompson v. Young*, the surety on a bond for the fidelity of a cashier was held not liable for the cashier's defalcation after the bank's charter was extended, and in *Bensinger v. Wren* the surety on a bond for the fidelity of the cashier of a private banking association was held not liable for the cashier's defalcation, after the association had been merged into an existing corporation chartered as an insurance and trust company, to the assignees of such corporation for the benefit of its creditors. The bond in the one case was to cover the acts of the cashier whilst such officer of the then existing bank, and in the other case as cashier of the then existing private banking association. There was no agreement in either case to answer for his acts as cash-

ier of another institution. In *Burgett v. Paxton* it was held that the surety in an injunction bond given to obtain an injunction restraining the sale of land under execution brought against the sheriff and judgment creditor was not liable to the assignee, after suit brought, of the judgment creditor, made a codefendant with the sheriff and said creditor on his own petition, no new bond being given, for the damages which he, the assignee, had sustained by reason of said injunction in a suit brought after its dissolution by the sheriff and original judgment creditor for themselves and for the use of the assignee of the judgment. It was so held because the bond was construed to cover by its terms only the damage which the original plaintiff might sustain by reason of the injunction. To permit a recovery of the damages which the assignee had sustained would be to enlarge that term of the bond.

In the case of *First National Bank of Quincy v. Hall*, 101 U. S. 43, 25 L. Ed. 822, cited by them, the question involved was not whether the party who was entitled to performance of the contract of guaranty (the guarantee) could assign the right, but whether the party who was under the obligation of performing it (the guarantor) could shift the duty of so doing to another. It was claimed that a firm composed of three at Chicago had guaranteed payment of drafts drawn on them by their agent at Quincy, conditioned upon stock to meet the drafts being in transit the same day or day after they were presented, to a bank at the last-named place, if it should advance money on them, and, drafts so drawn and advanced upon, against which no stock had been shipped, having been paid by the firm, it brought suit against the bank to recover the money so paid. Between the making of the alleged contract and said advances, there had been a change in the membership of the firm by the admission of two new members without the knowledge of the bank, and after the transaction complained of. It was held that no recovery could be had because of this fact. It was in this sort of a case that Mr. Justice Swayne said:

"The proof is conclusive that the bank had no knowledge of the change until after the commencement of this suit. The alleged cause of action arose more than eight months after the new partnership was formed, and nearly a year after the date of the letters by which the contract is claimed to have been made. There was no privity between the bank and the new firm. There was no binding acquiescence by the bank. There could be none without knowledge, and it is not claimed or pretended that such knowledge existed. A new party could no more be imported into the contract and imposed upon the bank, without its consent, than a change could be made in like manner in the other pre-existing stipulations. The bank might have been willing to contract with the firm as it was originally, but not as it was subsequently. At any rate, it had the right to know, and to decide for itself. Without its assent, a thing was wanting which was indispensable to the continuity of the contract."

Then as to the case of *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867, cited by them. That was a case where an attempt was made to change the person whose fidelity had been guaranteed, without the consent of the guarantor. It was there held that a surety who guaranteed the performance of certain conditions by a firm is not liable for the default of the firm after it has been changed by the addition of a new member. Judge Magruder said:

"A party may be induced to become surety for the individuals who compose a firm because of his confidence in their integrity, prudence, accuracy, and ability as business men, but he cannot be presumed to have intended to become responsible for the possession of such qualities by some third person, who may be afterwards taken into the firm without his knowledge or consent. It is often in the power of one partner by want of discretion or integrity to ruin another."

This case is certainly no authority in support of the contention for which it is cited.

Now, the case in hand is like all the cases so cited which have been so far considered in that the contract involved herein is a guaranty contract. In no other respect, though, is it like them. No attempt was made by the assignment relied on to change the obligor or any term of the contract other than the person entitled to the performance, and the amount of liability did not depend upon the future to any further extent than it would be affected by the action of the employees of the party entitled to the performance of the principal contract in the exercise of their liberal powers as to directing, changing, and estimating the work. It is the case of a guaranty of a contract already made, and within the knowledge of the guarantor at the time he signed the contract. It is a guaranty that, except as stated, is absolute in its terms, and definite as to amount and extent. It is held, in relation to absolute guaranties, in the state of New York, that they will pass by an assignment of the principal contract, without more, as an incident thereto. *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Claflin v. Ostrom*, 54 N. Y. 581.

Counsel for plaintiff in error urge further that the bond in suit is an insurance contract, and is for this reason nonassignable. It is true that contracts of the kind involved herein have been held to be insurance contracts; i. e., contracts insuring a guarantee against loss by reason of want of fidelity of an employé or the nonperformance of a contract. It was so held in the cases of *Jackson v. The Fidelity & Credit Co.*, 75 Fed. 359, 21 C. C. A. 394; *Guaranty Co. v. Mechanics' Bank*, 80 Fed. 766, 26 C. C. A. 146; *Am. Credit & Ind. v. Athens Woolen Mills*, 92 Fed. 581, 34 C. C. A. 161; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Guaranty Co. v. Mechanics' Bank*, 183 U. S. 419, 22 Sup. Ct. 124, 46 L. Ed. 253. But the sole effect given to this consideration in those cases was to apply to such contracts the general rules of construction applicable to ordinary insurance policies. Companies like plaintiff in error, being in the business of guarantying for profit upon contracts whose provisions are prepared by themselves, those provisions are construed most favorably to the insured. No other effect has heretofore been given to the fact that these contracts are in their nature insurance contracts. Should that circumstance be given in this case the effect of rendering the guaranty bond sued on herein nonassignable? Not unless nonassignability is of the essence of an insurance contract. It is true that ordinary fire insurance policies are held to be nonassignable. This, however, is due to some extent to an element of trust in such a contract on part of the insurer in the insured, and also to the fact that, accompanying a sale of the property, for them to be assignable without an express provision to that effect would be to permit

the insurer to change a term of the contract without the consent of the insurer, which term is other than the person who is entitled to the performance, to wit, that term which provides that it is the insured's interest in the property which is covered by the contract. The law as to the assignment of fire insurance policies is thus stated in Joyce on Insurance, vol. 3, § 2304:

"A policy of fire insurance is a personal contract, and, in the absence of the consent of the insurer, it cannot be assigned so as to permit the assignee to sue thereon in his own name. The contract is that the insured shall sustain no damage to the extent of the amount named in the policy, and, though it is an insurance on the property, still it does not pass with the sale thereof, and it is considered only as a contract of indemnity to the person named in the policy."

But the law is not so as to life or marine insurance policies. As to life insurance policies, the law is thus stated in Joyce on Insurance, vol. 3, § 2346:

"The rule that fire policies cannot be assigned without the consent of the insurer does not control in the assignment of policies of life insurance. \* \* \* With the gradual extension of the principles controlling choses in action, courts of law now recognize an assignment thereof to the extent of vesting the assignee with an equitable interest and permitting him to recover for his own benefit in the name of his assignor."

And as to marine insurance policies the law is thus stated in Joyce on Insurance, vol. 3, § 2350:

"The strict rules controlling the assignment of policies of fire insurance do not prevail in the assignment of marine policies. The latter is not distinctly a personal contract, as is a fire policy. \* \* \* The reason for the distinction between fire and marine policies is due to commercial necessities and convenience, and the fact, as we have stated above, that mere personal consideration is not such an important factor in marine policies."

There is nothing, therefore, in the nature of the bond in question, which renders it nonassignable. It is a guaranty of the performance of a contract, which does not simply contain no evidence that the right to have it performed shall not be assignable, but shows that it was within the contemplation and intention of the parties, could, and in all probability would, be assigned before the time for its completion would arrive. It must be held that it was equally within the contemplation and intention of the parties to the guaranty bond that it should be assignable along with the principal contract. And as to the liberal powers conferred on the employés of the party entitled to the performance by the construction company, hereinbefore referred to, the contract did not provide for the selection of any particular persons, but left that entirely to the receivers. They had the right to change them as they saw fit. Such provisions are usual in such contracts. We do not think that the element of confidence and trust contained in those provisions is sufficient of itself to warrant the conclusion that it was the intention of the parties either that the construction contract or the guaranty bond should not be assignable. And as a matter of fact the persons who held those positions under the receiver were continued therein by the plaintiff during all the time that the construction company was at work under the contract.

The result of our consideration of the question as to the assignability of the bond sued on is that we must hold that it was assignable.

(b) The other question involved in the refusal to give the peremptory instruction asked for, and thereby decided adversely to defendant's contention, was as to whether or not the construction contract provided a remedy for its breach by the construction company, which was other than an action to recover damages, and was exclusive. Counsel for plaintiff in error state that the construction contract contained a clause providing that, in case the construction company should not, in the judgment of the engineer of maintenance of way, well and truly, from time to time, comply with and perform all the terms and provisions therein stated and stipulated on its part, in manner and form and within the time therein mentioned, or in case it should appear to said engineer of maintenance of way that the work did not progress with sufficient speed, or in case of interference with said work by legal proceedings instituted against the construction company by other parties than the receivers, the engineer of maintenance of way should have power to annul the contract, if he saw fit to do so, by serving notice in a certain manner. They state that it further provided that upon the serving of said notice "this agreement, and every clause and part thereof, shall become null and void, and the unpaid part of the value of the work done shall be forfeited by the said contractor to the use of said receivers, in the nature of liquidated damages." It is the remedy thereby provided which they claim was exclusive. In support of their contention that it was they cite the following extract from the opinion of Judge Cooley in *Friedland v. McNeil*, 33 Mich. 40, to wit:

"It may be questionable whether the provision in the contract authorizing them, after three days' notice, to take the work in their own hands, and complete it at the contractor's expense, is not to be regarded, when acted upon as a remedy agreed upon, as a substitute for future damages."

And the following extract from the opinion of Judge Lewis, in *O'Connor v. Bridge Co.*, 95 Ky. 633, 27 S. W. 251, 983, to wit:

"In our opinion, the Henderson Bridge Company has no cause of action against O'Connor et al. by reason of their alleged failure to progress with the work according to an agreed program, or failure to comply with the contract in any respect. The remedy provided for the company in case of noncompliance with the contract by the contractors, and manifestly the only remedy contemplated by the parties was the right to annul the contract in either one of the three conditions stated therein, and in one of them to have the unpaid part of the earnings forfeited."

But the concluding portion of said alleged clause, providing what shall be the effect of the engineer of maintenance of way serving the notice therein provided, and which portion we have given within quotation marks, is not contained in the printed record or original transcript. The sole authority we have for its existence is the statement of counsel for plaintiff in error in their brief, not denied by counsel for defendant in error. This omission is sufficient in and of itself to dispose of this contention of counsel for plaintiff in error, but, in order to relieve from apprehension that serious harm may have been done by this omission, we deem it proper to go further, and say that the point is not well taken. It may be that, even if this clause did provide an exclusive remedy in so far as the construction contract

was concerned, that the right to sue on the guaranty bond would not be affected. And the fact that a guaranty bond was taken is quite persuasive that the remedy thereby provided was not understood to be exclusive; for, if so, why was the guaranty bond taken at all? But, coming to counsel's contention, the remedy thereby provided was not exclusive. It was entirely optional on the part of the engineer of maintenance of way. He was given power in either of the contingencies stated, if he saw fit to do so, to annul the contract. He was not bound to do this. Of course, if he exercised this power, and annulled the contract, then it might be said that the sole remedy left was that contained in the latter part of the clause omitted from the record as before stated. In the extract from Judge Cooley's opinion, quoted above—from counsel's brief—it is said that the remedy therein referred to might possibly be regarded as a remedy agreed upon as a substitute for future damages "when acted upon." And it is only in that contingency that it is considered that said remedy might be such a substitute. In the Kentucky case relied on the clause considered seems to have been substantially the same as that in question herein. But there the power conferred had been exercised, and the contract annulled, and it was only in view of that fact that the court held that the remedy provided was exclusive. It held, not that it was originally exclusive, but had become so by action taken under it. In this case no action looking towards an annulment of the contract was ever taken. In the original petition it was alleged that the engineer of maintenance of way did exercise this power; but this allegation was, in effect, withdrawn by an amended petition, and it was alleged that the defendant abandoned the work, and because of this abandonment plaintiff was compelled to complete it.

(c) Counsel for plaintiff in error claim that still another question was involved in the refusal to give the peremptory instruction, and was decided by it against their contention, and that, therefore, that ruling was erroneous. It grows out of the following facts, in addition to those that have already been stated: The contract between the receivers and the construction company, as heretofore stated, called for work to be done by the latter at two distinct places—one between Cochran and Milan, in Indiana, and the other at Skillet Fork, near Iuka, in Illinois. The construction company agreed to raise an iron bridge and wooden trestles at the latter place, in addition to changing and preparing the grade, and that without other compensation therefor than what it was to receive for excavation done in connection with the grading. Before the contract was entered into, the company was furnished with plans and specifications of the work to be done at that place, on which to make calculations for its bid. The contract contained a provision by which the receivers retained the right to change, at any time during the progress of the work, the alignment grades and widths of the road, or any part thereof, and also the limits of the sections, or to alter the character, vary the dimensions, or change the location of structures, or substitute one kind of material for another, or to omit entirely, when found necessary, or to require to be built where not then contemplated, without the contract prices per unit being thereby affected. In June, 1899, whilst the work was



progressing in Indiana, and before any work was done in Illinois, new plans and specifications for the work to be done in the latter state were furnished the company by the receivers, and it was required by them to do the work there in accordance therewith. These plans and specifications called for less excavation and for raising the iron bridge and trestles to a greater height than called for in the original ones. The receivers claimed that they had the right to make this change by virtue of the provision aforesaid. The company disputed this claim on the ground that the proposed change was such a material and radical one, that it was not within the contemplation of the parties when the contract was made, and it refused to and did not do any work in Illinois. After it ceased working at all, plaintiff did the work there according to said new plans and specifications, and part of the damages sued for in the action below was the difference between what it cost to do that work and the contract price, amounting to about \$7,000.

Counsel for plaintiff in error contend that said change was a material one, and not within the contemplation of the parties when the contract was made, that the construction company, by reason thereof, was not only justified in refusing to go on with the work at Skillet Fork, but would also have been justified in abandoning the work in Indiana, and that, therefore, it was released from further liability on its guaranty. The question as to whether this position is correct, is the further question which they contend was involved in and erroneously decided by the refusal to give the peremptory instruction. But this ruling, in so far as it relates to this question, was right, for the reason, if none other, that the court could not say, as a matter of law, that the conceded change that was made in the plans and specifications as to the Illinois work was a material one, and not within the contemplation of the parties when the contract was made. That was a question of fact to be determined by the jury, if it was true that the consequences claimed would indeed follow from it. For this reason, also, that ruling did not involve the question as to whether those consequences would follow if that fact was as counsel for plaintiff in error claim it to have been, and was not disposed of by it.

2. Other rulings are assigned as error on the ground that they involved this question, and disposed of it contrary to their contention. They are as follows:

At the close of all the testimony, defendant moved the court to exclude from the jury all evidence in relation to the work in Illinois. This the court refused to do. It requested the court to charge the jury that, if they found from the evidence that the change made in said work "materially decreased the profit to be derived" by the company, and were "a departure from the plans" upon which it made its bid and entered into the contract, it was "justified in refusing to do the work as so changed, and in abandoning the same." This charge it refused to give, but it was given substantially in other words. The jury were told that, if they found from the evidence that the change was "a radical departure from the plan, which would materially reduce the chances of profit, which the contractor had a right to expect, or involve loss to him," it was "an unreasonable exercise" of the discre-

tion which the receivers had to make changes, and they should not find for the plaintiff anything on account of the increased expense it was put to in doing said work. These three rulings, to wit, the charge of the court, the refusal to charge as requested, and the refusal to exclude said evidence, were duly excepted to, and are so assigned as errors. It is hard to see how plaintiff in error can complain of said charge. It is substantially that requested by it, and under it the jury seems to have found in favor of defendant, for it is agreed by counsel for both parties that the amount of the verdict shows that this is so. Nor can it complain of the court's refusal to give the charge requested by it, because it gave it in other words. Then as to the refusal to exclude said evidence. For it to have done so would have been to have decided as a matter of law that said change was material, and not within the contemplation of the parties, and therefore plaintiff was not entitled to recover any damages on account of that work. But these rulings did not involve the question as to whether, if said change was material, and not within the contemplation of the parties, the construction company would have been justified in refusing to go ahead with the Indiana work, and defendant was released from further liability on its guaranty. They simply involved the question whether, if such was the case by reason thereof, the defendant was justified in abandoning the Illinois work, and no damages could be recovered on that account.

3. There was a ruling, however, that may be said to involve this question, and dispose of it adversely to defendant, which was duly excepted to by it, and has been assigned by it as error herein by plaintiff in error. It was the refusal of the court to give this request to the jury, to wit: "I charge you that, if you find that there was any material alteration of the original contract, you must find for the defendant." Assuming that this ruling does involve, and so dispose of, this question, was it or not properly decided? At the outset we are met with the suggestion of counsel for defendant in error that defendant had no right to raise this question in the lower court, because it had not pleaded said change as affecting plaintiff's right to recover for the damages which it sustained by reason of the construction company's failure to complete the work in Indiana. It is claimed that it is pleaded only as a justification for the abandonment of the Illinois work, and as affecting plaintiff's right to recover damages for said company's failure to do the Illinois work. There is some basis for this contention in relation to the amended answer, and it is possible that a fact pleaded, though it is entitled to have a greater effect given to it, should be limited to the effect claimed for it in the pleading. But, however this may be, said change, as pleaded in the amendment to the amended answer, was not limited, and at any rate we will assume that the question is properly before us, and dispose of it on its merits, as we are of the opinion that from that standpoint the position is not well taken.

The contract contained a provision to the effect that, if the receiver should determine to build bridges, culverts, walls, or other masonry, or do other work not therein enumerated, on the said section or sections, the company would perform, build, and complete the same as

though it had been enumerated, and for the price stipulated to be paid for similar kinds of work, and upon the same terms and conditions, except as to time of completing the same, to be extended at the discretion of the engineer of maintenance of way, and further in these words: "The engineer of maintenance of way may, at his discretion, annul this contract as to any one or more sections of the work, without releasing the contractor from his contract on other portions of the work." Under this provision the engineer of maintenance of way had the power to annul said contract as to the work in Illinois entirely, and the exercise of that power would not release the company from its obligation to do the work in Indiana. It is not contended otherwise by counsel for plaintiff in error. Their position is that the engineer of maintenance of way did not exercise that power. Within the meaning of that provision nothing can be said to amount to an annulment of a portion of the contract that was not intended to have that effect. What the engineer of maintenance of way did in the particular in question was not so intended. He claimed that the change made in the plans and specifications was within the right retained to make changes, and hence that the company was bound to do the work in accordance therewith under the contract, and he and the receivers and their successors have at all times since maintained the position that he was so bound; and part of the damages sought to be recovered was for the increased cost of doing the work over and above the contract price. But though what the engineer of maintenance of way did was not intended as an annulment of that much of the contract, if the position of plaintiff in error is correct, it was, in effect, an annulment. It claims that the requirement to do the work according to the new plans and specifications was a material alteration of the contract, and because it was such the construction company was released from further obligation, not only to do the work in Illinois, but also in Indiana. A material alteration of a contract is a destruction of the old provision in the matter altered, and an attempt to foist a new provision on the other party to the contract. Certainly a party to a contract is not released from an obligation to perform some provision in it because the other party has attempted a material alteration of another provision therein, when he has power under the contract to annul that provision altogether. If he had gone no further than to annul that provision altogether, no release would have taken place, but because he has gone further, and attempted to substitute another provision in its place, a release takes place.

We cannot assent to this proposition. Nor do we think it makes any difference that the party is not conscious that he is making a material alteration, and does not intentionally do so. The position is that because he was not consciously and intentionally making a material alteration, a release takes place. The matter should be considered from the standpoint of the ground upon which the release is claimed; i. e., there has been a material alteration. Though a material alteration should otherwise be a ground of release, it should not, where the party making the alteration has the power to annul the provision attempted to be altered, and that irrespective of the question whether he is consciously and intentionally making it.

4. The court was requested to charge the jury that "a failure on the part of the railroad company to make a payment of a monthly estimate at the time specified is a breach which justifies the abandonment of the work by the contractor." And, again, that "any wrongful withholding of a part of a monthly estimate by the railroad company, when due the contractor, amounts to a failure to pay the same, and justifies an abandonment of the work by the contractor." The court refused to so charge the jury. The court did charge the jury that:

"The failure to perform some provision of the contract, unless accompanied by acts indicating an intention on the part of the party in default to renounce and abandon the contract, would not justify the other party in renouncing and abandoning it. Failure to pay the estimate at the time would not justify the Globe Construction Company in abandoning the contract unless it was accompanied by conduct that would indicate that the railroad company itself was renouncing the contract."

The defendant excepted to the ruling of the court in refusing to give to the jury each of the requests so made by it, and in so instructing the jury and these rulings are assigned as errors.

Counsel for plaintiff in error contend that the defendant in error failed to pay the estimates for November and December due under the contract December 10th and January 10th, and withheld from certain, if not all, of the other estimates certain illegal charges; that this conduct on its part would have justified the construction company in abandoning the contract entirely; and that, therefore, though it did not abandon the contract on either account, but because of inability to go ahead, there was no longer any responsibility on the guaranty bond. In support of their contention that the mere failure to pay a monthly estimate or wrongful withholding of a part of one to pay illegal charges would have justified the construction company in abandoning the contract entirely, they cite the following cases: *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894; *Phillips Construction Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. We do not think that these cases support this contention, but, without deciding whether they do or not, or the further question as to the effect of this contention being correct on the liability on the guaranty bond, we do not think that the judgment complained of should be reversed on account of these rulings. The construction contract contained a clause providing that the monthly and final estimates should not be payable until the construction company had paid in full all persons, laborers, and subcontractors in its employ in the work, for all work done up to and including the date for which preceding estimates had been made, and give evidence of such payment by filing with either of said engineers the pay rolls receipted in full, and that the engineer of maintenance of way should have the right at any time he saw fit to pay them the amounts due them, and deduct amounts so paid from the amounts payable under said estimate. The estimates for November and December were not paid because of numerous unpaid claims of such persons. The evidence was undisputed as to this. The court, however, in connection with that portion of its charge last referred to above, called the jury's attention to said clause of the contract, and left it to them to determine whether said estimates were withheld to pay hands, and, if

they were, such withholding would not have been a breach of the contract.

So far as the claim of wrongfully withholding parts of the monthly estimates on account of illegal charges, there was no such withholding, as will be shown when we come to consider the other class of rulings complained of.

Then as to the rulings which involved questions affecting the amount of recovery which have been assigned as error.

1. The permitting plaintiff's witness H. Devereux to testify as to the estimates made by him, and admitting those estimates in evidence. The ground upon which it is claimed that this evidence was not competent is that under the contract Devereux was not the proper person to make those estimates. The contract provided that the monthly and final estimates of the work to be done thereunder should be made by the engineer in charge of construction, should be subject to revision and correction by the engineer of maintenance of way, but should otherwise be final and conclusive. Devereux's title was resident engineer. With assistants and a force of hands under him, he had immediate charge of the work of construction in Indiana, and the estimates made and testified to by him were as to this work. He had nothing to do with the Illinois work which the construction company refused to do, and which was done by plaintiff after it abandoned the work, and made no estimates in regard thereto. They were made by the resident engineer in whose district that work lay, and who had immediate charge thereof. Over those two engineers was another officer, whose title was engineer of construction, who had general supervision of all the work of construction on the Mississippi division, extending from Cincinnati to East St. Louis, and who in turn was under the engineer of maintenance of way. The estimates made by the resident engineer were made under immediate supervision of the engineer of construction, and were approved and so indorsed by the engineer of maintenance of way. We are of opinion that said estimates were properly admitted in evidence. If the resident engineers were not the engineers in charge of construction within the meaning of the contract, the estimates made by them should be considered as made by the engineer of construction. But plaintiff in error is not in position to complain here of the admission of said estimates in evidence and permitting Devereux to testify in regard thereto. All of the estimates for the work done at both places from the beginning until the completion thereof were identified and read in evidence when the engineer of maintenance of way, who testified before Devereux, was on the stand as a witness; and they were allowed to be so read in evidence without objection. And when Devereux testified he was permitted to state that he made the estimates for the Indiana work, and that the monthly estimates were reasonably correct, and the final one correct, without objection. The only objection made was as to his being permitted to give a description of the final estimate.

2. Certain rulings which involve the question whether, under a provision of the contract that the receivers should transport over their railroad all materials used in construction at the rate of three mills per ton for each mile the same should be transported, required the

plaintiff to transport such materials to the place where same was intended to be used at that rate, or only to the nearest railroad station or side track. The court decided that it only required the latter. There was nothing said in that provision as to the place where same was to be delivered when so transported. It was silent on that subject. There was another provision by which the receivers bound themselves to transport over the railroad the employes, tools, and equipment needed for the work of construction, once each way, free of charge; but it expressly stated that the place to and from which the transportation was to be made was "the place where the said second main track and change of grade is to be constructed." The construction company billed all its material used for construction to the nearest station where needed whilst it was at work, and was charged the contract price therefor, to wit, three mills per ton. From that point to the place where needed it was transported by a work train hired by it from the receivers and plaintiff, used also for other purposes in connection with the work of construction. The construction company was charged by them a certain price per day for the engine and crew used upon this work train, and this, together with the charges for transportation to the nearest station, were deducted from the monthly estimates rendered, and paid to the construction company before it abandoned the work. These same charges were made thereafter as a part of the cost of construction in completing the work. It was inconvenient, if not practically impossible, to get the material, such as heavy stone, to the place where used, in any other way by the railroad. We think that the court's construction of this provision was correct.

3. The ruling in the original charge to the jury in regard to redressing the embankments between Cochran and Dillsboro, a distance of about six miles, the embankments covering about one-half of that distance. The contract provided that cuts and embankments should be dressed up in a thoroughly workmanlike manner, brought to the true subgrade, and the drain ditches in cuts neatly and evenly finished, as the engineer in charge of construction might require, and that the construction company should not receive compensation for such dressing and finishing up of the work, as the price paid for excavation should cover that cost. Said company dressed said embankments, and brought them to a grade even with the top of the ties of the main track. Evidence was introduced by defendant to the effect that said company so did by direction of Devereux, the resident engineer, the evidence of plaintiff being to the contrary. After these embankments were so dressed, the engineer of construction required them to be redressed to a grade even with the bottom of the ties, and, upon the construction company refusing so to do without extra compensation, the plaintiff put in a force of Italians to so redress said embankments, and the construction company, with its force, thereafter assisted in this work. The money expended by plaintiff in this work was deducted from the monthly estimate succeeding, and in making up the damages sought to be recovered it was put in as a part of the cost of construction. The court instructed the jury in its original charge as follows:

"If the Globe Construction Company's version of this matter is true, and if it involved a loss to the Globe Construction Company, the loss does not enter into the present account, and cannot be stricken from the account. There is nothing here in pleading in the way of counterclaim or recoupment, and I am unable to see how it could be credited upon this account, if any should be found."

This is the ruling complained of herein. But this is not the entire charge of the court on this subject. The jury were recalled, and charged in substance that, if the resident engineer required said embankments to be leveled up to the top of the ties of the main track, and the engineer of construction thereafter required it to be reduced to the bottom of the ties, the subgrade, the amount which plaintiff had paid to the Italians should be deducted from plaintiff's account. To this charge no exception was taken. It is true that it has no reference to the expense which the construction company incurred on this account, in so far as its force was engaged in the redressing. This, however, should have been made the ground of a counterclaim or recoupment, if it could have figured in the case at all, and was not so made.

4. The admission in evidence of a certified copy of the record in a suit brought by certain subcontractors of the construction company in an Indiana state court against said company and plaintiff, in which suit said subcontractors obtained judgment for the amount of their claim, costs, and a \$20 attorney's fee, which judgment was subsequently paid by plaintiff, and the amount paid charged as part of cost of construction. The contract provided that the final estimate should be payable upon the construction company's giving a release, under seal, of all claims and demands whatsoever growing in any manner out of the agreement. The ground upon which it is claimed that this record was inadmissible is that the construction company was not served with process in said suit, and plaintiff in error was not a party thereto. We do not think that the point is well taken; but, whether so or not, it must be considered to have been waived by the agreement of the parties hereto; that said record should be omitted from the transcript, which has been done.

5. The refusal to permit certain witnesses of plaintiff to answer certain questions asked on cross-examination in regard to the original estimates put upon the work to be done by the receivers and amount of money appropriated therefor. They were so asked with the view of showing that the cost exceeded those estimates, and thereby the officers of plaintiff had a motive to treat the construction company unfairly in their classification and estimation of the quantity of the work done by it, and subsequently by plaintiff. The evidence was too remote, and the action of the court proper.

6. The refusal to permit Col. C. B. Childe, an old civil engineer of much experience in railroad construction, to testify as to the proper classification of the material removed from Spellzhaus' cut—work done by plaintiff after the construction company had abandoned the work. Col. Childe had not seen the material removed either before, during, or after its removal. He had seen the cut a short time before the trial, and with a view to testifying. The opinion which he was asked to give was drawn from an inspection of the sides of the cut at

this time. In response to one question he stated that as much as 90 per cent. of the material so removed should be classified as loose rock, and this opinion was excluded, and he was not allowed thereafter to give an opinion as to how it should be classified. The contract divided material into three classes—earth, loose rock, and solid rock—and provided what should constitute each. The price to be paid differed as to each, being lowest for earth, and highest for solid rock. The provision as to loose rock contained this clause: "When loose rock, as here specified, is handled by a steam excavator, although blasting may occasionally be resorted to, it will be considered and classified as earth excavation." By virtue of this clause what would otherwise be classified as loose rock should be classified as earth excavation if handled by a steam excavator. The actual way in which the loose rock was handled, therefore, determined its classification. In view of this, if the opinion of an expert civil engineer as to how material removed from a cut should be classified, formed from looking at the sides of the cut long after the removal of the material, is ever competent, it was not competent in this case.

7. The ruling of the court in regard to interest. The court, in its charge, had said nothing on this subject. At its close a juror asked in regard to the matter. The court stated that the plaintiff claimed interest from the 1st of December up to the first day of the then term of court. The defendant excepted to this statement. The court then said: "The court has simply said, with reference to interest, that so much is claimed, and the jury will determine from the facts how much should be allowed." No exception was taken to this, and plaintiff in error is now in no position to complain of it. If it desired a more definite charge on the subject of interest, it should have requested it. *T. & P. Ry. Co. v. Cody*, 166 U. S. 606, 616, 17 Sup. Ct. 703, 41 L. Ed. 1132.

Perceiving no error in the proceedings of the lower court, its judgment must be affirmed.

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#### THIBODEAU v. HILDRETH.

(Circuit Court of Appeals, First Circuit. June 19, 1903.)

No. 468.

1. CANCELLATION OF INSTRUMENTS—GROUNDS—UNCONSCIONABLE AGREEMENT.

An agreement by an employé, in consideration of his employment, that the employer shall have the benefit of all inventions made by him while so employed, and that he will keep the same forever secret, if required by the employer, is not unconscionable, nor against public policy, and the employé is not entitled to have the same canceled on that ground after he has left the employment.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 117 Fed. 146.

¶ 1. See Contracts, vol. 11, Cent. Dig. §§ 552, 553.



John S. Richardson and William Quinby, for appellant.

Causten Browne (Alexander P. Browne, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. Hildreth brought a bill in equity against Thibodeau to enforce the provisions of the following contract:

"Whereas, Herbert L. Hildreth, of Boston, candy manufacturer, is desirous of having perfected and manufactured a certain machine or machines for use in the manufacture of candy, and especially for sizing, shaping, cutting, wrapping, and packing, also the pulling of molasses candy, and whereas I, Charles Thibodeau, being a skilled mechanic, and desirous of entering the employ of said Hildreth for the purpose of constructing, improving, and perfecting such machinery: Now, therefore, in consideration of such employment, and of the payment of wages to me at the rate of (\$3.25) three dollars and twenty-five cents per day, I hereby agree with said Hildreth to enter his employ, and that I will give him my best services, and also the full benefit and enjoyment of any and all inventions or improvements which I have made or may hereafter make relating to machines or devices pertaining to said Hildreth's business. I also further agree that should said Hildreth not desire to patent any of said inventions or improvements, but to keep the same secret, I will do all in my power to assist him in this, and will not disclose any information as to the same, or any of them, except at the request of the said Hildreth.

"Signed at Boston, Mass., this 29th of May, 1897.

"Charles Thibodeau."

In particular the bill sought a conveyance by Thibodeau to Hildreth of a certain invention named therein, and of an application to patent the same, to which conveyance the bill alleged that Hildreth was entitled by virtue of the contract. Thibodeau filed a cross-bill, asking for the delivery up and cancellation of the contract, on the ground that it was unconscionable, and obtained by fraud. The Circuit Court dismissed both bill and cross-bill, for the reasons set out in *Hildreth v. Thibodeau* (C. C.) 117 Fed. 146.

Reasonably interpreted, the contract provided that Hildreth should take the benefit and enjoyment of all those inventions and improvements relating to machines used in Hildreth's business which Thibodeau might make while employed by Hildreth. The employment might be ended at any time, either by Hildreth or by Thibodeau, and inventions thereafter made by Thibodeau would belong to him, and would not be covered by the contract. By the contract Thibodeau further agreed, if required to do so by Hildreth, to keep secret forever all the inventions which he made while in Hildreth's employment. As to these inventions, Thibodeau's agreement was perpetual, and it continues to bind him, notwithstanding his employment has been ended. This contract is neither unconscionable nor against public policy. Such an agreement is not uncommonly made by an employé with his employer, and it may be necessary for the reasonable protection of the employer's business.

The evidence fails to show that the contract was obtained by fraud or misrepresentation, and the cross-bill cannot be supported on that ground.

The decree of the Circuit Court is affirmed, and the appellee recovers his costs of appeal.

## SCRIVEN et al. v. NORTH et al.

(Circuit Court, D. Maryland. July 9, 1903.)

## 1. PATENTS—INFRINGEMENT—UNDER-GARMENTS.

The Scriven patents, No. 378,465 and No. 472,555, each for improvements in under-garments, construed, and *held* not infringed.

## 2. TRADE-MARKS—DESCRIPTIVE TERMS.

The words "Elastic Seam Drawer," used to designate a drawer having a strip of elastic knitted material inserted at the seams, are wholly descriptive, and cannot be monopolized as a trade-mark.

## 3. SAME—UNFAIR COMPETITION—IMITATION OF PACKAGES.

Thirteen years after complainants had commenced the manufacture of a peculiar style of drawers, which had always been put up and sold in a distinctive box, and after they had acquired a high reputation and a large sale, defendants commenced the manufacture and sale of drawers in all respects similar in appearance, and put them up in boxes of the same size, shape, colors, and style of lettering and marking. *Held* that, while defendants had the legal right to imitate the manufacture of complainants, which was not patented, the imitation of the packages was evidently with intent to deceive purchasers, and constituted unfair competition, against which complainants were entitled to an injunction.

In Equity. On final hearing.

Briesen & Knauth and Frederick P. Fish, for complainants.

Gans & Harman, for defendants.

MORRIS, District Judge. Bill for injunction for infringement of patents No. 378,465, February 28, 1888, and No. 472,555, April 12, 1892, to Jeremiah A. Scriven, for improvements in under-garments, and for infringement of complainant's trade-marks, and for an injunction against unfair competition by packing and selling the under-garments made by defendants in boxes imitating the boxes of the complainant, and for selling and causing the defendants' garments to be sold as Scriven garments.

## I. As to the Patents.

In 1885 the firm of J. A. Scriven & Co. began putting upon the market a special make of drawers, the body portion of which was of white jean, and along the seams on the inside and outside of the legs and along the seam at the back of the upper portion there were longitudinal insertions of buff-colored elastic knitted fabric, joining together the portions made of white jean. These garments were made after the method of the United States patent to C. A. Brown, No. 243,498, June 28, 1881 (now expired), of which patent Jeremiah A. Scriven was the owner, and they were so stamped. The specifications of that patent described an undershirt and drawers made of a woven material, with gores or gussets of an elastic knitted fabric inserted at places where it was desirable to give the garment greater elasticity, and the claim was for the combination of the woven body

¶2. Arbitrary descriptive or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth Co. v. Warner*, 50 O. C. A. 323.

¶3. Unfair competition, see notes to *Scheuer v. Muller*, 20 O. C. A. 165; *Lare v. Harper & Bros.*, 30 O. C. A. 376.

fabric and the knitted insertions. The garments put upon the market by the complainants were called "Scriven's Patent," "Elastic Seam 50," and "Scriven's Elastic Seam Drawer-50," and since 1892 have been put up in white paper boxes with gilt edges of the form known as a "telescope box," which had and continue to have printed in blue ink in large script letters on the front side and also on the top "Scriven's Patent Elastic Seam Drawer," and the number "50," and an illustration of a pair of drawers. The drawers originally sold by the complainants, and which, as to the elastic seam, are similar to those made by both the complainants and defendants, were marked by a stamp on the waist band as being made under the patent of 1881; those made since 1892 are stamped "Scriven's Elastic Seam, patented Feby. 28, 1888; April 12, 1892. 50." The patents alleged by the bill of complaint to have been infringed are the two patents last above mentioned.

Patent No. 378,465, February 28, 1888, was granted to the complainant Jeremiah A. Scriven for an improvement on the kind of under-garments described in the expired Brown patent, No. 243,498, June 28, 1881, which was composed of a woven body with knitted insertions. This patent is for a similar under-garment, made of two different kinds of knitted fabric. The insertions are, as in Brown's patent, of a knitted fabric; but, differing from Brown's patent, the body was also of a knitted fabric longitudinally elastic, but less laterally elastic than the insertions. The claim is for the garment made of a knitted body longitudinally elastic with laterally and longitudinally elastic knitted insertions, the insertions to be more elastic than the body. The sole novelty of this combination was the use for the body material of a knitted fabric instead of a woven material, as appears both from the specifications and claim and by the file wrapper and contents; and this is all that differentiates it from the expired Brown patent of 1881. As the material of which the body of defendants' garment is made is the woven jean of the Brown patent, I find there is no infringement of the patent of 1888.

It is urged by the complainants that in the Brown patent the insertions are shown only as gores and gussets at certain points in the drawer, and not as a continuous insertion along the whole length of the seams. Observing the drawing which illustrates the Brown patent and shows his invention, it would be difficult to hold that it required invention to extend the insertions until they should be continuous. The construction that complainants put on the Brown patent is evidenced by their making drawers similar to those now made by them, and marking them as made under that patent. If the continuous insertion was not covered by the Brown patent, then it is not covered by any patent, for it is not claimed or indicated as an invention in any subsequent patent put in evidence.

The other patent in respect to which the bill of complaint charges infringement is No. 472,555, April 12, 1892, to Jeremiah A. Scriven, for an improvement on the articles of underwear described in the above-mentioned patent No. 378,465, of February 28, 1888. The improvement claimed is intended to be applied to drawers. The insertion for the inside of the legs is made continuous across the crotch,

and the insertion at the back is also continued at right angles across the crotch, and the novelty consists in not sewing down the overlying piece of insertion to the underlying piece. By leaving the upper piece unattached at its edges to the under piece, it is claimed that the requisite strength is obtained at the crotch, while the desired elasticity is not lost, as it is claimed would be the result if the upper piece was sewed down at its edges to the under piece. The use of this device by the defendants is denied, and the evidence leaves it at least doubtful. The defendants do stitch the upper strip of insertion to the under strip, but the complainants charge that it is stitched very lightly at the edges, and with the intent that, as soon as the garment is laundried, the stitches will break, and, the overlap coming loose at the edges, it attains the elasticity which is the purpose of the method described and claimed in patent No. 472,555. There is contradiction between witnesses as to whether in fact the edges of defendants' overlap do break away in ordinary washing, and the proofs leave the question of fact so doubtful that I could not base a decree upon it, even if I held the patent valid.

## 2. As to Trade-Mark.

The complainants claim as their trade-mark the words and figures "Scriven's Elastic Seam Drawer 50." The words "elastic seam" do very precisely describe and express the peculiarity of the complainants' garment. The purpose of the introduction of the knitted insertion in patents Nos. 243,498, 378,465, and 472,555 is to give elasticity at the places where in the ordinary garment there is the least elasticity; that is to say, at the seams. The insertion takes the place of the hard inelastic seam, and to describe a drawer of this make as an elastic seam drawer is to express in plain ordinary language its special quality and characteristic, and not alone its origin, make, or ownership. Such words cannot be appropriated as a trade-mark.

The designation used by the defendants and imprinted upon their goods and the boxes in which they are put up for delivery is "Standard Stretchy Seam Drawer." Even if the words claimed by the complainants could be sustained as a valid trade-mark, I do not find that those used by the defendants are so similar as to lead to confusion, if not displayed with an intentional similarity of design and lettering.

## 3. Unfair Competition.

It appears that in 1898, which was about 13 years after the complainants and Scriven had been making the elastic seam drawers, and had established a good market and reputation for their goods, the defendants also took up the business of making a similar product having in all respects the same appearance. The body is made of white jean with a buff-colored elastic insertion, and the defendants put them up in boxes made and lettered so like the complainants' that they could easily be confused one with the other in appearance. The box and the lettering are peculiar and distinctive, and the similarity could not possibly be other than intentional, and the intention could not have any possible purpose except unfair competition. The boxes of both are of the same size, both of the telescope kind, both white with

gilt edges, both printed with large script type in blue ink on a white ground and with the lettering similarly arranged, and with the same illustrative picture of a pair of drawers, and both with the figures 50. There is evidence that confusion has arisen very detrimental to the complainants' business and reputation. The complainants have established a reputation for producing a high grade of goods, and have built up an extensive and valuable good will, and the defendants can have but one purpose in dressing the goods of their manufacture to look so precisely like the complainants', and that is to deceptively induce buyers to take an article which looks like the manufacture of the complainants, but which is made by the defendants. The defendants make their drawers of white jean, and select a buff-colored insertion, which causes them to look precisely like complainants'; and they imprint on the waist-band a stamp which, at a careless glance, is not at once distinguishable from complainants'. These are imitations of the complainants' goods, which, no matter with what motive done, the court cannot enjoin, because, if the complainants have no patent which is infringed, any one may copy the complainants' make of drawers; and the stamp imprinted is one in common use, and, when examined, is different; but the shape, color, and lettering of the boxes in no way results from the manufacture, but is an intentional imitation of a style of putting up complainants' goods, by which they have come to be known in the trade, and which must have been designedly adopted by the defendants for the deceptive purpose of misleading as to the origin of the goods, and of causing their goods to be deceptively substituted for the complainants'.

I will sign a decree in accordance with the views expressed in this opinion.

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McCARTHY v. WESTFIELD PLATE CO.

(Circuit Court, D. Connecticut. July 8, 1903.)

No. 1,083.

**PATENTS—INFRINGEMENT—CASKET HANDLES.**

The McCarthy patent, No. 478,168, for improvements in casket handles, claim 1, construed, and held not infringed by the device shown in the Klein patent, No. 559,898.

In Equity. Suit for infringement of letters patent No. 478,168, granted to John McCarthy July 5, 1892.

Howard P. Denison, for plaintiff.

Harold Binney, for defendant.

PLATT, District Judge. Suit for infringement of letters patent No. 478,168, dated July 5, 1892, for improvements in casket handles. Heard on the merits on final pleadings and proofs.

The issue is on claim 1 of the patent:

"(1) The combination, with the handle, the arm carrying it, and the body plate to which said arm is hinged, of a relief bar connected to said arm, and passing through a slot in said plate, and provided on its inner end with a head."

The defenses are invalidity and noninfringement. The former, however, is not seriously pressed. Our labors will be lightened if we devote ourselves assiduously to the latter. The plaintiff insists that his patent is entitled to a pioneer construction. The defendant denies this in toto, and claims that it is merely one of a long series of improvement patents relating to a relief device, which are intended to lessen the strain on the hinge pin, and thereby reduce the probability of unfortunate occurrences at funerals. He also contends that claim 1 of the patent in suit is void both for lack of invention and for double patenting, under the doctrine of *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121.

If the defendant is correct (and I am strongly disposed to agree with him in all his contentions, and especially in the first one), the case vanishes into thin air. Giving the plaintiff, however, the benefit of the doubt, and bringing to his aid the advantages which can be afforded by the broadest of constructions ever applied by any court to the most complete pioneer invention, he still fails to sustain his contention. It is not disputed that defendant makes the alleged infringing handle in exact accord with its own patent assigned to it by Klein, dated May 12, 1896, No. 559,898. That the examiner did not recognize the similarity between the two patents is plainly evident. The silence of the Patent Office during the pendency of Klein's application demonstrates that fact. The court is asked to find a similarity which escaped the observation of the trained observer at the Patent Office. I have searched for it in vain. The more one studies the situation, the clearer and more forceful become the very distinct and positive differences in the purposes, uses, and functions which are called into play by the two patents. The prior art lies in the middle between the patent in suit and the Klein patent. The former departs in one direction, the latter in the other. The patent in suit is the outcome of a struggle to relieve the hinge pin. The Klein patent is the outcome of a struggle to so strengthen the handle as to overcome the natural strain at the vital point. A careful reading of the specifications of the patent in suit can leave no doubt as to what the patentee thought that he had discovered as new and asked to monopolize:

"My invention relates to handles for boxes, trunks, caskets, and analogous receptacles, in which the handles are folded or shut down when not in use, and which are provided with means to relieve the hinge pin from part of the strain of the weight thereon.

"My object is to provide an improved fold-down handle, provided with a relief bar hinged to the handle or handle arm, and adapted to slide freely through and under the body plate when the handle is folded down and provided with a head larger than the opening through the plate, which is brought into contact with the inner surface thereof when the handle is raised, and then said relief bar will become an auxiliary support to the handle and to a certain extent relieve the hinge pin in the joint between the handle-bar and the body-plate from strain.

"My invention consists in the several novel features of construction and operation hereinafter described, and which are specifically set forth in the claims hereunto annexed. It is constructed as follows, reference being had to the accompanying drawings, in which

\* \* \* \* \*

"A is the body plate, preferably hollow inside, and provided with ears, a, in which the hinge pin, a', is mounted in the usual manner, and also provided

with an elongated slot, a", through its outer face, as shown in Fig. 3, or as shown in Fig. 7, when I use the downwardly extending arm secured rigidly to the handle arm.

\* \* \* \* \*

"A relief bar, c, curved substantially concentric with the hinge pin, has one end pivotally connected to the handle bar at c', passes through the slotway, a", and upon its inner end is provided with a head, c", larger than said slot, as shown in Figs. 1 and 2; or I may use the arm shown in Figs. 5 and 6, rigidly secured to the handle arm. In either case, when the handle is folded down the bar will slide under the body plate, and be substantially concealed therein, and when it is raised said bar is drawn out through said slot until the head engages with the inner face of the body plate adjacent to the edges of the slot, and said bar then becomes and is an auxiliary support to the handle and a relief to the hinge pin, and if the hinge pin breaks it will then receive and carry the whole strain.

\* \* \* \* \*

"I do not limit myself to the hollow plate having an opening or slot therein, as it will be evident that the plate can be made full, and the recess made in the outer face of the casket body."

The English is plain and unambiguous. The only element in the combination described in claim 1 which the patentee considered in the least novel was a "relief bar connected to said arm, and passing through a slot in said plate, and provided on its inner end with a head"; and that head, by his own statement, must have been larger than the opening through the plate. If it were not larger, it could not have performed its function as an auxiliary support when the handle was raised and ready for use. The defendant's purpose, on the contrary, was, as expressed in the inventor's description, to get rid of the unsightly or expensive additional strengthening brace or supplemental handle. It used a sheet steel hinge construction throughout, placing the sheet steel strips on edge to obtain the greater resistance, and using the soft metal exterior partly for ornament and partly to support the steel sheets in position and to stiffen and support them against lateral strain. From any and every point of view, the defendant's handle arm produces all the strain that exists and relieves none. It is a simple lever of the first order. The fulcrum is the hinge pin; the force is applied at the long end of the lever when the handle is lifted; and the short end of the lever is the shoulder or projection which engages with the inner surface of the body plate. Nothing else can be found. There is no diagonal tension brace, no auxiliary support. The steel arm is the only "arm." The slot, too small for the head through which the arm is adapted to slide freely under the body plate when the arm is folded down, seems to have disappeared. The head is not larger than the opening through the plate. The broadest application of the doctrine of equivalents would not permit the patent in suit to be so construed as to make the main arm its own auxiliary, and to consider a construction which actually increases the strain upon the hinge pin an infringement of one which is expressly designed to relieve the hinge pin. If the defendant were compelled to sustain its contention beyond a reasonable doubt, it has done so upon the evidence presented in connection with the exhibit "Respondent's Exhibit No. 10, Strain Sheet of Handles."

Let the bill be dismissed, with costs.

## LITTLE GEM MFG. CO. v. STRAUSS et al.

(Circuit Court, S. D. New York. July 18, 1903.)

## 1. PATENTS—INFRINGEMENT—POCKET SAFE FOR COINS.

The Brown patent, No. 450,216, for a pocket safe for coins, construed, and, as limited by the prior art, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 450,216 for a pocket safe for coins, granted to Fred. H. Brown April 14, 1891. On final hearing.

Andrew Fowlds, Jr., for complainant.

S. L. Moody, for defendants.

PLATT, District Judge. This suit is brought for infringement of letters patent No. 450,216, dated April 14, 1891, issued to Theodore M. Moe, assignee before issue of the inventor, Fred. H. Brown. Claims 1, 2, and 3 of the patent in suit are at issue. The defenses set up are: (1) Want of title in plaintiff; (2) license to defendants; (3) license to manufacturer of the banks sold by defendants; (4) laches, acquiescence, implied license, and equitable estoppel; (5) invalidity; (6) noninfringement.

A careful reading of the record in this case leaves the candid mind quite indisposed to follow the plaintiff into the shadowy country whither one is compelled to travel if the narrow and technical views are adopted which its position renders necessary. The paper title may exist, but the method of reaching it is not too satisfactory. The license to the manufacturers may be technically unsound, but in the forum of equity and conscience it has much merit. Laches, acquiescence, implied license, and equitable estoppel might be invoked to the discomfiture of the plaintiff, if no other plainly trodden path appeared, but a situation remains which easily settles the contention. In the light of the prior art the patent in suit either exhibits no invention at all, or if, after narrowing its construction, a shade of invention still remains, the defendant's device palpably fails to infringe. Let me, in all brevity, set down a fraction of my reason for reaching such a conclusion. Claims 1 and 2 of the patent in suit are:

"(1) A pocket savings bank for coins, comprising a tube, b, having a slot, o, for the insertion of the coins, a removable bottom, a, at one end of the tube, and a thumb-screw, m, at the other, adapted to be brought to bear upon a column of coins within the tube, and thereby remove said bottom to open the bank, substantially as described.

"(2) A pocket safe for coins, comprising a tube, b, having a slot, o, for the insertion of the coins, a removable spring-held bottom, a, at one end of the tube, and means at the other end adapted to be brought to bear upon a column of coins within the tube, and thereby remove said bottom to open the bank, substantially as described."

These are made quite specific by the letters of reference and drawings, and need to have been so, as will soon appear, after examining the prior art. The plaintiff is reduced to a single chance, viz., to stand upon its third claim, broadly and generically construed:

"(3) A pocket safe for coins, consisting of a slotted tube, a detachable spring bottom, and a thumb-screw, which, by impinging against the column



of money within, forces out the detachable spring bottom of the tube, thereby opening the bank, as described."

To obtain a fair idea of the art as it existed when the inventor applied himself to the discovery of the new and useful invention for which he claims a monopoly, it is unnecessary to dive deeper than the following patents: The Colby patent, No. 373,223, November 15, '87; the Brigham patent, No. 449,280, March 31, '91; the Goldsmith patent, No. 435,220, August 26, '90; the Hart patent, No. 449,852, April 7, '91. The Colby and Brigham patents were in litigation, and can be followed in *Colby v. Card* (C. C.) 63 Fed. 462, and in *Card v. Colby*, 64 Fed. 594, 12 C. C. A. 319. The former is for a bank made in the form of a locomotive or other toy. The latter is for a coin holder alone. Colby's invention consisted essentially of a slotted tube for the insertion of coins, with a detachable spring bottom, which is forced out by the weight of a predetermined number of coins overcoming the spring tension of the bottom. These functions he combined with a toy, and for that reason his invention was held by the Circuit Court of Appeals to have been limited by himself. Judge Grosscup on the circuit, however, found that the Brigham device infringed. His reasoning was simple and plain: The plaintiff's construction was such as I have indicated. The defendant's device was the same, except that to the weight of a predetermined number of coins was added the pressure caused by introducing the last piece. In the one case the operating force was weight, pure and simple; in the other it was weight plus the pressure furnished by a wedge on a solid column. Herein was no reasonable advancement upon or change from the plaintiff's idea. The patent in suit merely substitutes a screw pressure for the wedge pressure, and the wedge and screw are well-known equivalents. The Circuit Court of Appeals sustained the reasoning of the Circuit Court, reversing the decision solely on the ground adverted to. If Brown has not advanced on Brigham, and Brigham had not advanced on Colby, it is mathematically clear that Brown did not advance on Colby. Furthermore, the Brigham patent was used in divers ways to drive the Scoville Company, and perhaps others, into consenting to a decree sustaining the patent which was supposed to be infringed by the manufacture of the Little Gem banks. In a general settlement the plaintiff company was organized, and everybody then connected therewith understood the situation and acquiesced therein. To put it mildly, it is at least indecorous for those now interested to ask for a divorce of the Little Gem bank from the Brigham patent and from its associate and companion in arms, the Brown patent.

It is unnecessary to analyze the Goldsmith and Hart patents.

The four patents suggested show essentially the same means, combined in the same way for the same purpose, and operating in substantially the same manner, as the means employed in the patent in suit. When the patent in suit is narrowed, as it must be, to the specific construction shown therein, it requires no extended discussion to demonstrate that the defendant's construction does not infringe. The inclined slot of the patent in suit is absent. In place thereof is a straight slot and a spring lip, extending partly across the slot, which is displaced when the coin is inserted, and after the insertion immedi-

ately returns to act as a guard against the removal of coins through the slot. In this regard the defendants' construction is very much better than that of the patent in suit. The defendants' construction has a removable bottom, with inwardly projecting spring prongs, provided at their fore ends with outwardly extending heads, which can snap into an annular groove in the tube. A glance at the specifications and drawings of the patent in suit shows the marked distinction in this respect. As a compact, easily constructed, and cheaply manufactured article, the defendants' bank is far superior to that of the patent in suit. Some of its superiority comes from its closer approach to the prior art. To obtain a commercial success, it was certainly necessary to avoid those features of the patent in suit which differentiate that improvement from the prior art. I dispose of the case simply on the ground that there is no infringement.

Let the bill be dismissed, with costs.

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WHEEL TRUING BRAKE SHOE CO. v. CAR WHEEL TRUING  
BRAKE SHOE CO.

(Circuit Court, W. D. New York. August 1, 1903.,

No. 169.

I. PATENTS--INFRINGEMENT--ABRADING SHOE FOR CAR WHEELS.

The Hoffman patent, No. 605,056, for an abrading shoe for truing up car wheels, *held* valid and infringed.

In Equity. Suit for infringement of letters patent No. 605,056, for an abrading shoe for truing up car wheels, issued to William M. Hoffman May 31, 1898. On final hearing.

C. W. Parker (Parker & Burton, of counsel), for complainant.  
Cohn & Chormann, for defendant.

HAZEL, District Judge. This action was brought against the defendant for infringement of certain letters patent No. 605,056, issued to William M. Hoffman, assignor of Judson M. Griffin, who afterwards assigned to the complainant. The invention described by the specification is asserted to be an improvement in "abrading shoes for truing up car wheels." The patent has three claims. The first sufficiently sets them forth, and reads as follows:

"(1) An abrading shoe adapted to be used for truing up car wheels, having in combination a metallic shell and a filling of abrading material, and provided with clearance holes, substantially as described."

The answer alleges noninfringement, anticipation, prior uses, and other defenses. The case comes before the court upon a *prima facie* showing of infringement. No testimony was offered in behalf of the defendant, and none of the patents pleaded in anticipation are before me. The specification shows a grinding brake shoe, which may be substituted, whenever the wheel needs smoothing, for the ordinary brake shoe, or may entirely displace it. The invention is adapted to brake the wheel and to simultaneously grind the circumference,

which is apt to become uneven or flattened by use, imparting to it a smooth and circular surface. It is practically admitted that abrading shoes having depressed pockets, such as the patent in suit, filled with abrading material, are old. The claim to patentability and novelty appears to consist in the combination of the filled depressions or pockets and the cavities or openings between them. The form of the brake shoe is arched, the frame being of metal. The cavities are adapted to receive the detritus or fragments worn away from the surface of the wheel by the abrading shoe. The invention is not a very weighty one. Doubtless, however, it was an advance in the state of the art. There is nothing before me to remove the presumption of patentability and novelty to which complainant's patent is entitled. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939. Complainant's Canadian patent for this identical invention was sustained in the Exchequer Court of Canada as to its validity and novelty. Although not an authority, the novelty of the invention is certainly strengthened by this decision. Except for a slight difference in the shapes of the pockets, which are oblong, with narrow openings in their sides, the defendant's brake shoe is practically the same as complainant's.

A decree may be entered for complainant, with costs.

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CARTER CRUME CO., Limited, v. AMERICAN SALES BOOK CO. et al.

(Circuit Court, W. D. New York. June 20, 1903.)

No. 147.

1. PATENTS—INFRINGEMENT—MANUFACTURE OF INFRINGING ARTICLES.

A patent secures to the patentee the exclusive right to manufacture, as well as to sell and use, the patented article, and its manufacture by another without license constitutes an infringement, although no sale is made.

2. SAME—SALES BOOKS.

The Lawson patent, No. 406,845, for a manifold sales book, claims 4 and 5 construed, and *held* infringed.

In Equity. Suit for infringement of letters patent No. 406,845, for a manifold sales book, granted to Thomas W. Lawson July 9, 1889. On final hearing.

Duell, Magrath & Warfield (Charles H. Duell, of counsel), for complainant.

H. H. Rockwell, for defendants.

HAZEL, District Judge. This suit in equity was brought for infringement of claims 4 and 5 of United States patent No. 406,845, granted July 9, 1899, to the Lawson Manufacturing Company. The complainant is now the owner of the patent. The defense is a denial of infringement. The patent relates to sales books, which are arranged to safeguard against speculation, principally by sales clerks or employés in retail stores. The sales slips are consecutively num-

bered, and have between their folds a manifold slip for duplicating the inscription made by the salesman upon the sales slips. Claim 4 substantially describes the sales slips as being zigzag folded, and then interfolded with the copy slip. Claim 5 describes a series of zigzag folded sales slips, consecutively and integrally connected with a series of alternating slips for receiving fac simile copies of entries made upon the sales slips. The arrangement of the slips appears to be quite simple. It was skillfully contrived, and the utility has been established beyond dispute. The public generally appear to have acquiesced in the validity of the patent. The proofs tend to show that the patent has been quite generally respected. The manufacture and sale of the manifold sales books has been carried on without any other person presuming to seriously question the complainant's exclusive right. Twice before, however, complainant's rights were questioned, but in neither instance, through submission to the exclusive right of the patentee, was it necessary to judicially determine the validity of the patent or the scope of the claims. On the argument it was conceded that the method employed in manufacturing the Peck and Owen books, so called, was quite different from that employed in the manufacture of complainant's sales books, and therefore the alleged infringement as to those books was not pressed. It was, however, contended that the Heydolph exhibit, printed and numbered consecutively, with leaves zigzag folded in series, infringed the involved claims. The leaves of this exhibit, without a cover, technically may not constitute a manifold sales book as much as that manufactured and sold by the complainant, but I think that the arrangement of leaves in series, zigzag folded, and numbered consecutively, bring them within the intent of claims 4 and 5. It is contended by the defendants that there was no infringement because there was no sale and no use of the infringing article, and, further, that the leaves arranged as stated were intended simply as a sample, to illustrate the manner of folding. It appears from the evidence that the sample was used to procure orders for this style of manifolding. On the whole, the evidence abundantly discloses the making and threatened sale by the defendants of the patented article. The law gives to the patentee the sole and exclusive right, for a period of years, to make and sell the invented article for which the patent was granted (Rev. St. § 4884 [U. S. Comp. St. 1901, p. 3381]), and, therefore, a person who makes an article, the exclusive right to make the same having been granted to another, becomes an infringer.

A decree may be entered with costs, but without an accounting, restraining the defendant from making and selling manifold sales books, or leaves in semblance of the sales book, as herein described.

## THE APACHE (two cases).

(District Court, E. D. South Carolina. July 15, 1903.)

## 1. SALVAGE—WHAT CONSTITUTES SALVAGE SERVICE.

Any service rendered to a vessel in peril or distress which in any measure conduces to its safety is in the nature of a salvage service, and is to be compensated as such, unless the claimant pleads and proves a binding contract that the work done should be paid for at all events; and such service is none the less a salvage service because the peril apprehended did not befall, or because the labor expended was insignificant, and performed without actual risk, such considerations affecting only the amount of the compensation, and not the principle on which it is awarded.

## 2. SAME—COMPENSATION—SERVICES CONSIDERED.

The steamship Apache, a new vessel, worth from \$200,000 to \$350,000, and carrying a cargo valued at \$50,000, was injured in a collision in the night when entering Charleston Harbor, having a large hole knocked in the side, which caused one hold to immediately fill. She was beached by her master about 500 feet away from the main channel inside the jetties, and within the harbor limits, but about 5 miles from the docks. In the morning two tugs went to her assistance. They assisted in pumping her out, and at high tide made an unsuccessful attempt to pull her off into deep water. About five days later, a patch having been procured and put on, she was again pumped out and floated, and then taken to the city by the tugs. She was at no time in serious danger of sinking, having six water-tight bulkheads, five of which were uninjured; nor did she settle in the sand. The weather was mild, and the sea calm, the highest velocity attained by the wind being 30 miles an hour for a short time only. She was protected from the open sea by the jetties. During the five days the tugs remained and were used in taking the passengers to the city, going on errands, and doing such service as was required, but initiating no plans for relieving the ship, and rendering no services which involved danger. They were not equipped for wrecking purposes, but were engaged in towing, were worth from \$20,000 to \$30,000 each, and their ordinary hire was worth from \$75 to \$100 per day. Held, that they were entitled to compensation as salvors, but, in view of the fact that the ship was not in great peril, and that the service was not dangerous nor arduous, an allowance of \$1,500 each was as large as could justly be made.

## 3. SAME—SUIT TO RECOVER FOR SERVICES—EXORBITANT DEMANDS.

An award for salvage services will not be abated because of the exorbitant demands of the salvors made before suit, where their libel demanded no particular sum, and they did not attempt to hold the vessel, but permitted her to go, and agreed to accept a bond to be fixed by the court.

In Admiralty. Suit to recover for salvage services.

Nathans & Sinkler and Mitchell & Smith, for libelants.

Bryan & Bryan, for respondents.

BRAWLEY, District Judge. These libels for salvage were, by order of the court, consolidated for the purpose of taking testimony and entry of final decree, but the interests of the libelants remain distinct, and have been separately presented to this court. They are for services rendered to the Apache, a large and valuable steamship

¶ 2. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

belonging to the Clyde Steamship Company, and plying regularly between the ports of New York, Charleston, and Jacksonville. On the morning of October 9, 1902, on her way from Jacksonville to Charleston, with about 20 passengers and two-thirds of a cargo, she was struck by the steamship Iroquois, of the same line, on her port side, about 30 feet abaft her stem, and a hole about 20 feet wide on her main deck and about 10 or 12 feet wide at the water line was driven into her, and her No. 1 hold was almost immediately filled with water. The collision occurred at half-past 2 o'clock a. m., at about high water, in the main channel, about two miles from the entrance of the jetties. Her master, not then knowing the extent of his injuries, immediately thereafter ran her on the flats or sand bar to the north of the main channel, where she lay during the period covered by the services for which compensation is now sought. The Apache is an iron steamship, about three years old, about 350 feet in length, and testimony of libellant fixes her value at \$350,000 and for the claimant at \$200,000. It is agreed that her cargo, consisting of cross-ties, naval stores, and cotton, was of the value of fifty or sixty thousand dollars. Revel, managing owner of the Waban, was summoned by telephone between half past 3 and 4 o'clock on Thursday morning, October 9th, by Nickerson, the superintendent of wharves of the Clyde Company, to get the Waban ready, and render assistance. He immediately got up and went down to the tug, where he met Nickerson and Mansfield, the head stevedore of the Clyde Company, with some longshoremen, and they went down to the ship, arriving there between 5 and 6 o'clock. His testimony is that Nickerson, on the way down, said, "We will make no agreement for this work; we will go down and render what assistance we can to the ship;" and that he replied, "All right." Nickerson's testimony is that he met Revel on the wharf, and told him that: "We would go out to the Apache; that she was beached; and told him that we wanted to use the tug. I told him it was not a question of salvage, but simply by the hour or by the day, as we needed him;" and that Revel replied, "All right." Igoe, the master of the Protector, heard of the disaster from Revel about half past 4 o'clock, and immediately went down on his tug to the ship, arriving about 6 o'clock, and asked Bearse, the master of the Apache, if he wanted any assistance, to which he replied that he wanted some lighters, but did not want the tug; that he would send the Waban for the lighters. The price for the lighters—\$50 each per day—was agreed upon. Shortly afterwards Bearse informed him that he would take both the tugs, but nothing was said as to compensation for the use of the tug. The Waban was sent up to the city with passengers, and the Protector was sent to bring down the lighters. Shortly after the Waban returned to the ship, she commenced pumping in the fire room, and continued pumping until about 1 o'clock. A more detailed consideration of this service will be had hereafter. The Protector did no pumping on that day, and at 1 o'clock the pumping ceased, and, it being then about high water, an attempt was made to pull the ship off, both tugs pulling at the stern and the ship using her own power. This effort was unavailing. The tugs are described as first-class towboats. They

had no wrecking cables or kedges or other wrecking apparatus. The tugs remained in attendance upon the ship, carrying messages and officials to and from the city, and towing lighters whenever called upon, which lighters were loaded by the stevedores of the ship until Sunday night. By that time Pregnall, who had been employed for that purpose, had made a shutter or patch, designed to cover the hole in the ship, and after this patch was applied both tugs and the pumps of the ship commenced pumping out No. 1 hold, but, after pumping about an hour, it was discovered that the patch was not sufficiently tight, and it was taken off, and some additional mattresses, furnished by the ship, were battened on it, and on Monday morning it was again put in place, and the hole so far made tight that pumping was again resumed. A large pump furnished by Pregnall, the ship's pumps, and the pumps on the tugs succeeded at about half past 12 o'clock in pumping out the water from hold No. 1, when the ship floated, and the tug Rescue, of the Merritt Company, which had been summoned from Norfolk (a large and powerful wrecking tug, equipped especially for wrecking purposes), and had arrived on the scene the afternoon before, towed the Apache up to the city, where she was put upon the sand bar near the Battery until she could be repaired so as to resume her voyage to New York. In coming up to that point the two tugs were lashed alongside, using their pumps and backing, the ship being brought up stern foremost. The services of Pregnall and of the diver employed by him and of the tug Rescue are not involved in this case. The lighters have been paid for, and the sole question is as to the proper remuneration to be awarded to the libelants for services thus briefly related, and which will be considered later more in detail.

The first point to be determined is whether, as contended by the claimants, these services are to be considered in the light of mere harbor service, to be compensated upon a quantum meruit with a bonus, or whether they should be considered in the light of a salvage service, where the award should not rest upon the narrow ground of mere compensation *pro opere et labore*, but upon the larger policy of the maritime law, looking to merit and effort and peril in the duty of encouraging assistance in cases of distress. Any service or assistance applied for or received by a vessel in peril or distress which in any measure conduces to its safety is in the nature of salvage service, and is to be compensated upon principles more liberal than ordinary work. This rule of the maritime law is not established for the benefit of individuals, but rests upon the sound principle that it is to the general advantage of all interested in property exposed to the perils of the sea that sufficient inducements should be held out to all who are in position to render aid to make extraordinary exertions to save such property from peril. To displace a claim for salvage, it is necessary that parties who seek the protection of any other rule of compensation should plead and prove a binding contract that the work done shall be paid for at all events. It is none the less a salvage service that the peril apprehended did not befall, or that the labor expended was insignificant, and performed without actual risk. These considerations affect the quantum of compensation, but not

the nature of the service, or the principles by which that compensation is to be measured. I am of opinion that the claimants have failed to prove a binding agreement which would displace the claim for salvage, and that compensation for the services rendered must be tested and measured by the rules and principles which usually govern in salvage cases.

The case is not one which presents much difficulty. The witnesses were all examined before me, and, while there was a disposition on the one side to magnify, and on the other side to minimize, the services and the dangers, which is always to be expected where the interest or basis of witnesses gives color to their testimony, there is no room for any reasonable doubt as to the essential facts.

1. As to the location of the ship. She was put ashore by her master on the sand bank, about 500 feet from the main channel, at a point about 2 miles from the mouth of the jetties, and inside of the jetties, sheltered to the north by Sullivan's Island, to the east and northeast by the jetties, which were submerged at the Sullivan's Island end, with Morris Island to the southwest, and about 5 miles from the wharves of the city. The testimony is that fishing boats and pilot boats were accustomed in bad weather to come inside the jetties for safe anchorage, and to lie about that point. It is within the coast survey chart of "Charleston Harbor and its approaches."

2. The greatest velocity of the wind at any time while she lay there was on Friday afternoon, as appears by the official weather report, and that was 30 miles an hour, with decreasing velocity Friday night. In the scale of wind printed in the official newspaper weather report every morning, which was offered in evidence, light wind is 1—10 miles an hour; fresh wind, 10—20 miles an hour; brisk wind, 20—30 miles an hour; high winds, 30—40 miles an hour; gale, 40—60 miles an hour; hurricane, 60 miles and upwards. The hurricane season in this latitude had passed, although there is one notable instance of a cyclone late in October. The testimony of all the seafaring men aboard the ship is that there was at no time more than a brisk wind, and that was on Friday afternoon. The greater part of the time there was a light or fresh wind. Two photographs were offered in evidence—one taken on Thursday at 3:15 p. m., and the other on Friday at 4 p. m. They have the appearance of a ship lying in a summer sea; and in the photograph on Friday afternoon, when the wind was 28 miles an hour, according to the chart, and within 2 miles of the highest velocity, a small fishing boat appears near the ship, with full sail, standing up straight. It thus clearly appears that the ship was in no actual danger from high winds at any time while she was aground.

3. The ship had six iron bulkheads, extending to the upper between-decks: First, the collision bulkhead, which was 24 feet from the stem, uninjured by the collision; the second 100 feet from the first; the third 53 feet from the second; the fourth 43 feet, the fifth 28 feet, and the last 20 feet, from the stern post. The collision occurred in the channel in deep water, and the blow, 20 feet wide on the main deck and 10 or 12 feet on the water line, caused No. 1 hold to fill immediately. That she did not sink at once is proof that her



other bulkheads were intact, and that she had floating capacity enough to keep her from sinking. No 1 hold is 100 feet in length, and the testimony is that at no time did the water rise to within more than 5 feet from the top of the forward bulkhead. There was a leak in the bulkhead separating No. 1 and No. 2 holds. No testimony was offered as to the cause of this leak, except that it was supposed to be due to the starting of some rivets, and the water rose in No. 2 hold five to seven feet. Both holds, No. 1 and No. 2, were filled with cross-ties, naval stores, and cotton. The testimony of all the experienced seafaring men is that the ship, with all her other bulkheads intact, loaded, as she was, with lumber and other floatable cargo, would not have sunk if she had been in deep water. The most conclusive proof that such was their opinion at the time, and not a mere opinion formed after the fact, is found in the efforts which were made on Thursday to pull her off into deep water and bring her to the city, for it is not credible that such efforts would have been made if there was any apprehension of her sinking. My conclusion, therefore, is that she was in no danger of sinking from the water which was in her, first, because, by the law of her construction, with five water-tight bulkheads unimpaired, she was designed to float notwithstanding the filling of one or two of her holds; second, because she did not sink immediately after the collision, when her No. 1 hold must have filled immediately; third, that is the testimony of all the experienced seafaring men who were aboard of her, supported by the fact that her master, an intelligent and capable navigator, endeavored to pull her off and put her in deep water; fourth, because the character of her cargo was such as to add to her floating capacity.

The next danger to be apprehended in the position where she lay was that from defective bulkheads, or otherwise, she would take in more water. The testimony is abundant and conclusive that the highest water in her was never nearer than five feet to the top of her bulkhead, going down when the tide was low and rising with the tide, and no witness has testified that there was any material change. As already stated, there was a leak from some unexplained cause in the bulkhead separating No. 1 hold from No. 2 hold, and the latter had five to seven feet of water. The testimony of the engineer of the Apache, an uncommonly intelligent witness, is that he attempted to pump out No. 2 hold with his donkey pump, having two suction there; that, finding that this did not keep the water down, he opened the sluice gates from No. 2 hold into the fire room hold, so that he could use the other suction from the donkey pump connected with the fire room bilge, in addition to the suction in No. 2 hold; that the water in the fire room was always under his control by the use of the sluiceways, which were worked from the main deck by a rod, and opened and closed at his pleasure, and that at no time was it higher than  $2\frac{1}{2}$  feet from the skin of the ship. No other witness has contradicted this testimony, for no one else saw it, and he further testifies that there was no danger at any time of the water getting to the furnaces and fires, and that the ship's engines were always at work. That the ship's engines were at all times working there is no doubt. In addition to the donkey pump, the ship had a circulat-

ing pump and a sanitary pump. These had no direct connections with the fire-room hold, and, in order to use them, the sluices connecting the fire-room hold with the engine-room hold had to be opened; but the engineer testified that he did not wish to let the water by that method into the engine room, because he did not wish the dirt and slime in the engine room, but in case of any danger or necessity he could have done so, and controlled easily all the water that could thus have entered. To avoid bringing the water into the engine room, he sent to the city on Thursday, and got a pipe through which he made connection for his sanitary pump through the fire-room bilge, thus being able to use his sanitary pump, as well as his donkey pump, in pumping water from the fire room. The testimony is that the capacity of the donkey pump was 285 gallons per minute, and of the sanitary pump 117 gallons per minute. The circulating pump had a capacity of 4,200 gallons per minute, but it appears that that pump was not used in pumping water from the ship. After the unavailing attempt to pull the ship off, commencing Thursday afternoon at 1 o'clock, high tide, Bearse, the master, who had in the meantime sent for a diver, determined that the only thing to do was to put a patch on the ship over the hole, and a ship carpenter was employed to make such a patch, and the tug Protector was used to put out one of the ship's anchors. On Friday night, on the high tide, when the wind veered, the ship swung around on her forefoot on the sand as on a pivot, and, from heading north, lay henceforth heading east by south, not pulling on her anchor, and lay henceforth in that position. Pregnall, the ship carpenter, finished the shutter or patch or cofferdam, as it is variously called, on Sunday, and on Sunday afternoon it was carried down to the ship, and with his diver and the ship's crew the patch was put in position over the hole, and an attempt was made to pump out the No. 1 hold, the tugs assisting in the pumping; but when it was discovered that the patch was not tight, the pumping ceased until the next morning, when, the patch having been made tight, pumping was resumed. A large pump had been obtained from Pregnall with a capacity of 1,283 gallons per minute at 50 revolutions, doubled at 100 revolutions. The capacity of the ship's pumps, the donkey and the sanitary pump, has been already stated. The pumps of the Waban and the Protector are of about the same capacity, and the testimony as to their capacity is somewhat confusing. The exigencies of the case do not seem to require that this point should be determined with mathematical accuracy, and, although there is some testimony that the Waban's pump was defective, because it had no air chamber, I am of opinion that the two tugs together were able to pump somewhat more than the two pumps of the ship which were in use, and somewhat less than Pregnall's pump. The pumping on Monday commenced at 10 o'clock, and was continuous until 12:30, when the water in No. 1 hold was so far pumped out that the ship floated. This service was attended with no risk whatever, as the wind was light. The tugs remained by and lashed to the ship until she was pulled up to the hard off the Battery on Monday afternoon, the tugs pumping on the way up. During the remainder of the time the tugs lay by or

near the ship, carrying messages or officials to and fro, and carrying lighters when called upon. It is not claimed in behalf of the tugs, or proved, that they devised any plans for the salving of the ship, or made any suggestions looking to that end. They obeyed all orders that were given, and did all that they were told to do.

The case for the claimants is that the tugs, which had frequently theretofore been employed by the steamship company in harbor service, were hired for such services as were needful, with the understanding that they were to be paid for at the customary rates; that they were used in such services as were demanded of them as a convenience, and not as a necessity; that the ship could have put her passengers ashore in her own boats on Sullivan's Island, where there was a trolley line; that with her own pumps and with the pump hired from Pregnall she could have pumped herself out; that with her own boats she could have laid the anchor which was carried out by the Protector, and with her own steam she could have taken care of herself where she lay, and come to the city; and that the only service rendered by the tugs that she could not do herself was in towing lighters to the city, which lighters were loaded by her own stevedores, at her own expense, and that she was at no time in actual peril.

The case for the libelants is that on Thursday morning the ship was in danger of the water getting into her engine room and putting out her fires, and of thus being rendered helpless; that she was at all times in an exposed position, in danger from winds and seas; that she was in danger of sinking into the sand; that she was in danger of getting off into deep water, where the services of the tugs would be needful; and that their pumps materially contributed in getting the water out; and as material evidence tending to show that the ship was in danger they point to the fact that on Saturday a wooden bulkhead was erected on the main deck aft of the forward hatch, which could only have been done in the apprehension that the ship would sink to a point below that to which the iron bulkheads extended, and as further evidence of apprehended danger they point to the summoning of the Merritt wrecking tug Rescue. These various contentions will be considered in order.

(a) As to the pumping on Thursday morning, I find nothing in the appearance or manner of the engineer, Tinnerholm, to lead to the conclusion that he was not truthful in his testimony as to the water in the fire room, which, as already related, is that this water was brought there by him from No. 2 hold, through the opening of the sluices, and for the purpose of pumping it out, and thus lightening the ship preparatory to the attempt to pull her off. It is hardly conceivable that there could have been any imminent danger from that quarter without Capt. Bearse being apprised of it, for he testifies that when he saw the Waban pumping he asked the engineer why he was doing it, and he said, "As the boat was lying there doing nothing, and he supposed she was employed by the ship, he used her pumps as a convenience to assist him in pumping the fire room out." This pumping by the Waban did not commence until 10 o'clock, and, if there was imminent danger, it is not to be believed that he would not have been put to work at an earlier hour, or that the Protector, which had equal

facilities with the Waban for pumping, and which arrived at the ship about 6 o'clock, should not have been put to pumping, instead of being sent off to the city for lighters. All these considerations tend to confirm the credibility of the engineer.

(b) The danger to the ship from seas and winds has already been stated.

(c) As to the erection of a wooden bulkhead across the forward hatch, this was done under the direction of Selden on Saturday, when he arrived aboard the ship, and the reason given for it in his direct testimony was that "it was put there to guard against any possible danger that might arise from anything that we knew not of." In his cross-examination, in reply to questions evidently tending to that end, he gave some frivolous explanations of the possible uses of this wooden bulkhead; but it is evident that the witness, who was a nervous old gentleman, and who, as he testifies, was finding fault with everybody and everything, in his anxiety to get the ship off, testified correctly in chief that this bulkhead was put there to guard against any possible danger that might arise from any unknown cause. It was removed the same day by Capt. Pennington, the port captain of the line, a weather-beaten mariner of large experience, and who had, since his retirement from the command of ships, considerable experience in the wrecking business. He regarded the bulkhead as unnecessary and useless, and it was removed.

(d) As to the danger of the ship settling, this was not one of the dangers alleged in the libel, but some testimony has been adduced upon the point, mainly that of Smith, the diver, who says that he examined the ship at the point of collision on Saturday, and again on Monday; that on Saturday the rent or hole was  $4\frac{1}{2}$  feet above the sand, and on Monday, when he put the patch on, the hole was about 6 inches above the sand. He does not testify as to whether there was any accumulation of sand on the other side of the ship, or forward or aft the hole. The testimony of all the witnesses on the ship is that she did not sink or settle in the sand, and the probability is that the deposit of sand described by Smith was caused by the moving sands arrested by the current striking the side of the ship. As it has not been suggested or proved that the tugs did anything to ward off this danger, or could have done anything if it had supervened, it is difficult to see how the fact, if fully proved, would enter as an ingredient in fixing the value of the salvage service. That the ship did not settle was proved by the event, for, as soon as the water was out of the hold, she floated. The danger of the ship sinking has already been considered, and it has not been proved that the tugs did anything or could have done anything to prevent her sinking, and one of the ingredients of the salvage services claimed is the attempt to pull her off on Thursday, when, if this contention is well founded, they would have moved her from a place of safety to a place of danger. The ship could not have been in danger of settling in the sand and of slipping off and sinking in deep water both at the same time.

(e) The sending for the Merritt tug Rescue is adduced as evidence that the officers of the ship considered it in peril. After the demonstrated inability of the libelant tugs to pull the ship off on Thursday,

it was apparent to those on board that some greater and other facilities were needed in the salving of the ship than those which the two tugs would afford, as they had no wrecking apparatus, no cables or kedges, and had exhausted their efforts on Monday at high tide. If she was to be pulled off, a wrecking tug with all of the wrecking apparatus would be needed. If she was to be patched and floated, something more was needed to enable her to make her voyage to New York than the temporary wooden patch provided by Pregnall. The wrecking tug *Rescue* was provided with all of the needed apparatus for these two purposes, and, as a matter of fact, she did provide an iron patch, which was put on after the ship was brought up to the city, thus enabling her to go safely to her home port.

From the foregoing review, it clearly appears that none of the ingredients which justify a large award entered into this service. There was no imminent peril from which the ship was rescued; no risking of lives to save property; no going out into tempestuous weather, for the thermographic record of the weather bureau shows that the weather was mild and balmy, the maximum temperature 82, minimum 59; nor was there any severe labor, any expenditure of skill or ingenuity in devising or suggesting plans for saving the ship; in fact, nothing to distinguish the services here from ordinary harbor and towage services, except the fact that they were rendered to a ship in distress. That the *Apache* was a ship in distress, lying aground, with a gaping wound in her side, her main hold flooded with every tide, is a fact not disputed; and that she was in some degree of peril is also clear, for, although the protecting arms of the jetty saved her from the fierce grip of the sea, and technically, perhaps, within the harbor limits, she was in an exposed position; and although in some degree self-helpful, the fact that she kept the tugs near her indicated that she felt the need of them. In salvage, as in life, "they also serve who only stand and wait." It is the policy of the maritime law to encourage spontaneous services rendered in going to the aid of a ship in distress by giving some remuneration beyond the value of the work actually done, as an encouragement to induce the salvor and future salvors to incur risk in saving life and property; but this extra remuneration is always proportioned to the risks encountered and the services actually rendered, and it is never the policy of the law, nor in accordance with justice, to allow a situation created by calamity to be converted into an opportunity for extortion.

It remains only to fix the amount of the award. There is no precise rule or criterion by which that is to be measured, and it rests largely in the conscience and legal discretion of the court, enlightened, as far as it may be, by the decisions in other cases; but, as no two cases are precisely alike, this is an uncertain light. Two cases have been pressed upon the attention of the court: *The George W. Clyde*, 86 Fed. 665, 30 C. C. A. 292—where a schooner, badly injured by a collision, was in apparent danger of sinking immediately in water 60 or 80 feet in depth. Two tugs, happening to be near, took her in tow, and safely beached her about a quarter of a mile away in less than a quarter of an hour, and a reward of \$1,000 for salvage services was made by the District Court and confirmed by the Court

of Appeals. In the case of the Apache she was safely beached by her own exertion before the tugs came to her assistance. In other words, the service of the tugs commenced here at the point where in the case of the Clyde the services ended; the imminent danger, if there was any, being over. In the case of The Flottbek, 118 Fed. 954, 55 C. C. A. 448, the ship was driven by a gale to dangerous proximity to rocks and reefs near Cape Flattery, on the Pacific Coast, on the night of January 13th, and the steamship Mateawan, soon after daylight on the morning of the 14th, responding to signals of distress, attempted to take her in tow in a raging storm, but, finding that he could not rescue her without endangering his own vessel, her captain went on his way, promising to send relief, and on the night of the 14th the steam tug Holyoke was dispatched from Seattle to her relief, and, being joined by the tug Wanderer, the two proceeded towards the cape, encountering heavy seas, which disabled the machinery of the Holyoke. The steam tug Tacoma joined the Wanderer, and arrived in the vicinity of the Flottbek on the morning of the 16th. By that time the mate and half the crew of the Flottbek had abandoned her, reaching the land in a lifeboat. The distress signals were flying when the tugs arrived. The wind had abated, but there was a heavy sea. The finding of the court below that the ship, when rescued, was in a position of great peril, was sustained by the Court of Appeals, and the reward of \$22,830 was reduced one-third by the Court of Appeals. The circumstances have no analogy to those now under consideration. The case of The Excelsior (D. C.) 19 Fed. 436, has more likeness to that now considered than any which has been brought to my attention. There a large passenger and freight steamer, after passing Sewell's Point on her way out of Norfolk, came into collision with a tugboat, which drove a hole into her hull some 8x10 feet in dimensions. Her master beached her on Hampton Bar. She had filled with water, the sea coming over her main deck. She was entirely helpless, and the court held that the danger of possible destruction of her, though not certain, was imminent. The salvage service was rendered by the Baker Salvage Company with great energy, promptitude, skill, and success. The ship and all of her cargo, of the value of \$160,000, was saved. The award was \$6,000, by Judge Hughes, who was noted for great liberality in salvage cases, and who repeatedly held that salvage services on the South Atlantic Coast ought to be more liberally rewarded than farther north, owing to the greater dangers and fewer facilities; and the fact that the Baker Company was the only fully equipped wrecking company available, and that it maintained at great expense an ample outfit of divers, wrecking vessels and apparatus, is commented on as an inducement to a larger reward. In the case of The Excelsior all of the work of the moving the cargo, providing divers, patching the hole, and lifting the ship, which was submerged, was done by the salving company. In this case the tugboats had no special equipment for salvage purposes, and earned their livelihood in their regular avocation as towboats. The value of the property here is about double that in The Excelsior, but there is a much greater disproportion in the nature and value of the services rendered.

I find the value of the tugs to be from \$20,000 to \$30,000 each, and that a fair remuneration for ordinary towage services would be \$75 or \$100 per day. In view of the promptness with which they went to the assistance of a vessel in distress, of their abandoning all other work, and standing by her, ready and willing at all times to render such assistance as was demanded, I am of opinion that an award of \$1,500 each would be a fair remuneration. The sum of \$1,250 apiece was offered by the claimant, with an intimation that, for the sake of a settlement, they would pay \$1,500 each. If that sum had been tendered or paid into court, costs would have been denied to the libelants. As it was not done, costs must follow the decree.

I am asked to abate the award, in view of the exorbitant demands of the libelants, and authority is cited in support of such request. The demand of \$25,000 made by the libelants was unconscionable, and grossly exorbitant, and, if it had been followed by an attempt to hold the ship, I would not hesitate to diminish the award on that account; but the testimony shows that the ship was allowed to sail upon the written assurance of her proctor that he would give whatever bond was required, and the amount of the bond was fixed by the court at \$15,000. This amount was fixed by it upon the allegations in the libels, many of which have not been supported by the testimony, but, as no specific sum was demanded in the libels, I am of opinion that this is not a case where I would be justified in diminishing the amount, which I consider fair and just, because of demand made before the libels were filed.

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In re DRESSER et al.

(District Court, S. D. New York. July 20, 1903.)

**1. BANKRUPTCY—ARREST OF BANKRUPT—EXEMPTION—TIME.**

Bankr. Act July 1, 1898, § 9a, subd. 2, 30 Stat. 549, c. 541 [U. S. Comp. St. 1901, p. 3425], provides that a bankrupt shall be exempt from arrest on civil process issuing from a state court except on a debt or claim from which his discharge in bankruptcy would not be a release, "when in attendance on a court of bankruptcy, or engaged in the performance of a duty imposed by the act." General Order No. 12 (18 Sup. Ct. vi) provides that the bankrupt shall receive protection against arrest, to continue until final adjudication on his application for discharge unless suspended or vacated by order of court. *Held*, that the bankrupt's exemption from arrest was not restricted to particular occasions when his physical attendance in court was required, or he was actually engaged in performing some required duty, but that the court was authorized to release him from arrest on his furnishing bond to obey the orders of the court, and not depart from the jurisdiction during the continuance of such exemption.

In Bankruptcy. Exemption of bankrupt from arrest upon civil proceedings in a State Court, while he is in attendance upon the bankruptcy court in the performance of his duties to the bankrupt estate.

Morris J. Hirsch, for the motion.

Clifford W. Hartridge, opposed.

ADAMS, District Judge. This is a motion on the part of the bankrupt Dresser for the continuance of an injunction, heretofore granted upon his petition, pending the return of an order for Mary R. H.

Mayer to show cause why she and her agents, and the Sheriff of the County of New York, should not be restrained from executing, or attempting to execute, an order granted by the New York Supreme Court for the arrest of Dresser in an action brought therein by Mayer to recover damages for the conversion of fifty \$1,000 bonds of the Mexican Central Railway Company, delivered to the bankrupt on the 5th of November, 1902.

The petition alleges that on the 7th day of May, 1903, an involuntary petition was filed against Dresser and his partner and that thereafter, on the 9th day of July, 1903, they were duly adjudicated bankrupts; that the action in the State Court was instituted and the arrest threatened and that unless the court should intervene to stay the execution of such order, the petitioner would be incarcerated in Ludlow Street Jail, the County Prison of New York County. The petition further alleges that the petitioner is in attendance upon this court by reason of his adjudication as a bankrupt and is ready and will at all times obey any and all orders that may be made by this court; that he is informed that the referee in charge of the case is about to call a meeting of the creditors. He therefore asks that the plaintiff Mayer be restrained until a final adjudication be had upon an application for discharge or until the time limited for such application has expired.

The plaintiff has filed the following affidavit in reply:

"State of New York, County of New York—ss.

"Charles W. Mayer, being duly sworn, deposes and says that he is the attorney in fact for Mary R. H. Mayer, the plaintiff in a certain action for conversion, in the New York Supreme Court, New York County, in which Daniel Le Roy Dresser, one of the Bankrupts in this proceeding is defendant, and in which an order of arrest has been issued, and that he resides at No. 267 Fifth Avenue, in the Borough of Manhattan, New York City.

"That he has personal knowledge of all the facts and circumstances connected with the transaction between Daniel Le Roy Dresser, and deponent, as attorney in fact for Mary R. H. Mayer. That all the said transactions were conducted by deponent personally.

"That although the form of action of said complaint, stated simply, was one of conversion, in addition to the facts therein stated, and upon information and belief, the defendant, Daniel Le Roy Dresser obtained the said bonds by false pretences, and under a trust agreement to keep the said bonds in his possession, subject to the order of the said Mary R. H. Mayer, with intent to defraud the plaintiff in the action hereinbefore mentioned.

"On information and belief that, within two days after deponent deposited said bonds with said Daniel Le Roy Dresser, under said Trust Agreement, the said Daniel Le Roy Dresser disposed of said bonds for his own use, which was his intention at the time he induced deponent to deposit said bonds with him.

"That being in ignorance of the above facts deponent on the 9th day of February, 1903, demanded of said Daniel Le Roy Dresser the return of the said bonds, which said Dresser refused although the said Dresser at said time stated to deponent that he had the said bonds in his possession or under his control.

"That immediately upon deponent's learning that the statement which Daniel Le Roy Dresser had made to him, to wit that he had in his custody the aforesaid fifty Mexican Railway bonds referred to particularly in the affidavit of deponent herein, among the papers on which the order of arrest in the Supreme Court of the State of New York, was granted, that thereupon deponent demanded of Daniel Le Roy Dresser that he should repurchase the same bonds, or at any rate should furnish the money for them. This, Dresser promised to do immediately.



"That deponent knew, and Dresser well knew that Dresser was not acting as any broker or agent, but simply held these bonds subject to the order of Mary R. H. Mayer.

"That from the repeated promise of Daniel Le Roy Dresser made from day to day, and the promise of his Counsel, Charles S. Mackensie, that these bonds, or their face value would be paid, deponent waited.

"That instead of returning these bonds, or paying their value, the bankrupt made an assignment of all his property to the aforesaid Charles S. Mackensie, although on the 20th day of February, 1903, the following telegram which Charles S. Mackensie admitted he sent to Clifford W. Hartridge about these bonds, was received by Clifford W. Hartridge

February 20th, 1903.

'Clifford Hartridge,  
'149 Broadway,  
'New York.

'Will see you as soon as I reach New York, about twelve o'clock. Arranged to deliver bonds.  
Charles S. Mackensie.'

"That, as deponent is informed and believes, that within an hour after said bankrupt, Daniel Le Roy Dresser, made the assignment to said Charles S. Mackensie, certain creditors brought through Messrs. Black, Olcott, Gruber & Bonyge, an action in this Court, to put said bankrupt, Daniel Le Roy Dresser, into bankruptcy.

"That furthermore, on information and belief, these creditors, through the above mentioned firm, after said creditors had been called in consultation,—to which consultation your deponent was not invited, nor about which was he ever notified, nor about which did he know anything except what he afterwards saw in the public prints, and heard from various people,—met and agreed to accept One hundred cents on the dollar for their claims, less ten per cent. for the above mentioned firm of lawyers.

"That thereafter, on information and belief, these creditors who were to be thus taken care of, adjourned these bankruptcy proceedings from time to time, with the understanding that they were to get their money on the 7th day of July, 1903.

"That your deponent, through his Counsel, Clifford W. Hartridge, notified both Morris J. Hirsch, and Charles S. Mackensie, that if some provision were not made for the returning of Mary R. H. Mayer's bonds, or the payment for the same, that Mrs. Mayer would be compelled to take some action to protect herself, and that the only proper protection by way of an action that said Mary R. H. Mayer had, was an action for conversion.

"On information and belief deponent's counsel was informed by Messrs. Hirsch and Mackensie that if any action was taken it would not only seriously harass Dresser, but would interfere with his being able to pay anybody.

"That deponent waited before serving or attempting to serve any order of arrest, or any papers in an action for conversion on the aforesaid Daniel Le Roy Dresser until after the 7th of July, 1903.

"That deponent is informed and believes that immediately after the 7th of July, to wit on the 8th or 9th of July, said Dresser voluntarily either moved, or permitted himself to be adjudged a bankrupt.

"That on the 9th day of July, 1903, deponent's Counsel obtained an order of arrest from one of the justices of the Supreme Court of the State of New York, and on the morning of the 10th of July, placed said order of arrest with its accompanying papers, to wit the affidavit, complaint and summons in the hands of the sheriff, at the same time notifying Morris J. Hirsch that this was done, in order that he should make any arrangements for bail that he wished.

"That thereupon said Morris J. Hirsch obtained the order to show cause at bar.

"That deponent has shown every consideration possible in the hope that all creditors might be paid.

"Deponent has in no wise attempted to interfere with any adjustment the Bankrupt could make with his creditors.

"Deponent is informed and believes that in the argument before your Honor, and the affidavit of Dresser in this motion, it is and was stated that there would be an immediate call for creditors made by the Referee.

"Deponent is informed and believes that the Referee has stated that there would be no such call until on or after the 20th day of July, 1903, for the reason that the bankrupt has failed so far to file the schedule of his assets and liabilities.

"That the bail required in the order of arrest granted in the Supreme Court of the State of New York, is Fifty thousand dollars (\$50,000.00).

"That on information and belief, if this stay is not granted, and the bankrupt is kept within the reach of the orders of this Court, no possible harm could come to the creditors.

"On information and belief, that the fact that the deponent has made this a civil action, shows consideration for the interest of all the parties concerned, and deponent respectfully requests this Honorable Court not to make him a sufferer thereby, but that this application for a stay be dismissed.

"Charles W. Mayer.

"Sworn to before me, this 14th day of July, 1903.

"Daniel C. Beermand, Notary Public New York County."

The bankrupt has not denied any of the facts alleged in the opposing affidavit but relies upon the allegations in his petition and the case of *In re Lewensohn* (D. C.) 99 Fed. 73, affirmed in 104 Fed. 1006, 44 C. C. A. 309.

Although the facts in the two cases are dissimilar, the governing principle that the bankrupt should be exempt from arrest on civil process in order to be able to attend to his duties in the bankruptcy court, is the same.

In the *Lewensohn Case*, it was said by Judge Brown (pages 75, 76):

"3. By section 9a, subd. 2 [Act July 1, 1898, c. 541, 30 Stat. 549, U. S. Comp. St. 1901, p. 3425], the bankrupt is declared entitled to be exempt from arrest on civil process, except upon a debt or claim from which his discharge would not be a release. This imports that the bankrupt shall not be exempt from arrest where the debt or claim would not be released by his discharge, except to the limited extent provided; namely, when the bankrupt is 'in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act.'

"This latter exception is new; there was no similar provision in the act of 1867 [Act March 2, 1867, c. 176, 14 Stat. 517]. How far does this exception extend? Is it to be construed as applying to the whole period during which the bankrupt has duties to perform, or only to the particular occasions when he is actually performing them? Section 7 [Act July 1, 1898, c. 541, 30 Stat. 548, U. S. Comp. St. 1901, p. 3425], imposes numerous duties upon the bankrupt which continue at least up to the time of the hearing on his discharge. In most important cases his attendance for examination is required on numerous occasions from time to time, not merely upon his original examination and on his examination upon the application for a discharge, but on many other questions that frequently arise with reference to his assets or to disputed or doubtful liens or claims against the estate.

"For the bankrupt it is contended that a liberal construction should be given to this exemption, in order to avoid the perpetual embarrassments in the bankruptcy proceedings which would be caused by his incarceration under state process. Opposed to this it is urged, that the exemption should be limited to the particular occasions when the bankrupt is actually in attendance in court, or actually performing a required duty, differing little from the ordinary right of a witness to exemption while in attendance on the court, to which exemption he was held entitled under the act of 1867 without any express provision. In *re Kimball*, 1 N. B. R. 193, 14 Fed. Cas. 474.

"In general order 12 (18 Sup. Ct. vi) the supreme court, in prescribing the precise extent of the bankrupt's protection from arrest, seems virtually to

have given its own construction to this section, by providing that the bankrupt shall attend before the referee on a day named; 'and from that day shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court.'

"General order 30 (18 Sup. Ct. viii), being presumably limited in its operation to the same period of time (Loveland, Bankr. 514), becomes thereby practically compatible with section 9a, subd. 2. In the case of *In re Baker* (D. C.) 96 Fed. 954, the exception in section 9a, subd. 2, is not considered.

"The construction apparently given to that section by general order 12, does not seriously interfere with the creditors' right to arrest in cases where the discharge is not a bar. It merely suspends the exercise of that right for a certain limited period. The bankrupt is not entitled to postpone his application for a discharge beyond a year from the adjudication, and no extension of time would be granted by the court merely to prolong his freedom from arrest.

"As this court may suspend or vacate the protection from arrest provided by rule 12, the court may grant it on terms, and hence under section 2, subd. 15 [Act July 1, 1898, c. 541, 30 Stat. 545, 546, U. S. Comp. St. 1901, p. 3421], may require security that the bankrupt during its continuance will obey all orders of the court and not meanwhile depart from its jurisdiction. Upon the bankrupt's giving a bond to that effect, with approved security, the stay should be continued for a period not exceeding 12 months from the date of adjudication, unless an application for discharge be then pending, and in that case, until the final determination of that application."

No other discussion of the matter is necessary.

The motion will be granted upon the bankrupt giving, within five days, approved security in the sum of \$50,000 that he will during the continuance of the injunction obey all orders of this court and not depart from its jurisdiction. Order to be settled upon one day's notice.

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### CURTICE v. CRAWFORD COUNTY BANK et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. September 3, 1903.)

No. 110.

#### 1. CLERK OF CIRCUIT COURT—COMMISSIONS—PROCEEDS OF PROPERTY SOLD.

Rev. St. § 995 [U. S. Comp. St. 1901, p. 711], requires "moneys" only which are paid into court or received by the officers thereof to be deposited with a depository so as to entitle the clerk to commissions thereon under section 828 [U. S. Comp. St. 1901, p. 635], and does not affect the power of the court to permit payment for property to be made in other forms as may be most appropriate or convenient to the parties; and where a bidder is permitted to make a deposit with the master in the form of a check or certificate of deposit, and to pay for the property by crediting the amount on the decree in his favor, neither the deposit nor the purchase money is required to be deposited in court.

In Equity. On motion by clerk to require master to deposit proceeds of sale.

See 110 Fed. 830.

Thomas Boles, pro se.

James F. Read and J. B. McDonough, for Crawford Co. Bank and others.

¶ 1. See *Clerks of Courts*, vol. 10, Cent. Dig. § 77.

ROGERS, District Judge. This is a motion made by Thomas Boles, clerk of this court, for an order requiring the special master appointed to make the sale to deposit in this court the proceeds of the sales made by him. The facts are as follows: There was a decree of this court rendered in this cause at the June term, 1901, to wit, on the 20th of September, 1901. By the terms of the decree it was provided that:

"In making said sale said special master shall offer and sell separately said note, judgment, and each of said certificates of stock. Upon the acceptance of any bid for such property, or any part thereof, the purchaser or purchasers shall forthwith deposit with the said special master a sum equal to ten per cent. of the amount of said bid in money or in check, satisfactory to the said master; and, in the event the successful bidder shall fail to make good his bid upon its acceptance by the said master, the master shall immediately proceed to resell said property without further order of said court or notice, or advertisement whatsoever."

It is further provided that:

"The master shall make return to the court of the sale made by him under this decree; and if the court shall confirm said sale the purchaser or purchasers shall have thirty days within which to pay or settle for the balance due by him or them upon said purchase; and, in default thereof, the court may order a resale of said property, and said purchaser or purchasers shall be liable for all the expenses thereof, and for any deficiency of price realized thereon; and the money or check deposited by him or them on the acceptance of his or their bid shall be applied thereto. It is further ordered, adjudged, and decreed that the fund arising from the sale of said property shall be applied in the following order of priority, to wit: (1) To the payment of the costs in this cause, arising under the cross-complaint herein, and the expenses of said sale, including reasonable compensation to said master. (2) To the payment of the judgment rendered in favor of said Crawford County Bank against said E. B. Peirce, administrator, as aforesaid. (3) If, after making all the above payments, there be a surplus, then the same shall be paid into court, subject to the further order of the court herein."

The case was reserved for the purpose of making such distribution of such surplus fund. The case was taken to the Court of Appeals of the Eighth Circuit, and the decree was modified by that court as follows:

"On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, modified so as to provide that the proceeds of the sale of stock certificate No. 108, after deducting its pro rata of the costs of the action in the Circuit Court, be applied, first to the payment of the indebtedness due from the estate of Robert L. Hynes, deceased, to the appellant, J. M. Curtice, and that any sum which may remain after such indebtedness and accrued interest if discharged, be applied on the claim of the Crawford County Bank, and as thus modified, that the decree of the said Circuit Court be, and the same is hereby, affirmed."

On the filing of the mandate from which the last excerpt was taken at the January term, to wit, on the 2d of February, 1903, a decree was entered in this court, modifying its original decree in conformity to the provisions of the mandate of the Circuit Court of Appeals. It will be seen that the effect of this decree was to require (1) that all the costs be paid, including a reasonable compensation to the master; (2) that the proceeds of certificate No. 108, which had been awarded by this court to the Crawford County Bank, was directed to be ap-

plied, first, to the payment of the plaintiff, J. M. Curtice, and the residue thereof to be applied to the debt of the Crawford County Bank, thereby nullifying that provision of the original decree, which required the surplus to be paid into court. Afterwards, on the 16th of March, 1903, by an assignment duly entered of record, the plaintiff, Curtice, sold and transferred his entire interest in said decree to the Crawford County Bank. On the same day that said assignment was made the special master made sale of all the property described in the decree, and on the 26th of March, thereafter, filed his report, which was duly approved on April 11, 1903. At said sale the Crawford County Bank bought all the property. In the order approving the sale it also appears that the Crawford County Bank had become the purchaser of all the interest in the decree which J. M. Curtice had and recovered, and that the debt of the said J. M. Curtice, and that of the Crawford County Bank were largely in excess of the sum realized from the sale of all the property. Said order confirming and approving the sale vested in the Crawford County Bank all the property sold, except the sum of \$17.50, allowed the master. On the day said sale was approved the clerk filed his motion hereinabove referred to to require the special master to pay into court the proceeds of the sale of all the property, amounting in the aggregate to \$17,410.

As said by Mr. Justice Brown in *Thomas v. Chicago & C. S. Ry. Co.* (C. C.) 37 Fed. 548:

"While this is nominally an effort to compel the performance of a duty enjoined by statute, viz., the deposit of money with a designated depository, it is in reality a proceeding to collect the commission of the clerk upon the moneys so deposited. By Rev. St. U. S. § 995 [U. S. Comp. St. 1901, p. 711], 'all moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to credit of such court: provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of the parties under the direction of the court.' By section 996 [U. S. Comp. St. 1901, p. 711] moneys so deposited shall only be withdrawn upon the order of a judge entered and certified of record by the clerk. By section 828 [U. S. Comp. St. 1901, p. 635], the clerk is allowed 'for receiving, keeping and paying out money in pursuance of any statute or order of court one per cent. on the amount so received, kept and paid'; and by section 798 [U. S. Comp. St. 1901, p. 621] he is required to present at each regular session of the court an account of all moneys remaining therein or subject to its order, stating in detail in what causes they were deposited, and in what causes payments have been made."

By the report of the master it is made to appear that the Crawford County Bank, immediately after the sale, deposited with the special master "a sum equal to ten per centum of its purchase price, to wit, the sum of \$1,741." By an affidavit of the special master, filed since the motion was made, it appears that the 10 per cent. of the amount paid at such sale was not paid in actual cash, but consisted of a certificate of deposit issued to him by the purchaser, the Crawford County Bank, through its cashier, S. A. Pernot. It appears, therefore, that no money or cash ever passed into the hands of the master. By the terms of the original decree it was a matter of discretion with the master to require the money to be paid or receive a check satisfactory to himself. It will be remembered that by the terms of the

decree of the court of appeals (which this court would have to follow) no money was required to be paid into court at all. It will be seen by an examination of the language of the statute that nothing but moneys paid into courts of the United States, or received by the officers thereof, are required to be deposited with the treasurer, or assistant treasurer, or designated depository of the United States in the name and to the credit of the court; and in the case last referred to Brown, J. (now associate justice of the Supreme Court of the United States), distinctly held that the statute referred to applied only to moneys, and not to properties of other kinds which came into the hands of the master. In that case he said:

"The decree in this case seemed to contemplate a purchase and reorganization of the road by the bondholders, and it accordingly provided, as is proper and customary in railway foreclosures, that the bonds and coupons which represented the mortgage debt in process of foreclosure might be used in payment of the purchase price by any bidder at the sale, for their proportionate value, according to the amount so bid. It was obviously framed upon the theory that the road would not sell for enough to pay the principal or the face of the bonds. No provision was made for such bondholders as did not choose to participate in the reorganization of the road, but by the supplemental decree the master was directed to give public notice to the holder of such bonds to present them to him for payment, in cash, of the pro rata amount to which each bond and coupon was entitled from the purchase money paid on sale. It is now urged that by this arrangement the bondholders who participated in the reorganization received by indorsement upon their bonds the full proportionate amount of their bonds, while the nonparticipating bondholders, who were paid in cash, received a like amount, but with a deduction of the commission of 1 per cent. to the clerk. This is entirely true, but it is a distinction which arises from the language of the statute itself. The statute requires only that 'moneys' shall be deposited with the designated depository, and makes no such provision with regard to bonds or other personal property that may be accepted in lieu of money upon the sale. If, for instance, the plaintiff in an execution should direct the marshal to receive in payment of the property sold a railway or municipal bond at its face value, such bond would not require to be deposited, nor would the clerk be entitled to a commission upon it; but, if money is required to be collected in payment, such money, by the express language of the statute, must be deposited. There is undoubtedly some inequality here, but it is one which results solely from the language of the statute."

In this case no money ever came to the master. The certificate of deposit which was placed in his hands was the property of the bank, subject to certain contingencies expressed in the original decree (which in this case never happened), and immediately upon the approval of the sale the certificate became the property of the bank without reservation, because the bank owned the Curtice judgment and its own judgment, but was, of course, bound for all costs rightly taxable in the cause. *Easton v. Houston & T. C. Ry. Co.* (C. C.) 44 Fed. 719, was a case in which the sale was ordered, and the money directed to be paid into court. Afterwards, by consent and on motion, the decree was modified, and the commissioner was directed to receive, in lieu of money, bank checks or bank certificates of deposit. The clerk sought by intervention to modify the decree so as to have the money brought into court, and thereby receive his commission. Judge Pardee said:

"The court had the right to modify the decree. The original decree provided for modifications upon proper application, and the complainants petitioned for the one in question, and the defendants consented thereto. The

modification seems to have been a proper one under the circumstances of the case. The money affected by it was earnest or forfeit money. In a contingency it was to be restored in its entirety to the purchaser, and was undoubtedly his money until the sale should be confirmed. If it had been deposited in the registry of the court, as provided in the original decree, and the sale had been set aside, it could not have been restored in its entirety to its owner, because in that case the clerk's fee would have attached, and properly so; for then he would have had the responsibility of receiving, keeping, and paying out the money."

That was the case here. No money was received by the special master. He was not required to receive money unless, in his judgment, it became necessary. He had the liberty to accept checks, which he did accept, and, having accepted the checks, he was not required to pay them into the depository of the court, even if the decree had provided for it. But, as stated, the decree did not so provide, and, it being the decree of the Circuit Court of Appeals, this court had no power to alter or modify it, and no power to disobey or disregard it. The merits of this controversy, in the opinion of the court, are entirely with the bank. There are a number of cases which incidentally bear upon the subject; among others, *Johnson et al. v. Southern Building & Loan Association (C. C.)* 95 Fed. 922, affirmed in *Bowles v. Bowman*, 102 Fed. 1000, 41 C. C. A. 675; *U. S. v. Kurtz*, 17 Sup. Ct. 15, 41 L. Ed. 346.

The motion in this case is denied.

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ENTERPRISE MFG. CO. OF PENNSYLVANIA v. LANDERS, FRARY  
& CLARK.

(Circuit Court, D. Connecticut. July 1, 1903.)

No. 993.

1. UNFAIR COMPETITION—COPYING MANUFACTURED ARTICLE—IMITATION OF DRESS.

Any manufacturer has the right to copy an article made by another which is not protected by patent, but he has not the right to so imitate it in shape, design, color, and number as to deceive purchasers of average intelligence and cause them to mistake his product for that of the prior manufacturer.

2. SAME.

Complainant for many years made and sold coffee mills of different sizes, each having a distinguishing number, but all of a distinctive shape, design, and color by which they became known to the public and acquired a high reputation and a large sale. Defendant, later, began the manufacture of mills of exactly the same pattern, admittedly copying those of complainant in shape and design, and even in coloring, the only distinction being in the numbers used, which were also similar, and in the initials and address of the maker, which were not conspicuous. It was shown that purchasers had in fact been deceived, and had bought and used defendant's mills supposing them to have been made by complainant. *Held*, that such action constituted unfair competition, against which complainant was entitled to an injunction.

In Equity. Suit to enjoin unfair competition. On final hearing.

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

Howson & Howson, for plaintiff.  
E. D. Robbins, for defendant.

PLATT, District Judge. Since 1866 the complainant and its predecessor have been continuously engaged in the city of Philadelphia in the manufacture of hardware. The complainant succeeded to the business of its predecessor, the Enterprise Manufacturing Company of Pennsylvania, in the year 1893. During the year 1874 its predecessor commenced the manufacture and sale of a line of coffee mills of varying sizes, adopting therefor a certain characteristic shape, design, color, and ornamentation. Said coffee mills, which have been continuously and uniformly numbered 0, 1, 2, 3, 5, 7, and 9, according to size, have since 1874 been manufactured by the complainant and its predecessor, and sold in large numbers, reaching about \$75,000 during the year just prior to this suit. The characteristic shape, design, color, and ornamentation originally adopted for said coffee mills have been retained without change to the present day, other sizes, with different numbers, being added from time to time. Nearly all of the mills are of the same type, and have the same characteristic shape and appearance, varying only in size, the mills having fly wheels of a particular design, and being finished in red and blue, with decorations in gilt and colors. Nos. 0 and 1 are without fly wheels, and are finished in black, with decorations in gilt and colors. Samples of Nos. 0 to 9, inclusive, are in evidence. In 1876 the complainant's predecessor also commenced the manufacture of a set of mills, numbered 2½, 4, 6, 8, 10, 14, 16, and 18, whose shape, design and color, decoration and general appearance, differ in no wise from the mills heretofore mentioned, save that a nickle-plated hopper is substituted for the hopper of the other mills. The sale of this line of mills has been continuous, and the appearance has remained the same throughout. Other sizes, with other numbers, have likewise been added. A specimen of No. 2½ is in evidence as a sample of this line of mills. The specimens of complainant's mills introduced in evidence are the important selling sizes, and they show the shape, design, coloring, and decoration of the entire line of complainant's coffee mills. The complainant's mills, which are known throughout the trade as "Enterprise" mills, have attained a very high reputation, and are the leading coffee mills on the market. The long-continued and uninterrupted use by complainant and its predecessor, without change, of the characteristic shape, design, coloring, and decoration of said mills, has caused the characteristic appearance of the Enterprise mills to be well-known to the trade, and Enterprise mills are recognized by the trade by reason of their unique appearance.

Defendant, shortly before the filing of the bill in this case, after examining complainant's line of coffee mills, concluded to enter for the first time upon the manufacture of the same line of hardware, and sell in competition with complainant. The defendant, therefore, commenced the manufacture of coffee mills, using parts of mills sold by the plaintiff as patterns wherever it was convenient or profitable to do so. It is now making and selling coffee mills which in all substantial respects are the same goods as those made and sold by the plaintiff,



and intends to make other mills with the later style of hopper, which will be substantially the same goods as those made and sold by the plaintiff. Defendant has placed upon its mills, so produced and sold, the numbers 01, 11, 20, 30, 50, 70, and 90, in every case affixing the number to a size of mill which corresponds with the mill of the plaintiff which bears the numbers 0, 1, 2, 3, 5, 7, and 9. On the mills numbered 0 and 1 the plaintiff places its initials and address upon the base, and in the other sizes its name and address upon the periphery of the fly wheel, through which power is furnished to the mechanism of the mill. The defendant at one time failed to place any name upon any part of the mills which it produced of the type of plaintiff's numbered 0 and 1, but it soon avoided that error, and has for the most part always placed its initials and address upon that type at the base, and his always placed its name and address upon the periphery of the fly wheels of the mills of the other type. The address in either type of mill would be hidden from the view of a purchaser looking at the mill from the front, and his first impression would necessarily be gained from the distinctive appearance of the mill itself.

Upon these facts, there really seems to be no room left for serious contention. The plaintiff's case comes perilously near to being one of trade-mark law, pure and simple. For many years it has, without deviation, so prepared its coffee mills, by the use of various devices constantly employed, that they had come to be generally known as the "Enterprise" mills, and of the plaintiff's manufacture. If it had adopted one distinguishing and identifying mark or device for that purpose, and had succeeded with the one as it has with the many, a trade-mark case would be here, and the equity jurisdiction would be undisputed. If any mistake has been made, it grows out of the abundance of devices adopted; but, multitudinous as they are, their constant use as an identifying collocation of devices is admitted. Any possible weakness from the standpoint of a technical trade-mark case renders the situation exceptionally strong when we come to consider the facts from the standpoint of unfair trade and competition.

The boldness and evident sincerity exhibited by the defendant, which may be gathered from its answer and from the brief of counsel, is a refreshing combination. In the answer it says that it is doing what the plaintiff says that it is doing, and that it has an inherent natural right to do so, and proposes to do the things which it is alleged that it threatens to do, and that such action also is right and proper and defensible. In the brief the position is further emphasized, as, for example:

"Plaintiff's grievance is that the defendant is showing to the trade that it is making a line of goods of which the plaintiff has enjoyed a monopoly, and which it desires without a patent to still monopolize."

"The plaintiff seeks to secure by a decree of this court a monopoly of the manufacture of a certain set of unpatented coffee mills. The defendant, on the other hand, claims the right to make and sell goods exactly like those which the plaintiff has been making and selling."

"The defendant judged that it was wiser to offer to the public a coffee mill of a form and appearance such as they were known to like. The mills made by the plaintiff evidently met with public favor, both on account of their mechanical efficiency as grinding machines, and also on account of their pleasing appearance as articles of furniture. The defendant accordingly

determined to make its mills like those of the plaintiff both in effectiveness of mechanical construction and attractiveness of appearance."

The fallacy of the defendant's contention is evident, and I am entitled to no particular credit for pointing it out, because numerous judges have called attention to a like fallacy heretofore. The plaintiff claims no monopoly in the manufacture and sale of coffee mills. The world at large and its products are open to the defendant. It can ransack the universe, and, avoiding possible patents, put together and market what it will in the way of coffee mills, with this one exception, it shall not so arrange its materials and so dress its goods as to produce and market a coffee mill which will be liable to be mistaken for the mills upon which, by long and persistent effort, the plaintiff has been enabled to obtain a distinctive reputation. The very cases cited—and I assume that no stronger ones exist—fail obviously to support the contention.

*Fairbanks v. Jacobus*, 14 Blatchf. 337, Fed. Cas. No. 4,608, very truly says that, apart from patents and designs, any one may make anything in any form, and may copy with exactness that which another has produced, "unless he attributes to that which he has made a false origin by claiming it to be the manufacture of another person"; and further, "what is not free is to pretend that a scale is made by one person which is in fact made by another."

*Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, is equally impotent. In that case the master laid down this principle "that no one shall by imitation or any unfair device induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own products or merchandise." The master further found that there was no evidence of actual deceit, or of an actual attempt to deceive. He recommended a decree in a certain form; the trial court went beyond his recommendation; and the Supreme Court, speaking through the now Mr. Justice Holmes, sustained the master. The master had sustained the infringement, although in respect of the zithers in controversy there were minor differences in dress, and although one bore the name "Regent" on a plate, and the other bore the name "Germania," and although one was marked "No. 5," and the other "No. 7." He found that they would be mistaken one for the other, and also that it is not necessary that the imitation should be so close as to deceive people when they are placed side by side.

And, to clench his contention, counsel in the case at bar cites *Globe Wernicke Co. v. Fred Macey Co.* (C. C. A.) 119 Fed. 696. This is from the Circuit Court of Appeals of the Sixth Circuit, and is one of the latest deliverances upon the question of unfair competition. The decision is authoritative as a federal decision, and peculiarly so by reason of the high character and learning of the members composing the tribunal, and I am at a loss to know why my attention has been directed thereto. If counsel will read page 704 again, he must see that the authority is controlling against him. Let me quote for his benefit:

"It is not alleged that the defendant represents to the public that the bookcases are of the complainant's manufacture, but only that it makes bookcases and sections in the same sizes, styles, varieties of woods, and finish as the complainant, and that by reason thereof the public are misled."

And again:

"Without doubt a party may adopt distinguishing marks to denote the origin of production as being his own, or he may adopt some other peculiar method of distinguishing his own goods, and thus retain the benefit of the good reputation which he had acquired for them."

And again:

"In the present case the complainant does not rest upon the adoption of \* \* \* special characteristics of any kind, but upon the use of the common features which pertain to the articles made and sold."

Let me suggest that the reason so few cases are found from which earnest ingenuity can even claim to find countenance for such action as that which is herein divulged is because experienced business men do not as a rule attempt such a thing. The courts are constantly endeavoring to uphold and enforce commercial morality, and afford protection to honest enterprise and skill. Justice would be sadly misnamed if, through her equitable arm, she was unwilling or unable to protect the plaintiff in a case like the one at bar. It is unavailing for the defendant to hold aloft the white flag of peace, and, under its supposed protection, to invade and lay waste the plaintiff's well-earned territory. On the question of actual intent to deceive, the law is positively clear that the intent may be inferable from the circumstances of the case. In other words, every one is held to be accountable for the natural and probable result of his acts.

I shall now make my last quotation from authoritative and controlling law—*N. K. Fairbank Co. v. R. W. Bell Co.*, 77 Fed. 877, 23 C. C. A. 554. The Circuit Court of Appeals for my own circuit, speaking through Judge Lacombe, says:

"Business men of ordinary acuteness who wish to establish a distinctive reputation for their goods with the general public, who seek to have such goods so arrayed that they will always be unmistakably recognized by the public, certainly do not begin by assimilating the elements of their design to those of some competing manufacturer; when they are found doing this, it must be assumed that for some reason or other they prefer to have the goods arrayed, not in a distinctive dress, but in one resembling their competitor's."

What will that court say, if a case comes before it in which, on the confessed facts, the defendant not only assimilates the elements of the plaintiff's design, but, with an air of bold defiance, imitates the plaintiff's goods with painful minuteness, and asserts an inherent right to do so.

The whole case resolves itself down to this: Has the defendant, by placing its name in some instances, and in others its initials, upon its coffee mills in the manner shown, sufficiently distinguished them so that likelihood of misconception by the ordinary purchaser, acting in the ordinary way, is eliminated? It failed to prevent one customer from sending the defendant's mill to the plaintiff for repair, and such a demonstration of fact is worth any amount of hypothesis. If the defendant was excessively anxious to keep off the plaintiff's territory,

why did it not make some change in color, configuration, or design? The confusion could have been avoided with ease. He prepared the couch with eyes wide open, and he ought to occupy it now with grace. The absolute similarity of the mills in an almost endless variety of ways is so marked, the finger directing the purchaser to the plaintiff is so imperative, that it cannot be possible that the letters on the periphery of the wheels could blot from the ordinary mind the forceful evidence of plaintiff's production which the extremely attractive collocation of colors, shape, and design presents. When the first glance of the eye fixes the idea of origin firmly upon the mind, a minor detail must in the ordinary case pass unnoticed. By dint of comparison and constant repetition in the quiet of the courtroom, such a detail may grow distinct and exceedingly luminous, but in the crowded store, in the rush and hurly-burly of everyday business life, it would fade into nothingness when opposed to the general attractiveness of the entire structure. That the defendant puts into the hands of the retailer or jobber the means of deceiving, whether with or without intention, is too obvious to deserve further discussion.

It is well also to keep in mind the way defendant treated the matter of numbers. The explanation is unsatisfactory, and does not convince me that their use was such as to leave no doubt about the defendant's motive. If the defendant had made its coffee mills so constructed and dressed that their appearance had marked them as distinctively its product and prevented any confusion with the plaintiff's goods, it might perhaps have used the numbers which it did use, with propriety, and with equal propriety could have used the exact numbers applied by the plaintiff to its goods; but, as the case stands, the use of the numbers with such slight change only intensifies the injury, since it furnishes an additional means of creating confusion, misapprehension, and deception. Their use also furnishes a strong reason for doubting the absolute good faith of the defendant, the immaculate purity of its motive. And on this branch of the inquiry let me offer this last word: If the defendant had the courage of its conviction, why should it have stopped the exhaustive simulation of the plaintiff's goods when it reached the point of placing thereon certain usually harmless numbers which are understood by the trade to be used for the sole purpose of indicating size?

The only question open is as to the extent of the relief to be granted. The injunction should be broad enough so that, while not interfering with the inherent right of the defendant to make coffee mills of such design, shape, and dress as it may please to employ, it will prevent said defendant from marketing a mill, not only such as it now markets and threatens to market, but any mill which, by reason of its shape, design, and arrangement of color and number, shall so resemble the coffee mills of the plaintiff as to be likely to create a misapprehension in the minds of the purchasing public of average intelligence, and to tend to lead the ordinary consumer to mistake the mills of the defendant for the mills of the plaintiff.

Let an injunction issue in accordance with this opinion, and let the matter go to a master for an accounting.

**REDFIELD v. BALTIMORE & O. R. CO. et al. (two cases).**

(Circuit Court, S. D. New York. July 29, 1903.)

Nos. 24, 25.

**1. JURISDICTION OF FEDERAL COURT—SUIT BY STOCKHOLDER—ALIGNMENT OF PARTIES.**

In a suit by a stockholder of a corporation of the same state against such corporation and a foreign corporation to charge the latter as trustee because of acts which as majority stockholder it caused the former to do in fraud of its other stockholders, the domestic corporation is not a party in the same interest as complainant, and cannot be aligned with him for the purpose of giving a federal court jurisdiction on the ground of diversity of citizenship.

**2. SAME—INDISPENSABLE PARTIES.**

To a suit by a stockholder in a domestic corporation to charge a foreign corporation as trustee on the ground that as the owner of a majority of the stock of the domestic corporation it caused such corporation to do acts which were in fraud of its other stockholders, the domestic corporation is an indispensable party, and a federal court is without jurisdiction of such suit where complainant and such corporation are citizens of the same state.

In Equity. On demurrers to bills.

Wm. G. Guthrie, for demurrers.

Edw. R. Andrews, opposed.

PLATT, District Judge. In No. 24 the substantial allegations are these: The Baltimore & Ohio Railroad Company, having in 1883 acquired 51 per cent. of the capital stock of the Staten Island Rapid Transit Company in return for its guaranty of the latter company's bonds, in 1898, with ulterior motives, defaulted on its own guaranty, and likewise caused the Staten Island Company to default in the payment of the interest upon its bonds, although earned; that it thereupon, in furtherance of its design to acquire an undivided title to the property of the Staten Island Company, entered into an arrangement with the Staten Island bondholders to foreclose their mortgage; and that at the foreclosure sale, thus brought about, the Staten Island property was in fact acquired in the interest of the Baltimore & Ohio by the new Staten Island Rapid Transit Railway Company, substantially all of whose stock it owned. The relief prayed for is that a number of shares of the capital stock of the Staten Island Rapid Transit Railway Company equivalent to the Baltimore & Ohio Railroad Company's holding in the old Rapid Transit Company, to wit, 2,550 shares, be assigned by the Baltimore & Ohio to the old Rapid Transit Company. The defendant the Baltimore & Ohio Railroad Company is characterized as a trustee for the defendant the Staten Island Rapid Transit Railroad Company, and the injuries said to have been sustained by the plaintiff are conceded to be injuries sustained by him as a member of the corporate body.

In No. 25 there are minor differences. The insolvency of the Baltimore & Ohio Company appears as a reason for default on its guaranty.

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

The relief sought is that the defendant transfer 100 shares of stock in the new Staten Island Company to the plaintiff. The defendant is alleged to be a "trustee for the minority stockholders and the bondholders and for the Staten Island Rapid Transit Railroad Company." The violation of this trust constitutes the gravamen of the bill. In both suits the demurrers challenge the jurisdiction of the court.

In No. 24 the first ground of demurrer filed by both defendants is as follows:

"(1) That this court has no jurisdiction of the said bill because it appears that the plaintiff and the defendant Staten Island Rapid Transit Railroad Company, an indispensable party defendant, are both citizens of the state of New York."

In No. 25 the first ground of demurrer filed by the defendant is as follows:

"(1) That it appears from the plaintiff's own showing by the said bill that the Staten Island Rapid Transit Railway Company and the Staten Island Rapid Transit Railroad Company are necessary and indispensable parties to this suit and should be joined as parties defendants."

Since my decision is based upon the points raised in the quotations made, it is unnecessary to state the other grounds set forth in the demurrers.

Let us first take up suit No. 24. The parties are so arranged herein that citizens of New York appear upon both sides of the case. If they belong there, the Circuit Court has no jurisdiction. *Amory v. Amory*, 95 U. S. 187, 24 L. Ed. 428; *Cont. Ins. Co. v. Rhoads*, 119 U. S. 240, 7 Sup. Ct. 193, 30 L. Ed. 380; *Mex. Railway Co. v. Eckman*, 187 U. S. 433, 23 Sup. Ct. 211, 47 L. Ed. 245. The court is asked to extricate the pleader from the sad plight into which his own logic carried him. That the Staten Island Rapid Transit Railroad Company is an indispensable party does not appear to be in contention. *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Swan Land & Cattle Co. v. Frank*, 148 U. S. 610, 13 Sup. Ct. 691, 37 L. Ed. 577.

We come at once, then, to the vital question, shall that company be aligned as a coplaintiff? That depends upon the answer to another question, is there such an antagonism between the parties as to forbid such alignment? In determining whether such an antagonism does or does not exist there are two views of the case which demand diligent and thoughtful examination.

The plaintiff has invoked the benefit of equity rule 94. He sets forth that he had asked the Staten Island Company to bring suit in its corporate capacity, and had told it that failure to do so would be considered a refusal, and the company, being under the control of the Baltimore & Ohio, has neglected to bring the suit, just as he supposed it would, and he therefore makes it a defendant. He assumes to sue "at the special instance and request of the majority stockholders." The defendant contends that under the federal decisions such a refusal, after request, in and of itself creates such an antagonism as to make its alignment as coplaintiff impossible. A line of cases is cited, beginning with *Dodge v. Woolsey*, 18 How. 346, 15 L. Ed. 401, then *Memphis City v. Dean*, 8 Wall. 73, 19 L. Ed. 326, and *Greenwood v. Freight R. Co.*, 105 U. S. 16, 26 L. Ed. 961; *Detroit v. Dean*, 106

U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300, is considered inferentially favorable; *Bowdoin College v. Merritt* (C. C.) 63 Fed. 215, is especially referred to as controlling. In their brief counsel for plaintiff seem to appreciate the force of the *Bowdoin College Case*, and cite, as against it, *Barry v. Mo., K. & T. Ry. Co.* and another (C. C.) 27 Fed. 1. If it were necessary to follow the defendant to the limit in his contention on this view of the case, it is not impossible to distinguish the *Barry Case* from the *Bowdoin College Case*, but such a distance my view of this matter does not compel me to travel.

When we look at the facts which are admitted by the demurrer, the antagonism impresses itself quite as forcibly upon me as it evidently did upon the pleader when he told his story of trick, artifice, and fraud. The chain of reasoning by which counsel metamorphoses an antagonism which seemed really self-evident then into a harmonious and friendly relation now is not well forged. He contends that the *Baltimore & Ohio Company*, the wicked partner or master, or whatever it may seem best to call that company, owned and controlled a majority of the *Staten Island Company's* stock, and through that domination was enabled to bring about the lamentable situation so dolorously portrayed. He argues that an antagonism is legally impossible by reason of that continuous domination. I think that the antagonism is emphasized and accentuated by that fact.

The position of the *Baltimore & Ohio* is certainly an anomalous one. It had a corporate entity of its own, and also controlled the corporate entity of the *Staten Island Company*. So controlling the latter's corporate entity, it was enabled to perpetrate a fraud upon the minority stockholders and the company. Apparently such action placed both corporate entities in antagonism to the complaining member of the minority of the *Staten Island Company*. It would seem necessary for both corporate entities to appear in court with an "opportunity of explanation and defense." *Taylor v. Holmes* (C. C.) 14 Fed. 507. A wrongdoer, be he slave or whatever you please, cannot be expected to request the injured owner of 100 shares of the stock to hale him into a court of equity and expose his shame to the world at large. To align the *Staten Island Company* as coplaintiff would be exceptionally inconsistent in this case, since it was necessarily a party to the injuries complained about, and it would cut a sorry figure in court as a confessed wrongdoer. *N. J. Central R. R. Co. v. Mills*, 113 U. S. 256, 5 Sup. Ct. 456, 28 L. Ed. 949; *East Tenn., etc., R. R. v. Grayson*, 119 U. S. 244, 7 Sup. Ct. 190, 30 L. Ed. 382; *MacGinniss v. B. & M. Cons. Copper, etc., Mining Co.*, 119 Fed. 101, 55 C. C. A. 648.

The antagonism, after the last analysis, is obvious, inherent, fundamental, and jurisdictionally necessary. We may admit, for the sake of argument, that the *Baltimore & Ohio Company* by its major ownership became trustee under an express trust for the minority stockholders and for the company. That does not change the face of affairs so far as the corporate action of the company which it controls is concerned. If that company was a slave at the beginning, it is still a slave. Slavery would render it legally incapable of antagonizing its master. It would be compelled to raise its voice at least in support

of the master's policy. It may have become necessary for the plaintiff to flee from the wrath to come. I do not offer my views upon that point. I have only the word of his eloquent counsel to support the suggestion. But when during that expedition he reaches the gates of this forum, they are, in my opinion, hermetically sealed against him. Whatever the result, he must stand or fall upon the equitable considerations of another tribunal.

Let us glance for a moment at No. 25. Here the plaintiff insists that the Staten Island Company is not an indispensable party. But the very line of reasoning which he adopts to sanction the elimination of that company carries him beyond the power of equity also. Under the decisions, if he can come here at all, he must come as a stockholder representing his stock, as a fractional portion of the corporate entity, demanding relief against the major holder, who has done him and the company to which he belongs a wrong which equity can remedy. Obviously the corporate entity ought to come in and defend itself, explaining its action if it can be explained, and is just as indispensable as the party who controlled that entity. With the record as it stands, the court could not furnish adequate and ample relief. Its power would be seriously hampered. Equity will never permit herself to be so placed. If the corporate entity had become extinct, a different situation would present itself; but the plaintiff is evidently of the opinion that the old Staten Island Company is still quite vigorous and hearty, and I see no reason for taking a different view of the matter.

I have purposely refrained from a discussion of the other interesting points raised by the demurrers, but they have been carefully examined. The suggestions that the new Staten Island Company is an indispensable party, and that there is a lack of equity in the bills as framed, are not without merit.

And now both cases can properly be disposed of at the same time. Let the bills be dismissed, with costs to each defendant in No. 24, and with costs to the defendant in No. 25, and let both dismissals be without prejudice.

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#### TAMPA WATERWORKS CO. v. CITY OF TAMPA.

(Circuit Court, S. D. Florida. July 15, 1903.)

##### 1. JUDGMENTS—CASE PENDING ON APPEAL—RES JUDICATA.

Plaintiff brought suit in the state court to restrain defendant from enforcing a certain city ordinance fixing the maximum rates which plaintiff should charge for water supplied to patrons in defendant city, on the ground that the passage of the ordinance was a violation of plaintiff's contract rights. A demurrer was filed to the bill, which was overruled, and a final decree of injunction rendered. On appeal the judgment was reversed, and the trial court directed to sustain the demurrer and permit further proceedings. On remand of the case the bill was dismissed, and a final decree rendered, from which plaintiff appealed, in order that the Supreme Court might render a final decision, from which a writ of error might be prosecuted to the Supreme Court of the United States. Pending such appeal plaintiff sued in the federal court to restrain the city from enforcing such ordinance, on the ground

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¶ 1. See Judgment, vol. 30, Cent. Dig. § 1025.



that the rates fixed were unreasonable, and operated as a taking of complainant's property without due process of law. *Held*, that the prior suit, while still pending, was not *res judicata* or a bar to the second.

**2. SAME—PUBLIC SERVICE CORPORATION—WATERWORKS—RATES—ESTABLISHMENT—REASONABLENESS—INJUNCTION PENDENTE LITE.**

Where, in a suit to restrain the enforcement of a city ordinance establishing maximum water rates, which the city was authorized to fix under legislative authority, the bill and affidavits of plaintiff waterworks corporation showed that the rates fixed were so low that, if enforced, plaintiff would barely be able to pay operating expenses, it was entitled to an injunction restraining the enforcement of such ordinance *pendente lite*.

In Equity. Heard on motion for injunction *pendente lite*.

Sparkman & Carter and P. B. Knight, for complainant.

Glenn & Wall, for defendant.

PARDEE, Circuit Judge. The bill charges that a certain ordinance of the city of Tampa, passed under authority of the laws of the state of Florida, prescribing maximum rates that the complainant waterworks company may charge for water furnished the city and citizens of Tampa, is unreasonably low, and, if put in force and operation as threatened, will be confiscatory of the complainant's property, and will be a taking of complainant's property without due process of law, in violation of the Constitution of the United States. The facts stated in the bill and affidavits submitted show a decided *prima facie* case in favor of this contention of the complainant company. It is also charged in said bill that the ordinance in question is an impairment of the original contract of the complainant company with the city of Tampa, and in violation of the Constitution in that respect.

The city of Tampa, appearing on this hearing, shows no facts or circumstances in denial of the matters set up in the bill, and contends merely that a certain suit brought by the complainant in the state court of Florida in relation to the same ordinance is a bar to the complainant's bill.

The proceedings in the state court relied upon by the city of Tampa are set out in the bill and otherwise admitted to be as follows: The city of Tampa, on the 20th of December, 1901, without notice, passed Ordinance 274, undertaking to fix the water rates of the water company. This was done under and by virtue of charter 5070, the same being an act of the Legislature passed in 1901 (Act May 31, 1901, Laws 1901, p. 240), providing that cities and towns of the state of Florida were empowered by ordinance to prescribe maximum rates and charges for the supply of water furnished by individuals or corporations to cities, towns, and villages, provided such charges were just and reasonable, and provided also that the act should not be construed to impair the validity of any valid contract heretofore entered into between any city, town, or village and any person or corporation for the supply of water to such city, town, or its inhabitants. Immediately on the passage of the said ordinance the Tampa Waterworks Company filed its bill in the circuit court for Hillsborough county, Fla., claiming that in 1887 they had made a contract with the city of Tampa for the erection in said city of a waterworks plant; that in said contract the city had agreed for a term of years, to wit, 30

years, to take water from the Tampa Waterworks Company, and to pay said company a certain stipulated sum for hydrants, and also fix the rates that the company could charge the inhabitants of said city; that the enforcement of said ordinance would be in violation of said contract, and hence in violation of the contract clause of the Constitution of the United States, prohibiting any state from passing any law impairing the obligation of contracts. Upon the bill being presented to the circuit judge a temporary injunction was issued, restraining the city of Tampa from enforcing the ordinance. There was no allegation in the bill of complaint that the rates then charged by the company were reasonable, or that the rates fixed by Ordinance 274 were unreasonable; the company resting its case solely and entirely upon the ground that the enforcement of the ordinance in question would be in violation of its contract with the city. Thereafter the city of Tampa filed its answer, setting forth at length the fact that the rates charged by the Tampa Waterworks Company were unreasonable, and that the rates fixed by Ordinance 274 were reasonable. It also set forth other facts not necessary now to be stated. It also filed its cross-bill, praying the court, for reasons therein stated, to annul the contract altogether, upon the ground that the city of Tampa had no right to make the contract in question. Thereafter, and upon motion of the city of Tampa, the circuit judge permitted the withdrawal of the answer and the cross-bill filed in said case by the city, and in lieu thereof said city filed a demurrer to the original bill of complaint. The circuit judge overruled the demurrer, and (the city declining to answer) rendered a final decree making the injunction before that time granted perpetual. The city thereupon appealed the case to the Supreme Court of the state, and the sole question before that court was as to whether or not the action of the city of Tampa in passing the ordinance in question was in violation of the contract rights of the complainant.

Section 30 of article 16 of the Constitution of the state of Florida provides as follows:

"The Legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discriminations and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures."

This clause of the Constitution was in force at the time the contract between the city of Tampa and the waterworks company was made, and the Supreme Court held that it became a part of the contract as much as if it had been written into it; that their construction thereof was that the Legislature had the right at any time that it saw fit to invest cities and towns with the power to fix water, gas, electric light, telephone, or street railroad rates, and that when the Legislature by chapter 5070, the same being the act of 1901 above alluded to, invested cities and towns with the power to fix maximum water rates, and when the city of Tampa thereafter, in pursuance of said grant or power, did pass Ordinance 274, the passage of such ordinance did not, and the enforcement thereof would not, violate any contract rights of the Tampa Waterworks Company.

The court stated plainly in its decision that there was no question of the reasonableness of the rates involved in said cause, and thereupon reversed the decree of the lower court, and directed the lower court to sustain the demurrer and remanded the cause for further proceedings. The Supreme Court having remanded the cause for further proceedings, the decision was not final, and although a federal question was clearly involved no writ of error to review the same in the Supreme Court of the United States was permissible. See *Telegraph Co. v. Burnham*, 162 U. S. 341, 16 Sup. Ct. 850, 40 L. Ed. 991; *Clark v. Kansas City*, 172 U. S. 334, 19 Sup. Ct. 207, 44 L. Ed. 392.

When the mandate of the Supreme Court of the state was sent down, the circuit court rendered a decree dismissing the bill of complaint and dissolving the injunction before that time granted. Thereupon the waterworks company appealed from said decision to the Supreme Court of the state of Florida, in order that the Supreme Court of the state might render a final decision in the cause, and, if adverse, a writ of error sued out to review the same in the Supreme Court of the United States. Pending the appeal from the circuit court to the Supreme Court, an application was made by the waterworks company to one of the justices of the Supreme Court for a supersedeas; but on the 30th of June, 1903, the said Supreme Court declined to grant complainant such supersedeas. Said appeal was taken to the January term, 1904, of the Supreme Court of Florida, so that the cause is now pending on appeal from the decision of the circuit court.

While conceding that an appeal in the case was a matter of right, and necessarily that the cause is now pending in the state courts on such appeal, counsel for defendant still contends that the decree of the Supreme Court of the state of Florida rendered on the first appeal is absolutely conclusive, and cuts off all right on the part of the complainant to relitigate the matters there and herein involved.

The decree of the Supreme Court on the former appeal was as follows:

"The interlocutory decrees granting the primary injunction and overruling the demurrer to the bill, as well as the final decree perpetuating the injunction and awarding costs against the city, are reversed, and the cause is remanded with directions to sustain the demurrer to the bill and *for such further proceedings as may be agreeable to equity practice and consistent with this opinion.*" (Italics mine.)

It is not necessary to cite further authority to the effect that a decree of an appellate court remanding a cause for further proceedings is not a final decree, and cannot be sustained as *res judicata* in any other court. Certainly, the views of judges, as expressed in opinions and not embodied in a decree, are not *res judicata*. Such views may be conclusive on the court which announces them, and on inferior courts of the same jurisdiction, but they are subject to doubt and denial in other courts.

It appears that the Supreme Court of Florida upon a second appeal from the inferior court declines to reconsider any question of law decided upon the first appeal. *Hart v. Stribling*, 25 Fla. 445, 6 South. 455; *Doyle v. Wade*, 23 Fla. 90, 11 South. 516, 11 Am. St. Rep. 334; *Reynolds v. Fla. Cent. & Pen. R. R. Co.*, 42 Fla. 451, 28

South. 861; Sanderson v. Sanderson, 20 Fla. 298; Wilson v. Fridenberg, 21 Fla. 386; State v. White, 40 Fla. 318, 24 South. 160. It also appears from the above cited cases that when a second appeal is taken the court does not dismiss that appeal for want of jurisdiction, but, on the contrary, entertains jurisdiction and gives judgment. In Hart v. Stribling and Doyle v. Wade and Reynolds v. Fla. Cent. & Pen. R. R. Co. the court not only entertained jurisdiction of the appeal, but reversed the judgment of the court below. In Sanderson v. Sanderson the court affirmed the judgment. In Wilson v. Fridenberg the court rendered a new decree. *Lis pendens* in a state court does not bar proceedings between the same parties on the same cause of action in the federal courts. Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Bryar v. Campbell, 177 U. S. 654, 20 Sup. Ct. 794, 44 L. Ed. 926.

I am well satisfied that the decree and proceedings in the Circuit Court of Hillsborough county, now pending on appeal in the Supreme Court of the state of Florida between the parties hereto, wherein the constitutionality of Ordinance 274 of the council of the city of Tampa is involved, constitute no bar to the proceedings herein, where is mainly involved the reasonableness of the maximum water rates prescribed in said ordinance.

On the facts stated in the bill, and affidavits in support thereof, it is clear that the maximum rates imposed by the said Ordinance 274, if forced upon the complainant, will be practically confiscatory of the complainant's property. It is clearly shown that with said rates in force the complainant would barely be able to pay operating expenses. It seems to me, therefore, that an injunction *pendente lite* should issue to protect the rights of complainant; but, as this conclusion is based entirely upon the facts presented by the bill and affidavits in support thereof, I think it proper to require a bond to cover the contingency that the complainant's case may not be established on contradictory hearing and final decree.

It is therefore ordered that an injunction issue enjoining and restraining the defendant, the city of Tampa, from enforcing said Ordinance 274, or any provision thereof, until the further order of the court, upon complainant's giving bond in the sum of \$5,000, with security to be approved by the clerk, in favor of the city of Tampa, in its own interest, and in trust for water consumers of said city, conditioned that, if complainant shall not obtain relief under the present bill, the said complainant will refund on demand to the said city of Tampa all amounts collected for water during the pendency of this suit in excess of the rates prescribed in said Ordinance 274. Should the litigation be unduly prolonged, and said bond be found insufficient in amount, another bond in a further amount may be required.

## NEW RUPERRA S. S. CO. v. 2,000 TONS OF COAL.

(District Court, D. Massachusetts. July 20, 1903.)

No. 1,399.

## 1. SHIPPING—CONSTRUCTION OF CHARTER PARTY—TIME FOR DISCHARGING.

A provision of a charter party that lay days for unloading shall commence "when steamer is ready to unload and written notice given, whether in berth or not," must be given effect; and delay in waiting for a berth is chargeable against the charterer, although the lay days do not commence merely by notice given of the steamer's arrival in port, but only when she is actually ready to unload, so far as she can be made so by those in charge.

## 2. SAME—EXCEPTION IN CASE OF STRIKES.

A delay in obtaining a berth at a port because of the large number of vessels unloading coal brought from foreign countries, owing to a domestic shortage caused by a strike of miners, was not caused by strikes, within an exception in the charter party.

## 3. SAME—CAUSES BEYOND CHARTERER'S CONTROL—WAITING TURN AT DOCK.

Where a charter party required the vessel to be discharged at a fixed rate after she was ready to unload, whether in berth or not, a provision that, "in case of strikes, \* \* \* or any other causes or accidents beyond the control of the consignees, which prevent or delay the discharging, such time is not to count," does not exempt the charterer from liability for delay caused by the vessel waiting her turn.

In Admiralty. Suit for demurrage.

Carver & Blodgett, for libellant.

Tower, Talbot & Hiler, for claimant.

LOWELL, District Judge. The steamer *Roath*, carrying about 5,400 tons of coal, was chartered in Cardiff October 1, 1902. She sailed in cargo from Wales November 2d, and arrived at Boston November 18th. The cargo had already been sold to various persons on the line of the Boston & Maine Railroad, and so could be most conveniently discharged at the Mystic dock. In consequence of the anthracite coal strike, an unusually large amount of foreign coal was brought into Boston in November and December, 1902, and all vessels engaged in the foreign coal trade were much delayed in their discharge. Many vessels were waiting their turn to discharge at the Mystic dock. The *Roath* drew too much water to be berthed safely without some lightering. About December 1st she was lightered of 500 tons, and on December 5th she was berthed in her turn at Mystic dock, and thereafter was discharged at the rate of about 700 tons a day. The charter party provided:

"That the said steamer, \* \* \* being so loaded, shall thereafter proceed with all possible dispatch to Boston, U. S. A., or so near thereunto as she can safely get, and there deliver her cargo alongside any wharf and/or vessel and/or craft, as ordered, where she can safely deliver, always afloat; but if required to shift, the expense of so doing to be paid by consignees, and the time to count, on being paid freight, at the rate of  $\frac{8}{s}$ , say eight shillings and sixpence. (8) The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the steamer, at the average rate

¶1. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

of 750 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained, consignees to pay steamer demurrage at the rate of fourpence per net register ton per running day, or pro rata for part thereof, time to commence when steamer is ready to unload, and written notice given, whether in berth or not. In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignees, which prevent or delay the discharging, such time is not to count, unless the steamer is already on demurrage. Charterers to effect the discharge of the cargo, steamer paying one shilling (25 cents) per ton of 20 cwt., or 1,015 kilos, and providing only steam, steam winches, winchmen, gins, and falls."

The claimant has contended:

(1) That the lay days did not begin before the steamer's arrival at her berth in Mystic dock. The English cases seem to sustain this contention, where the charter party does not contain the phrase "whether in berth or not." *Murphy v. Coffin*, 12 Q. B. D. 87. Whatever may be the rule in the absence of these words, they are plainly intended to settle the controversy which might otherwise arise between charterer and owner. Whether this settlement is effected by fixing the period when the voyage is ended, or by fixing the time when the lay days begin, irrespective of the end of the voyage, need not be determined here. That the lay days began when the vessel was in port ready to discharge, "whether in berth or not," is clear. The American cases are not more favorable to the claimant than are the English.

(2) That the lay days did not begin until the vessel was really ready to unload, having come to the wharf, or as near it as she could get, with hatches off, winches ready, etc.; that the time should not be reckoned from the notification given to the charterer just after the vessel had come to anchor in the lower harbor. This is true. "Ready to unload" means actually ready to discharge, so far as the vessel can be made ready by those controlling her. In this case the steamer was "ready to unload" November 18th.

(3) That the vessel must deliver alongside the wharf, and that demurrage did not begin until she was ready to do so. This contention is answered under 1 and 5. If the charterer undertook, in effect, to find the steamer a berth, he is liable for the delay caused by her not getting one.

(4) That the delay was caused by "strikes." The connection of the strike with the delay was too remote. This has been held in cases where the connection was closer than here.

(5) That the delay was due to "other causes or accidents beyond the control of the consignees." In *Davis v. Wallace*, 3 Cliff. 123, the charter gave the vessel "quick discharge," and made the charterers liable "provided detention should happen by their own or their agent's default." It was held that the charterers were liable for the delay caused by the vessel's waiting her turn. This case is an authority for the libellant. It is not disputed that an agreement to discharge at a fixed rate is at least as absolute as one to discharge with quick dispatch. Liability for delay happening by the charterer's default is not more extensive than that for delay not arising from causes or accidents beyond the charterer's control. Libellant's counsel, indeed, did not seriously contend that he could prevail if *Davis v. Wallace* were

followed here. He urged that the language there used concerning the charterer's default was overlooked by the court, and that the case has since been overruled, or at least doubted. But *Davis v. Wallace* has been cited and approved many times, and the decision has never been called in question. In some opinions the default clause was specifically mentioned. See *Futterer v. Abenheim*, Fed. Cas. No. 5,164; *Gronstadt v. Withoff* (D. C.) 15 Fed. 265; *Id.* (C. C.) 21 Fed. 253; *Sleeper v. Puig*, Fed. Cas. No. 12,940; *Mott v. Frost* (D. C.) 47 Fed. 82, 84; *Hagar v. Elmslie*, 107 Fed. 511, 46 C. C. A. 446; *Moody v. Five Thousand Laths* (D. C.) 2 Fed. 607; *Williams v. Theobald* (D. C.) 15 Fed. 465; *Fish v. 150 Tons* (D. C.) 20 Fed. 201; *Thacher v. Boston Gas Co.* 2 Low. 361, Fed. Cas. No. 13,850; *Keen v. Audenried*, Fed. Cas. No. 7,639; *Davis v. Pendergast*, Fed. Cas. No. 3,647; *Carbon Co. v. Ennis*, 114 Fed. 260, 52 C. C. A. 146. If there be anything to the contrary in *Flood v. Crowell*, 92 Fed. 402, 34 C. C. A. 415 (which is not asserted), it is opposed to all other authorities. In *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106, the court assumed that *Davis v. Wallace* was correctly decided, and was at pains to show that delay caused by bombardment was not analogous to delay caused by crowded wharves. Cases like *The Viola* (D. C.) 90 Fed. 750, are concerned only with the discharge of vessels in the absence of express agreement. If there be material difference between American and English law on the question here presented, the former must prevail, as it is the *lex loci solutionis*; but by English law the result would probably be the same. Thus in *Re An Arbitration*, 8 Asp. M. L. C. 330, the words in question, which are commonly used in English charter parties, were held to mean causes *ejusdem generis* with those previously mentioned.

Following *Davis v. Wallace*, I hold that the libellant is entitled to recover.

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#### THE PRUDENCE et al.

(District Court, S. D. New York. July 13, 1903.)

#### 1. COLLISION—SAILING VESSEL AND BARGE IN TOW—FAULT OF TUG.

A tug with three barges in tow on a long hawser held in fault for a collision in the night in Delaware Bay between the rear barge, which was 460 fathoms behind, and a meeting schooner, which was at the time tacking, and on a crossing course, for her failure to keep a lookout, and for not taking any measures to avoid the schooner, rendered especially necessary by the length of her tow. The schooner, which had a vigilant lookout, and held her course until collision was inevitable if it was continued, held not in fault.

In Admiralty. Suit for collision.

Owen & Sturges, for libellants.

Carpenter, Park & Symmers, for the Prudence.

ADAMS, District Judge. This action was brought by the libellants, the owners of the Schooner William D. Marvel, against the Steamtug Prudence, to recover the damages suffered by them from a collision, which occurred in Delaware Bay about 1.30 o'clock in the

morning of the 14th of August, 1902, between the schooner and the barge Drifton in tow of the Prudence. The schooner was bound from Boston to Philadelphia, laden with empty barrels, and the Prudence, with three barges in tow tandem, laden with coal, was bound from Philadelphia to New York. The first barge was about 200 fathoms astern of the Prudence, the next about 130 fathoms astern of the first barge, and the last, the Drifton, was about the same distance astern of the second barge. The night was clear. The tide was ebb. The wind was strong from the north northeast. The exact place of the collision is in dispute but it admittedly occurred a short distance above the Breakwater. The schooner's general course was north northwest and the tug's south southeast.

The libel alleges that the tug's three towing lights were discovered bearing off the schooner's port quarter while the schooner was on her port tack; that when the schooner had reached the Over Falls, on the Cape May side of the Bay, it became necessary for her to tack and the tug's lights then bore off the starboard bow; that the tug's red light and the red lights of two barges were discovered but no lights were seen on the other barge until shortly before the collision; that when the tow had approached in such close proximity to the schooner as to make a collision inevitable if the schooner continued her course, the schooner's wheel was hove hard to port and the head sheets raised, those being the only things that could be done to prevent a collision, but as the sea was choppy and the wind was baffling, the schooner failed to come around but lay head to the wind, making no headway; that the tug continued on until finally the Drifton came into collision with the schooner, the latter's jib-boom being carried away by the foremast of the barge and some slight damage done to the barge. The schooner charges the tug with fault in not having a vigilant lookout, in not altering her course and that of the tow to pass under the schooner's stern on her starboard side and in making no attempt to avoid the collision.

The answer of the tug alleges that when she was about half way between the Brandywine Flash Light and the Lightship and steering for the latter, the schooner was observed crossing the bow of the Prudence about a half a mile away and heading apparently about east; that at this time, the speed of the Prudence did not exceed three miles per hour over the bottom; that the schooner was then on her port tack and was upon a course away from and clear of the course of the Prudence; that the schooner then disappeared from view; that shortly thereafter, the schooner's red light was seen three or four points upon the port bow of the Prudence and it was observed that she had come about upon her starboard tack, and was apparently heading in about the opposite direction from that of the tug and tow, so that the courses of the vessels were not such as to involve any risk of collision if the schooner maintained her course; that after the tug had passed the schooner, the latter was seen to come into the wind but failed to go about and paid off under full sail towards the last barge in the tow and shortly thereafter they came together; that when it was observed by those on the tug that there was danger of collision between the schooner and the Drifton,



the engines of the tug were slowed; that previous to the collision the Drifton changed her course to the starboard so that at the time of the collision, her red light only was in view to those on the tug; that at the time of the collision the schooner was still paying off and headed for the barge at nearly right angles. The tug charges the schooner with fault (1) in not beating out her starboard tack, instead of going about on her port tack; (2) in not casting anchor when she missed stays; (3) in not having an efficient lookout; (4) in failing to observe the red light of the Drifton, which was a regulation light and burning brightly.

The testimony substantially supports the contention of the libellants. It appears that the schooner had a competent lookout properly stationed and that the lights of the tug and of the first two barges were duly seen and reported. The lights of the Drifton were not seen until the vessels were almost in the jaws of the collision and as a vigilant watch was kept on the schooner and no testimony has been produced from the Drifton, or the other barges as to the light, I conclude that it was defective. In any event, it only bears upon the question whether the schooner should be held in fault so as to effect a division of the damages.

There can be no doubt about the fault of the tug. She was bound to keep her tow clear of the schooner's course and it was the duty of the schooner to keep her course until it could be plainly seen that by doing so she was running into a collision. The *Maverick* (D. C.) 75 Fed. 845; *Id.*, 84 Fed. 906, 28 C. C. A. 562. Admittedly, the tug did not change her course to avoid the schooner, nor reduce her headway until a collision was imminent. The schooner was seen to cross the course of the tug on her port tack some distance away and then passed out of view. When again seen from the tug, she was on her starboard tack, showing her red light and about three fourths of a mile away. The navigator of the tug incorrectly supposed that the schooner was not approaching the tow and that by keeping her course, she would avoid it. The tug contends that the schooner was three points on the tug's port bow when she was seen on her starboard tack but this is doubtful. The wind was not exactly steady but was in a general north northeasterly direction. The schooner could not sail nearer the wind, than five or six points, and necessarily proceeded on a course northwest by north or northwest. As the tug was going south southeast, the courses were somewhat crossing, instead of being opposite, and a collision would ensue if both vessels kept their courses, unless the schooner was a considerable distance to the windward of the tug and tow, especially in view of the length of the tow and of the fact that the tide set the schooner somewhat to the westward. The testimony on the schooner's part shows that when on the starboard tack, she was sailing by compass, as steadily as practicable, on a course between northwest and northwest by north, until the Drifton was made out and there was danger of collision. The circumstances show that the schooner was not far enough to the windward of the tug and tow to avoid the latter by keeping her course. There certainly can be no just criticism upon the schooner for not beating out this tack. As for the port tack,

the testimony of the schooner shows that she went as far as she prudently could towards the Over Falls Shoals before she went about on her starboard tack. Then, as I have said, the starboard tack course was kept until danger appeared from the third barge. In endeavoring to avoid this danger, and when in extremis, the schooner attempted to tack again and missed stays, apparently without any remissness on her part, as the wind was baffling; certainly without legal fault being attributable to her in view of her situation. While in this condition, she was set towards the tow by the wind and tide and the collision occurred. The primary cause of the collision, was the neglect of the tug to shape her course so that the schooner would not collide with the tow. This the tug could do in any way she wished, so that the result should be accomplished, but apparently the prudent way for her to navigate was to starboard her helm when the schooner was made out on her own port bow and pass the schooner starboard to starboard.

The tug had no lookout especially assigned to that duty. It is claimed that the mate, who was in charge of the navigation, was standing outside the pilot house acting as lookout but his other duties absorbed his attention to a certain extent and it is evident from the fact that he did not observe the schooner when she first came about on her starboard tack, not very far distant, that he was not vigilantly performing a lookout's duty.

The tug was in fault for not avoiding the schooner, for not having a lookout and for not stopping and reversing in time to avoid the collision. There is no evidence that if the schooner had anchored, the collision would have been avoided, and I find no fault upon her part.

Decree for the libellants, with an order of reference.

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#### THE ISOLA DI PROCIDA.

(District Court, S. D. New York. June 29, 1902.)

**1. SHIPPING—FALSE BILL OF LADING—POWER OF MASTER TO BIND SHIP.**

Under the rule of the federal courts a master has no power to bind the owners or the ship by a false bill of lading, whether the falsity is in relation to the amount of goods shipped or the date of the shipment, and this rule is not changed by the provisions of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]). Such act subjects a person guilty of a violation of its provisions respecting bills of lading to a fine, which is made a lien on the vessel, but does not make the vessel liable for the damages occasioned thereby.

In Admiralty. Suit in rem to recover damages for issuance of false bill of lading.

Martin A. Ryan, for libellant.

Ullo & Ruebsamen, for claimant.

HOLT, District Judge. This libel is filed against the steamship Isola di Procida, to recover damages for issuing a false bill of lading. In August, 1901, Solon J. Vlasto, of New York, the libellant's

assignor, agreed with the Banca Mobiliare Societa Anonima, a bank doing business in Fiume, Sicily, to purchase from it 800 tons of brimstone, to be shipped during September. Vlasto thereupon arranged with John Munroe & Co., of New York, for a credit with that house for the payment. The letter of credit provided that the bills under it should be drawn on Munroe & Co., of Paris, prior to October 1, 1901, accompanied by bills of lading. The bank drew a draft on Munroe & Co., at Paris, for the price of the brimstone, which, upon presentation, was duly accepted and paid in the regular course of business. The draft was dated September 30th, and had annexed a bill of lading, dated at Girgenti, Sicily, September 30th, acknowledging the receipt upon the steamship *Isola di Procida* of the 800 tons of brimstone. This bill of lading was signed, "For the Master, per pro. Munzone, Mineo & Co., Agents." No brimstone had been received on the steamship on September 30th, the date of the bill of lading. The steamship at that time was at Marseilles. She reached Girgenti October 12th, took the 800 tons of brimstone on board, sailed from that port October 16th, and arrived in New York November 19, 1901. Between the time when the brimstone would have arrived in New York, if it had been shipped in September, and the time when it actually arrived, there was a fall in the price of brimstone, and the libellant sues to recover the damage caused by such fall in price.

The principal defense pleaded in the answer is, in substance, that the persons who signed the bill of lading had no authority from the owners of the ship to do so. Upon this point I think that the proof of the ratification of the bill of lading by the master and owners of the steamship is such that the bill of lading signed for the master by Munzone, Mineo & Co., as agents, is of equal legal effect as if it had been signed by the master personally. But, in my opinion, if it had been signed by the master, it would not have bound the ship, so far as the incorrect date is concerned. The general rule, under the decisions in the federal courts, is that the master of a vessel has no power to bind the owners of the ship by a false bill of lading. *Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341; *Bulkley v. Cotton Co.*, 24 How. 386, 16 L. Ed. 599; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *The Loon*, 7 Blatchf. 244, Fed. Cas. No. 8,499; *Robinson v. Memphis, etc., Co. (C. C.)* 9 Fed. 129; *Id.*, 16 Fed. 57; *American Sugar Refining Co. v. Maddock*, 93 Fed. 980, 36 C. C. A. 42; *Missouri, etc., Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944. Various state courts hold that common carriers are estopped from denying their liability upon a false bill of lading given by the master or agent. *Armour v. Michigan, etc., Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Bank of Batavia v. New York, etc., Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *Brooke v. R. R. Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; *Wichita Savings Bank v. Atchison, etc., Co.*, 20 Kan. 519; *Sioux City, etc., Co. v. First Nat. Bank*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488. But this is not the rule in the federal courts. Most of the cases in which the rule has been applied have been cases in which either no goods were shipped, or a less amount was shipped than stated in the bill of lading; but

the rule is based on the principle that a master has no implied authority to give a false bill of lading of any kind, and I think that the principle would have the same application to a bill of lading which is false in the date as to one which is false in the amount. I think, therefore, that in this case, so far as it is governed by the general rule of law established by the decisions in the federal courts, the libellant cannot recover damages against the steamship because of the false date of the bill of lading.

The question arises, however, whether the fourth section of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2947]) has modified the general rule. That section requires a bill of lading to be issued to shippers stating the various particulars usually contained in a bill of lading, and provides that such document shall be prima facie evidence of the receipt of the merchandise therein described; and section 5, 27 Stat. 446 [U. S. Comp. St. 1901, p. 2947], provides that for a violation of any of the provisions of the act the agent, owner, or master of the vessel guilty of such violation, or who refuses to issue on demand the bill of lading therein provided for, shall be liable to a fine not exceeding \$2,000, and that the amount of the fine and costs for such violation shall be a lien upon the vessel. I think that these sections impose no new duty upon the master. It was always the duty of the master to issue a bill of lading, and it was always his duty to issue a true one. The provision in the Harter act that such document should be prima facie evidence of the receipt of the merchandise therein described adds nothing to the general rule of law previously existing. A bill of lading was always prima facie evidence of its contents. The legal question in respect to which the contrariety of view in different jurisdictions has arisen has been whether the receipt contained in the bill of lading was conclusive, or only presumptive, evidence of its contents. The true construction, in my opinion, of the provisions of the Harter act in regard to bills of lading is that the rule previously established in the federal courts that a false bill of lading is not binding on the owner or the ship still remains the law; but, if a false bill of lading is given, the person giving it is liable to a fine not exceeding \$2,000, and the amount of that fine is made a lien on the vessel. But any damage caused by the falsehood does not create any lien on the ship. The true remedy of the party injured in such a case is an action against the person who actually issued the false bill of lading. *Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341; *Stumore v. Breen*, 12 App. Cas. 698; *Relyea v. N. H., etc., Co.*, 42 Conn. 579.

My conclusion is that the libel should be dismissed, with costs.

## In re STUDEBAKER.

(District Court, S. D. New York. March 19, 1903.)

## 1. BANKRUPTCY—DISCHARGE—DESTRUCTION OF BOOKS AND RECORDS.

Where it was shown that a bankrupt inherited stocks from his father of the value of \$150,000, which, according to his testimony, he sold, and the proceeds of which he spent in stock speculations and gambling within three years preceding his bankruptcy, the destruction of his bank check-book and passbook within a year prior to his bankruptcy, unexplained, justifies an inference that it was with fraudulent intent to conceal his true financial condition, and is sufficient ground for refusing his discharge.

In Bankruptcy. On application for discharge.

To the Honorable George B. Adams, Judge of the District Court of the United States in said District:

I, the undersigned, referee in bankruptcy, to whom as special commissioner the issues of specifications herein were duly referred, to ascertain and report the facts, respectfully report:

"That the said issues were brought on for hearing, and I was attended upon said hearing by the counsel for the opposing creditor and the counsel for the bankrupt, and that testimony was adduced thereon, the stenographic minutes of which are herewith filed, marked 'Schedule A.' That the specifications were filed on behalf of Max Bleiman, a creditor, and which are substantially as follows:

"First. That the said bankrupt knowingly and fraudulently concealed from his trustee, etc., property belonging to his estate in bankruptcy, to the amount of about \$150,000, alleged to have been realized by him from the sale of stock bequeathed him by his father.

"Second. That he knowingly and fraudulently concealed, etc., other property belonging to his said estate in bankruptcy, consisting of his salary of \$3,600 per year, paid to his wife, and alleged to have been held by her for said bankrupt.

"Third. That he knowingly and fraudulently made false oath in these proceedings in omitting from his schedules the above-mentioned property.

"Fourth. With fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, he destroyed certain records, etc.

"Fifth. That with like intent and in like contemplation he failed to keep books of account, etc.

"Sixth. Knowingly and fraudulently made false oath in omitting from his schedules \$5,000 alleged to have been in his possession or under his control. The testimony shows, in substance, that in about 1897 the bankrupt received by bequest from his father, who died October, 1897, 1,000 shares of stock in the Studebaker Carriage Company, besides some real estate; that he disposed of said stock from time to time, and received therefor about \$150,000. The bankrupt testified that the whole of the sum received from the sale of the said stock he has spent; that it was lost in gambling—cards, faro, and horses—and that no one holds any of said stock in trust for him (see examination before U. S. commissioner, pp. 3 and 9); that he was never engaged in any trade or business, and never kept any books (page 4); that he ran through the above-mentioned sum of money in a period of about three years; that he had memoranda of the purchase and sales of stock, but he does not know what became of them (page 9); that he is employed now by the Studebaker Manufacturing Company, which has a place of business in this city, at a salary of \$300 per month, which employment began about March, 1901; that this salary is paid over to his wife. It seems that the payment is made by checks either payable to her order or payable to his order and indorsed for him by her (see page 12; also stenographer's minutes of testimony before referee, page 2), and that the checks or their proceeds are deposited in her bank account, or applied by her to the payment of family expenses. The bankrupt testifies (testimony before the commissioner, page 14) that about \$30,000 of the proceeds of this stock was used in paying debts previously

contracted, and that some of these shares of stock was disposed of by him in Chicago. It also appears that after coming from Chicago he opened an account in the Second National Bank in this city. It appears from the transcript of said account in evidence, and filed herewith, that the account was opened February 23, 1899, and closed October 23, 1901, the total amount of deposits during that interval being \$70,032.50, and the account being closed with an overdraft of \$1.47.

"The only witnesses produced were the bankrupt and his wife, and their testimony is uncontradicted. There is, therefore no direct evidence that any other disposition was made of the proceeds of the Studebaker stock than to which the bankrupt testified, and the claim that that amount or any considerable part of it is still in the bankrupt's possession seems to rest chiefly upon the improbability that any man could dissipate in the course of three or four years the sum of \$150,000 in stock speculation and gambling. No attempt was made to contradict the statement of losses in stock speculation by calling the broker through whom said speculations were had, and, while such improvident and reckless speculation is not, it is hoped, a frequent occurrence, there is nothing impossible, or even improbable, in the story that so large a sum was dissipated in stock speculations, especially when to such speculations is added betting on horse races and gambling at faro. The bankrupt's account in the Second National Bank tends to corroborate his testimony, showing, as it does, that he expended over \$70,000 between February 21, 1899, and October 23, 1901, during which period he had no source of income excepting this bequest and his stock speculations and gambling.

"I recall nothing in the testimony before me which would justify a finding of fact that any part of the proceeds of this stock is in the hands of the bankrupt, and concealed from his trustee; and the same remark applies to the sum of \$5,000 or less which the bankrupt received as the proceeds of real estate devised to him by his father.

"I am confirmed in this opinion by the statement in the schedules in which of the \$9,304.54 total liabilities over \$7,600 appears to have been for money borrowed by the bankrupt, and with the exception of \$332.40 borrowed by the bankrupt during the year 1902. It is hardly conceivable that a man, if he had concealed \$150,000, or anything like that sum, would have borrowed in that year over \$7,000 in various sums and from various people, and then sought relief from these comparatively small debts by filing his petition in bankruptcy.

"In regard to the payment of the bankrupt's salary to his wife, the testimony of both the bankrupt and his wife agree that it was paid to her practically directly, and that it was applied, so far as it goes, to the living expenses of the family; and there appears to be no proof that any of this sum is retained or concealed by the bankrupt's wife, or applied for any other purpose than the support of the family, the expenses of which would, as appears from the testimony, be fully equal to, if not in excess of, the amount of such salary. Especially it does not appear that any of the salary received by the bankrupt prior to filing his petition herein remains undisposed of, or retained by anybody for the bankrupt's use. No concealment was made of the fact that the salary was paid to the bankrupt's wife, and, although I do not recall any evidence as to the reason why such payment was made to her rather than to him, the previous actions of the bankrupt, in connection with the large legacy received from his father, would seem to afford a reasonable explanation and justification of the somewhat unusual method of paying the bankrupt's salary to his wife.

"The bankrupt did not, it appears, keep books of account, but, inasmuch as the testimony shows that prior to his present employment he was in no business, and that in his present employment on a salary there seems to be no occasion for keeping a set of mercantile books, I do not think his failure to keep such books can be considered as militating against his discharge.

"So, also, as to the alleged destruction of the books referred to in the fourth specification, while the bankrupt admits that he destroyed some memoranda of stock transactions, I see no evidence from that fact or elsewhere in the testimony before me of any fraudulent intent on his part to conceal his true financial condition by so doing.

"For the foregoing reasons, I am of the opinion that the specifications have not been sustained, and that the bankrupt is entitled to his discharge.

"All of which is respectfully submitted."

Maurice Meyer, for bankrupt.

Lesser Brothers, for creditor.

HOLT, District Judge. This is an application for the bankrupt's discharge. One of the grounds of objection is that the bankrupt, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed his bank checkbook, passbook, and vouchers. The evidence shows that the bankrupt inherited from his father, in 1897, property of the value of \$150,000. He testified that he sold this property, and in the three years before bankruptcy lost it in stock speculation and gambling. He now has a salary of \$3,600 a year, which is paid by arrangement to his wife. He lives on a liberal scale in an apartment for which he pays a rent of \$2,000 a year. His scheduled debts amount to about \$9,000, about \$7,000 of which is for money borrowed within a year before his bankruptcy. He admitted, upon examination, that he had destroyed his bank checkbook and passbook during the year before the adjudication. He gave no explanation for such action. He testified that he never kept any other books. The objecting creditor claimed, and, on the facts, was justified in suspecting, that some of the \$150,000 claimed to have been lost in speculating and gambling was concealed; but he was unable to prove it. If the bankrupt had not destroyed his checkbook, the creditor might have had some basis for investigating the truth of his statement.

Under the circumstances, I think that the inference is justified that the bankrupt destroyed his checkbook and bankbook with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy. The application for his discharge is therefore denied.

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THE EDGAR F. LUCKENBACH.

THE WALLACE B. FLINT.

(District Court, S. D. New York. July 7, 1903.)

1. COLLISION—TUGS WITH TOWS MEETING—VIOLATION OF RULE FOR PASSING.

Two tugs held in fault for a collision between their respective tows in East river for violation of article 18 of the inland rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2281]), which required them when meeting to pass port to port, and one with two barges lashed together in tow on a short hawser, having a combined width of 85 feet, for the further reason that, after making the agreement for passing, she failed to comply with it by changing her course until the two vessels were so close together that her tow could not follow in time to avoid the collision.

In Admiralty. Suit for collision.

James T. Kilbreth, for libellant.

Peter S. Carter, for Luckenbach.

Carpenter, Park & Symmers, for Flint.

ADAMS, District Judge. The libel herein was filed by the Coast-wise Steamship Company against the tugs Edgar F. Luckenbach and Wallace B. Flint, to recover the damages it suffered from a collision which occurred in the East River, about 9 o'clock p. m., on the 9th of November, 1901, between its barge Chalmette, in tow of the Luckenbach on hawsers and a car float, which was being towed by the Flint on her starboard side.

The Luckenbach, with the Chalmette and another barge, both of them light, was bound from Providence, Rhode Island, to Newport News, Virginia. She had brought the barges through the Sound tandem, on long hawsers, but when the vicinity of Riker's Island was reached, they were placed alongside of each other, bow to bow, the Chalmette being on the starboard side, and made securely fast. A short hawser, of 25 or 30 fathoms, was then run from the bow of each barge to the bitts of the Luckenbach.

The Flint, with a car float on each side, backed out of the slip, between piers 45 and 46, East River, and straightened up the river, bound for the Harlem River. The whole tow was about 90 feet wide. The Luckenbach and tow were then coming down the river, at the rate of 6 or 7 miles per hour, and showed the Flint her red and her green light, as well as her towing lights. There was also another tug, with a car float on each side, coming down the river, showing both of her colored lights and her towing lights. She was about abreast of the Luckenbach and their courses were parallel. There were about 100 feet of clear water between the tows. After the Flint had straightened up the river, she showed both of her colored lights, as well as her towing lights, to the other vessels.

The tide was ebb. All the lights were clearly made out by the respective vessels. There is some reference in the Flint's testimony to the Chalmette's lights being dim, but such fact is not established. It was clearly recognized from the beginning that the Luckenbach had a tow astern.

In this situation, the Flint undertook to go between the other tows. She blew a signal of one whistle to the No. 12, which the latter answered with a similar signal and kept her course and speed. After the response of the No. 12, the Flint blew a signal of two whistles to the Luckenbach, which the latter answered with a similar signal. She was then about a half a mile away from the Flint. As the Luckenbach did not immediately conform to the agreement, the Flint repeated the signal when they had approached each other to within 300 or 400 feet and the Luckenbach again replied with a signal of two whistles. The No. 12 and the Flint passed port to port, about 15 or 20 feet apart. Immediately before reaching the Flint, the Luckenbach stopped her engine and sheered to port and passed the Flint's starboard float about 20 or 25 feet away. She then sheered back, but left the tow to take care of itself. The tow came on with the impetus already given to it by the Luckenbach, aided by the tide, and the Chalmette brought up with her starboard bow against the starboard corner of the starboard float and suffered severe injuries.

The libellant contends that both the Flint and the Luckenbach were in fault, the former principally because she initiated a starboard to star-



board course of navigation, when the rules required that the vessels should pass port to port—Inland Rules art. 18 (Act June 7, 1897, c. 4, § 1, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2281])—and the latter, because she consented to the proposed course, and did not conform to it. The Luckenbach at first joined in other charges made by the libellant against the Flint, viz.: in that she did not maintain a proper lookout; in that she did maintain an improper rate of speed; in that she did not reverse when danger of collision was imminent, etc. The Luckenbach denied all faults on her own part and finally relied upon a charge against the Chalmette that she permitted her hawser to become slack and in that way caused both herself and the Independent to sheer into the Flint's tow. The Flint urges that the Luckenbach and the Chalmette were both in fault, the first because the Luckenbach did not change to port as indicated by her signals, and the Chalmette because she did not have a lookout, and failed to change her course to port.

The part of the river in which the collision took place is much in dispute, those on the Flint and the master of the Luckenbach contend it was in about the middle of the river. Numerous other witnesses say it was close to the Brooklyn shore. After the collision, the barges were very close to the Brooklyn shore but they had swung around then so that they were heading up the river and had doubtless been somewhat set over by the tide. It is probable that the collision was on the Brooklyn side of the river but not so close to the shore that there would have been any difficulty in the tows passing port to port.

I consider that the libellant's principal charges against the tugs should be sustained. It is not necessary to pass upon the minor ones. It is urged by the Flint that she was just starting after getting her heading up the river and that she was practically under no headway. As I find that the place of collision was about opposite pier 50, at the foot of Montgomery Street, Manhattan, and she had proceeded to that point from about opposite pier 45, she had actually proceeded up the river, against the tide, about 1,200 feet, while the Luckenbach had probably come down the river in the same time, more than double the distance. There was, therefore, ample opportunity for the vessels to conform to the rule and no adequate reason has been given for adopting a course at variance with it. Such course should not have been initiated by the Flint, but having been consented to by the Luckenbach, the latter should have been vigilant to conform to the agreement, in which duty it failed, no change of course having been made by her until the second set of signals when the vessels were in such close proximity that collision was imminent.

I do not find any fault on the part of the Chalmette. She had no lookout stationed forward but that omission did not in any way contribute to the collision. With respect to the alleged sheer of the barges to the starboard, the testimony shows that the Chalmette and the Independent were respectively 34 and 51 feet wide or a combined width of 85 feet. The Luckenbach was probably about 30 feet wide. With the barges following directly behind, the Chalmette's starboard side would have been about 30 feet nearer the Flint's course than the starboard side of the Luckenbach. The starboard bow of the Chal-

mette struck the starboard corner of the float and as the Luckenbach, by changing to port, only passed 20 or 25 feet away from the float, it is evident there was no sheer by the barges but merely a failure on their part to immediately follow the tug. There is uncontradicted testimony that the Chalmette's helm was starboarded as soon after the Luckenbach changed as practicable but that it did not have any effect because the Independent did not follow, and the Chalmette, being so much the smaller, could not steer both vessels. There were no witnesses examined from the Independent. She belonged to the owner of the Luckenbach and it must be presumed in the absence of any explanation of their non-production that if any witnesses favorable to the Luckenbach could have been produced they would have appeared on the trial.

Decree for the libellant against the Luckenbach and the Flint, with an order of reference.

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MANNHEIM INS. CO. v. CHIPMAN.

(District Court, S. D. New York. July 14, 1903.)

1. MARINE INSURANCE—PREMIUMS—PAYMENT TO BROKER.

Defendant negotiated an open policy of marine insurance with plaintiff, through certain brokers, to whom plaintiff paid a commission. The premiums were paid monthly by defendant to the brokers, but the latter failed to pay over the sum to plaintiff. This course of dealing was continued for some time, and various letters were written by plaintiff to the brokers, requesting payment, and threatening that if payment was not made to notify the insured that payments to brokers would not be acknowledged. *Held*, that plaintiff recognized the brokers as its agent for the collection of the premiums, and hence was not entitled to recover payments made to such brokers, and not remitted.

2. SAME—ESTOPPEL.

Where an insurer permitted the insured to pay monthly premiums on open marine policies to brokers by whom the insurance was effected, and received such premiums from the brokers without objection, it was estopped from thereafter resorting to insured for premiums paid to the brokers which they had failed to pay over, though the original arrangement did not contemplate collection of premiums by such brokers.

Eustace Conway, for libellant.

Tyler & Durand, for respondent.

ADAMS, District Judge. This is an action brought by the libellant, the Mannheim Insurance Company, to recover from the respondent, William A. Chipman, the sum of \$507.96, claimed to be due for premiums incurred during November, 1901, upon an open policy of marine insurance, dated May 1, 1901, covering cargo shipped by the respondent to Australia. There is no dispute as to the policy having been issued by the libellant, or as to the non-payment of the premiums to it. The premiums were actually paid by the respondent to a firm of insurance brokers, who did not, however, pay the premiums over, and, in January, 1902, made a general assignment for the benefit of

their creditors. The question to be determined is, whether the payment to the brokers was a payment to the underwriter.

The policy, among other things, provided:

"Premiums payable monthly in cash. The assured hereby warrants and agrees to report to the insurers as soon as practicable after they have knowledge thereof, all their above described risks and to pay premiums thereon when due."

The libellant contends that under this provision the respondent was not justified in paying the premiums to the brokers excepting at his own peril, and that the brokers were the respondent's agents in all respects and not the agents of the libellant in any respect.

The respondent, on the other hand, contends that the brokers were the agents in fact of the libellant for the collection of all of the premiums due under the contract, but that in any event, under the circumstances of the case, the libellant is estopped from denying that the brokers acted as its agents in collecting the premiums sued for.

The evidence shows that the insurance contract was the outcome of negotiations had between the agent of the underwriter and one of the brokers who represented the respondent. The policy was delivered to the brokers as the agents of the respondent and subsequently was received by him. The respondent's risks under the policy were reported by him to the brokers and by them to the underwriter. The bills for the premiums were made out in the name of the respondent and sent to the brokers for collection. The brokers were entitled to a commission of ten per cent. from the underwriter on the amount of the business and when they paid the premiums they had collected to the underwriter, they deducted the commission. This had been going on for several months. The premiums were always paid by the respondent to the brokers, who were expected by both parties to remit them to the underwriter. This course of business continued up to the time of the failure of the brokers and thereafter the respondent paid directly to the underwriter. Similar transactions had also taken place between the underwriter and the brokers with other parties with whom the underwriter was dealing. The payments of the premiums collected by the brokers were slow and the agent of the underwriter, on October 3, 1901, threatened the brokers in writing that if he did not receive a check at once, he would notify all insured parties that the premiums had not been paid over and take steps to secure payments from them direct. On the 8th of October, 1901, a similar threat was made and on the 11th of December, 1901, he wrote to the brokers that unless he received a check for all outstanding premiums he should notify the insured that payment of premiums to the brokers would not be considered as exonerating the insured from their obligations to pay the premiums direct to the underwriter. The effect of these threats was that all of the premiums collected up to November were paid by the brokers to the underwriter. Although the underwriter made a general claim that it was entitled to receive the full amount of premiums, without regard to the brokers, yet it appeared that in all of the transactions with the respondent, the brokers collected the premiums from the insured and paid them over to the underwriter, less the brokerage

or commission. The underwriter recognized the brokers as its agents for the collection of the premiums and only looked to the respondent when the brokers failed.

But even if the original arrangement did not contemplate such collection by the brokers, the conduct of the underwriter in allowing the respondent to regularly pay the premiums to the brokers and its receipt of them from the brokers, precludes it from now resorting to the respondent for the premiums which he paid the brokers as usual but which they failed to pay over. The underwriter had notice that the brokers were withholding collected premiums but never notified the respondent, although there was opportunity to do so before the November premiums were paid to the brokers. The premiums were due monthly and had been paid every month by the respondent, who had always taken the brokers' receipts as vouchers for the payments and had no reason to believe that there could be any claim upon him after he had made the usual payments. The libellant, for its own purposes, was indulgent with the brokers and, omitting to advise the respondent of the situation as it existed, permitted him to go on paying them. As the underwriter had established agency relations respecting the premiums with the brokers, it cannot be permitted to repudiate them for the purpose of collecting the unpaid premiums from the respondent.

Libel dismissed.

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#### THE J. C. AUSTIN.

#### THE McDONALD.

(District Court, S. D. New York. June 26, 1903.)

#### 1. COLLISION—TOWS MEETING IN HUDSON RIVER—FAILURE TO KEEP LONG TOW IN LINE.

A steamer engaged in towing about 70 canal boats down the Hudson river, arranged in 14 or 15 tiers on hawsers, and extending to a length of 2,200 feet; which, although having two helper tugs, allowed the tail of the tow to swing close to the eastern shore, while she was on the western side of the river, thus occupying practically the entire channel, was in fault for a collision between one of the tows near the end of the line and a meeting boat which was being pushed up the east side of the channel by a steam canal boat. The latter, which had started to pass the steamer and tow before knowing of its extraordinary length or position across the river, held not in fault where, after discovering the danger, she stopped and reversed, and did all that was possible to avoid the collision.

In Admiralty. Suit for collision.

James J. Macklin, for libellant.

Carpenter, Park & Symmers, for the J. C. Austin.

Amos Van Etten, for the McDonald.

ADAMS, District Judge. This action was brought by the owner of the canal-boat Thomas Leonard against the steam canal-boat J. C. Austin, to recover the damages caused to him by a collision on the 4th of July, 1900, between the Leonard and a boat being pushed ahead

of the Austin. The Leonard was in tow, with about 70 other vessels, on hawsers, of the steamboat McDonald, bound down the Hudson River from Albany to New York. The tow was altogether about 2,200 feet long and consisted of 14 or 15 tiers of four or five boats abreast, the Leonard being the outer port boat in the third hind tier. The Austin, with tow, was bound up the river. The collision occurred at daybreak, a short distance below Coxsackie, close to the eastern bank of the river. The tide was flood. A strong wind was blowing from the west.

The libel charged the Austin with fault in not keeping a proper lookout, in proceeding at a dangerous rate of speed, in not stopping and backing in time to avoid the collision, in not giving any signals and in being on the wrong side of the channel.

The claimant of the Austin brought in the McDonald by petition, alleging that she was in fault for not having a proper lookout, in not keeping the Leonard away from the easterly side of the river and in not having a helper tug on the leeward side of the tow to keep it straight.

The claimant of the McDonald, answering the petition, admitted the collision but denied that there was any fault upon the part of the McDonald and alleged that the Austin was in fault in the respects charged by the libellant.

The testimony shows that the channel at the place of collision was from 500 to 600 feet wide. Before reaching this point, the tow, in following the channel, had passed a bend in the river which gave it a heading to the eastward, and caused the tide to strike the starboard side of the tow, setting it, in connection with the strong westerly wind, over to the eastward. After the bend was turned and a comparatively straight place in the river reached, the tail of the tow, on account of the tow's extreme length, remained on the easterly side and at the place of collision was within a few feet of the wharves on that side while the tug was on the westward side of the channel. It was usual for tows coming down the river to keep over to the westward of the channel, in conformity with legal requirements, and the pilot of the Austin when he first saw the tow, supposing it to be of ordinary length and that there would be room for his boats to pass to the eastward, kept going until it became apparent that the tail of the tow was so near the eastern shore that a collision was imminent, when he endeavored to avoid it by stopping and reversing, but as the tow occupied practically all of the channel, the collision could not be avoided. Those on the McDonald were not aware that the collision had occurred until some time afterwards when it became necessary to care for the Leonard.

The McDonald was in fault for the collision in failing to properly manage her tow so as to avoid danger to other craft, which were entitled to navigate the river without being imperiled by the McDonald's usurpation of all of the channel. She had two helpers, one alongside of herself and one which, when not engaged in picking up boats for the tow, was assisting to tow and at the time of this collision was on the starboard side of the tow about the third tier. There was no tug aft to keep the tow as straight behind the McDonald as the channel of

the river would permit and the tow was allowed to sweep along the eastern shore without any regard to other vessels which might be there. Under the circumstances, it was the McDonald's clear duty to see that a helper was sent to the "rear of the flotilla to assist in keeping the end of the tow in line." *The Richmond*, 63 Fed. 1020, 1022, 12 C. C. A. 1.

I find no fault upon the part of the *Austin*. She was on the right side of the channel and the only way she could have avoided the collision was by waiting below until the tow passed and it is urged on the part of the McDonald that she should have done so, citing: *Scots Grays v. Santiago de Cuba* (D. C.) 5 Fed. 369; *Id.* (C. C.) 19 Fed. 213; *The Marshal* (D. C.) 12 Fed. 921. These cases were decided in conformity with *The Galatea*, 92 U. S. 446, 23 L. Ed. 727. It was there held that where in order to avoid a collision, it was necessary for one of two colliding vessels to stop, it was the duty of that one to do so which was proceeding against the tide, as her movements could be controlled with less difficulty than those of the other vessel. The doctrine evidently has no application against the *Austin*, as she was going with the tide. The evidence shows that those on the *Austin* proceeded upon a reasonable expectation of finding necessary space to pass to the eastward of the McDonald's tow and were disappointed because of its extraordinary length. Moreover, the fault of the McDonald sufficiently accounts for the collision without resorting to a possible delinquency on the part of the *Austin*.

Decree for the libellant against the McDonald, with an order of reference. The libel is dismissed as to the *Austin*.

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#### THE NEWBURGH.

(District Court, S. D. New York, July 3, 1903.)

##### 1. COLLISION—STEAMER AND ANCHORED VESSEL—EXCESSIVE SPEED IN FOG—ANCHORING IN CHANNEL.

A steamer which came into collision with an anchored lighter in the Hudson river in a dense fog, while proceeding at a speed of eight miles an hour, *held* in fault for the collision because of excessive speed; the lighter also *held* in fault for deliberately anchoring in the channel during the fog when in the vicinity of the anchorage grounds, which could easily have been reached.

In Admiralty. Suits for collision.

Carpenter, Park & Symmers, for libellants.

Boardman, Platt & Soley and Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. A libel was filed by Warren A. Davis, an engineer on the steam lighter *Clifford*, against the steam propeller *Newburgh* to recover damages for personal injuries suffered and personal effects lost by reason of a collision, which occurred on

¶ 1. Collision rules as to speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.

the Hudson River, about opposite 104th Street, Manhattan, about 9.30 o'clock A. M., on the 29th of December, 1901. A libel was also filed by Eugene S. Belden, managing owner of the Clifford and of the lighter Christine, which was in tow of the Clifford, on behalf of the owners to recover injuries suffered by reason of damages to the Clifford and the Christine, and on behalf of the crew of the Clifford, who lost some personal effects. Answers were filed by the claimant of the Newburgh and upon the issues raised, testimony was taken to be used in both actions.

It appears that the Clifford, with the Christine on a hawser, was bound from Hammond's Flats to 133rd Street, Hudson River, to load. After rounding the Battery, a fog shut down, which became dense, and the Clifford after proceeding up the river to the vicinity of 90th Street, Manhattan, took the Christine on her port side and anchored. The tide was flood. The fog was so thick then that the master could not determine just where in the river the vessels were, but it is conceded by the claimant of the Clifford that they were somewhat to the eastward of the anchorage grounds, and it is claimed on her behalf, that at the time of the collision, she was about opposite 100th Street. Before the vessels swung to the Clifford's anchor, and while heading across the channel, the Clifford was struck on the starboard side by the Newburgh. Immediately upon letting the anchor go, the Clifford had commenced ringing her fog bell, and continued ringing it at intervals of less than a minute each, for several minutes before the collision. The blow was a severe one and the Clifford sank from its effects in a few minutes.

The Newburgh, a passenger and freight steamer, bound from Manhattan to Newburgh on the Hudson, left her wharf at foot of Franklin Street, about 9 o'clock. According to her story, it was foggy when she left and she proceeded under one bell until about opposite 23rd Street, Manhattan, when the fog lightened up and her engine was hooked up to full speed, which was about 16 miles per hour. When the vicinity of 60th Street was reached, the fog shut down again and the speed was reduced to one-half, or about 8 miles per hour. Shortly afterwards, the bell of the Clifford was heard a little on the starboard bow of the Newburgh and her course, which was about up the centre of the river, was changed  $\frac{1}{2}$  point to port, but her speed was maintained. Suddenly the Clifford appeared ahead, less than 200 feet away, heading to the eastward and the Newburgh stopped and reversed her engine but she could not avoid the Clifford nor materially reduce her headway and the severe collision resulted.

Upon the facts of the collision, both vessels were in fault: the Clifford for anchoring in the channel, when the anchorage grounds were available, and the Newburgh for navigating at an immoderate speed in a fog.

It is urged on behalf of the Clifford, that as the Newburgh was obviously in fault for excessive speed, the Clifford should be excused for not being on the anchorage grounds, and *The A. P. Skidmore and The City of Lawrence*, 115 Fed. 791, 53 C. C. A. 287, is cited in support of the contention. That was a case of collision where the City of Lawrence, at anchor just outside of the anchorage grounds

in the East River, was run into by the Skidmore, which was a moving vessel and held in fault for the absence of lookouts. The City of Lawrence was also held in this court by Judge Brown for not being on anchorage grounds—108 Fed. 972—but was relieved on appeal, as the evidence showed that her pilot did everything he could in the fog to find the anchorage grounds. The Court said:

"With so dense a fog, in a locality frequented by so many vessels, it was hazardous for the steamship to proceed at all, and we are not prepared to say that it was not good judgment on the part of the master to bring her to anchor at the earliest practicable moment after he had satisfied himself that he had reached the anchorage ground."

This case is quite different. The master here deliberately anchored his vessel in the channel, when in the vicinity of the anchorage grounds, which he could easily have reached, because, he said:

"I didn't think it safe to get on any anchorage ground there—it was a good place to get in collision."

In other words, the pilot substituted his judgment for the mandate of the law, with the result of contributing to a collision, and the vessel must be held.

The evidence indicates that the Newburgh was going much faster than 8 miles per hour but that is more than sufficient to condemn her. The fog was so dense that a vessel could not be seen at a greater distance than 200 feet and yet, having knowledge of there being a vessel a short distance ahead, the Newburgh proceeded without any precaution other than slightly changing her heading, with the result of bringing about a dangerous collision. It was no excuse for her that the Clifford was not on the anchorage grounds. The latter from the beginning bore a trifle on the Newburgh's starboard bow, while the anchorage grounds were known to be on her port side. She was therefore navigating with regard to a vessel anchored in the channel and bound to take precautions accordingly, in order to escape liability herself.

The libellants are entitled to recover half damages against the Newburgh. Decree accordingly, with an order of reference.

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ELLIS v. INMAN, POULSEN & CO. et al.

(Circuit Court, D. Oregon. July 30, 1903.)

No. 2,769.

1. MONOPOLIES—ANTI-TRUST LAW—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.

A combination between all the lumber manufacturers of a city to raise and maintain the price of lumber to local consumers, and to refuse to sell lumber to consumers who purchase any part of their supply from outside mills, some of such mills supplying the local market being situated in another state, is not in violation of the Sherman anti-trust law, as in restraint of interstate commerce, its effect on such commerce being indirect and incidental only.

At Law. On demurrer to complaint.



Veazie & Freeman, for plaintiff.

Cake & Cake, for defendant Inman, Poulsen & Co.

Wm. D. Fenton, for other defendants.

BELLINGER, District Judge. The defendants, comprising all the lumber manufacturers of Portland, have entered into a combination to monopolize the local lumber market, and to advance the price of lumber sold for use within the city. There are a number of outside mills, including two mills at Vancouver, in the state of Washington, convenient to the Portland market, and capable of supplying that market with rough lumber, but without adequate facilities for supplying finished and kiln-dried lumber. In consequence of the high prices charged by the combination, the plaintiff, who is a contractor and builder in Portland, and others similarly situated, purchased rough lumber at the Vancouver mills, and, being under the necessity of having finished and dried lumber, applied to the defendants therefor. The defendants refuse to sell plaintiff lumber of this character unless he will agree to buy hereafter all the lumber required by him for use in the city of Portland of them, and will pay, in addition to their usual prices, the difference between the prices at which plaintiff purchased rough lumber at Vancouver and the prices charged for that kind of lumber by the defendants. The combination in this case is to advance the price of lumber to Portland consumers. It has no reference to the trade in lumber with Vancouver. If this is a wrong, it is a wrong done to such consumers, who are compelled to pay extortionate prices to the monopoly. It is not contended that the advance of price in the local market—the thing for which the combination was formed—operates in restraint of the trade in lumber with Vancouver. Such advance has a contrary tendency so far as rough lumber is concerned. And it is not apparent why the defendants, having a particular kind of lumber not obtainable elsewhere, may not refuse to sell such lumber to those who patronize outside mills in the purchase of a part of their supplies, or why the defendants may not discriminate in prices in favor of those who purchase exclusively from them. The tendency of this discrimination is to keep those who are compelled to have finished and dried lumber from purchasing rough lumber at outside mills. Assuming that this operates in restraint of the trade in rough lumber between Vancouver and Portland, it is not such a result as follows directly or immediately from the acts complained of. The discrimination is against all outside mills. A relatively small number of these happen to be located at Vancouver. The remainder are in Oregon, and convenient to the Portland market. Among the Portland purchasers of rough lumber at these outside mills there are some who are consumers of finished and dried lumber. Some of these purchasers of rough lumber resort to the mills at Vancouver, and of these some require finished and dried lumber; and it so happens (but as to this the allegations of the complaint are not definite) that the outside mills, including those at Vancouver, cannot or do not furnish an adequate supply of such lumber; and so we at length reach a point where, through the intervention of special and temporary conditions,

the working of the combination tends indirectly to restrain the trade in rough lumber between Vancouver and Portland. It also in the same way tends to create a trade in finished and dried lumber between these points, since there is no reason why the outside mills cannot, in a short time, be prepared to supply the demand for finished and dried as well as rough lumber; and yet the combination cannot be credited, because of this tendency, with being organized in furtherance of such a trade. If the defendants should greatly reduce the price of all kinds of lumber to all purchasers, it would have a tendency to lessen, if it did not destroy, the trade in lumber now carried on between Vancouver and Portland, yet they would not be accused in so doing of acting in restraint of that trade. No more can they be said to be so acting within the meaning of the act of congress when they raise the price of lumber to their Portland consumers, or discriminate in the sale of special kinds of lumber in favor of customers who buy exclusively from them.

The demurrer is sustained.

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McLAREN et al. v. STANDARD OIL CO. OF NEW YORK.

(District Court, S. D. New York. July 16, 1903.)

1. ADMIRALTY—DELIVERY OF CARGO—SHORTAGE—EVIDENCE.

A ship received 151,886 cases of petroleum to be transported to Japan. The consignee only acknowledged receipt of 151,661. The cargo was tallied out of the steamer by her second and third officers and three of her sailors, whose tally showed a shortage of 753 cases, which was manifestly incorrect. When the discrepancy was discovered, the master requested a recount from the consignee, which was declined, on the ground that it could not be conveniently had, and in the meantime part of the cargo was reshipped. It was shown that no part of the cargo was used on the steamer, and there was no opportunity for abstraction or loss during the voyage, and that all of the cargo received was delivered except six cases, purchased for the steamer's use. *Held*, in the absence of other evidence, such facts established a *prima facie* case of delivery of the entire cargo.

Convers & Kirlin, for libellants.

Wing, Putnam & Burlingham, for respondent.

ADAMS, District Judge. This action was brought by the libellants, the owners of the steamship Strathford, to recover from the respondent, the sum of \$322.98, which it withheld from the freight on a cargo of petroleum, shipped from Philadelphia to Nagasaki, Japan, on the 15th of June, 1901, and consigned to the respondent's agent. The quantity shipped was 151,886 cases but the consignee only acknowledged the receipt of 151,661 cases, and the value of the 225 missing cases is the sum in controversy.

By the terms of the charter party, the steamer was entitled to a berth in discharging where she could lie afloat and in safety. Under this provision, she was discharged at Nagasaki by means of lighters, which were employed by the consignee.

The cargo was tallied out of the steamer into the lighters by the

2nd and 3rd officers of the steamer and 3 of her sailors. At the end of the discharge, according to such tally, the quantity was apparently 753 cases short but it was not actually so, as the consignee acknowledged the receipt of all but 225 cases. It is evident that the steamer's tally is of no importance and there is no reliable evidence as to the quantity that went over her side and was delivered into the lighters. There is no evidence whatever, apart from the consignee's acknowledgment, of the quantity delivered by the lighters. It is shown by the libellants that no cargo was used on the steamer and that there was no opportunity for abstraction or loss during the voyage. There is some positive, and apparently straightforward, general testimony on the part of the steamer that all of the cargo received, excepting 6 cases purchased at Nagasaki for the steamer's use, was delivered to the lighters. When the discrepancy was discovered, the master of the steamer asked the consignee for a recount at Nagasaki but it was not allowed on the ground that it could not conveniently be had. In the meantime, some part of the cargo had been reshipped by the consignee.

The respondent has offered no testimony with reference to the discharge but relies upon the absence of testimony on the part of the libellants to show the delivery of the quantity received on board.

The case is not free from doubt, but I consider that the libellants' testimony suffices to make out a *prima facie* case of delivery to the lighters, and, in the absence of any testimony to overcome it, there should be a decree for the libellants.

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BISHOP et al. v. YORK.

(Circuit Court, M. D. Pennsylvania. September 8, 1903.)

No. 2.

1. EQUITY—SUFFICIENCY OF BILL—RIGHT OF PLAINTIFFS TO MAINTAIN SUIT.

A bill to recover property which was given by a decedent in her lifetime to defendant cannot be maintained where the only right shown in plaintiffs is based on a compromise agreement between them and the executors and devisees of the donor, by which the latter consented that the executors should pay over and convey to plaintiffs one-half of all property and sums which were devised for the use and benefit of said devisees, and it is not shown that the property in suit is any part of that so devised.

In Equity. On demurrer to amended bill.

E. N. Willard, for plaintiffs.

J. A. Beeber, for defendant.

ARCHBALD, District Judge. As stated in the former opinion (118 Fed. 352), the right of the plaintiffs to maintain this bill depends on the interest which they are able to show in the bonds in suit. These bonds were given to the defendant, Luella York, by Elizabeth P. Patterson a few days prior to her death, and it is to call in question the validity of that gift that the suit proceeds. The plaintiffs are step-

children of Mrs. Patterson, being the children of her late husband, Nicholas Patterson, by his first wife; and under the statute law of Ohio, are entitled, in case of her intestacy, to such property as came to her from her husband, their father. 78 Ohio Laws, p. 107, Rev. St. 1892, § 4162. This law can avail them nothing, however, for in the first place Mrs. Patterson left a will, which, although at the start they contested it, they have now agreed should be probated and sustained; and in the next place it does not appear that the bonds in fact came to Mrs. Patterson from her husband. What is said of them in the bill is that they were either given to her by her husband in his lifetime, or bequeathed to her by him, or bought with money or the proceeds of other property given or bequeathed to her by him; and if the latter be true (and it is given as a possible alternative) it is difficult to see how the plaintiffs could claim them under the statute as a part of their father's estate in her hands. This is not, however, of any great importance, for it is virtually conceded by counsel that the plaintiffs must stand or fall by the compromise agreement made with Mrs. Patterson's executor and devisees. By that agreement, in consideration that the plaintiffs would not further contest the wills of their stepmother or their father, as they had been doing, the devisees consented that the executor "should pay over and convey" to the plaintiffs "one-half of all property and sums" which were devised to the executor for the use and benefit of the said devisees. It is to this, and this only, that they can lay claim, and there is nothing to show that the bonds in suit form any part of the property so referred to. They may or may not, depending on the character and extent of the devises and bequests brought into the agreement, of which they were to get one-half. If these embraced the whole estate, their claim may be good; but, on the other hand, if these bequests and devises were specific in amount, or confined to certain designated property, and particularly if there was a residuary clause to other devisees than those who took part in the settlement, it is plain that the agreement gave no interest in the bonds. It is only, as it is averred and proved, that of right they constitute a part of the immediate estate, out of which the plaintiffs are to get their one-half, that we are in any way concerned with them here. The right asserted by the plaintiffs to maintain the bill is an extraordinary one, and has already been denied by a court of co-ordinate rank. *Bishop & Smith v. Leonard* (C. C.) 123 Fed. 981. It is not, therefore, to be sustained where there is doubt with regard to a fact which clearly is an essential basis of it.

Let a decree be drawn dismissing the bill, unless the plaintiffs move to amend within 20 days for sufficient cause shown.

## GREENE et al. v. UNITED SHOE MACHINERY CO.

(Circuit Court of Appeals, First Circuit. March 10, 1903.)

No. 438.

**1. APPEAL—DISMISSAL ON APPLICATION OF APPELLANT—REOPENING OF CASE IN TRIAL COURT.**

Where an appeal has been taken from an interlocutory decree for an injunction and accounting in a patent suit, the Circuit Court of Appeals cannot remand the cause, with leave to the Circuit Court to reopen the decree for further proceedings, without first reversing, nor will it reverse the decree for that purpose, or with any directions, without an examination of the merits, but it may, on a proper application by appellant, dismiss the appeal without prejudice, where it does not appear that the appellee will be unduly prejudiced thereby. *Marden v. Campbell Co.*, 67 Fed. 809, 15 C. C. A. 26, applied.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Charles H. Drew, for appellants.

James E. Maynadier (George A. Rockwell, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This appeal comes up from a decree in favor of the complainant below against the defendants, now the appellants, on a bill alleging infringement of certain letters patent issued for an alleged invention. The case was heard in the Circuit Court on bill, answer, and proofs, with a decree thereon for a master and an injunction. Thereupon, in accordance with the settled practice in this circuit, an appeal was taken to us as from an interlocutory injunction under section 7 of the act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550], establishing the Circuit Courts of Appeals. The time for taking a new appeal from the interlocutory decree has long since expired, so that no further appeal will lie, unless, on proper proceedings, the decree appealed from can be and is reopened.

Since the appeal was entered in this court, the appellants have filed certain affidavits which they claim show important new matter, and which, as they further claim, if submitted to the Circuit Court, would justify that court in reopening the decree appealed from. As we view the present situation of the proceedings, it is not necessary that we should open these affidavits, except only far enough—as we have done—to satisfy ourselves that the appellants proceeded in good faith in filing them and in the applications which they have made to us in connection therewith.

Having filed these affidavits, the appellants first asked us to remand the cause to the Circuit Court, with leave to be given that court to reopen the record and permit the parties to proceed further as set out in the application. An application to remand, with leave for further proceedings in the court below, cannot ordinarily be made with reference to a final decree, because, ordinarily, an appellate tribunal can-

not interfere with proceedings below without first reversing or modifying the decree. This is a self-evident proposition, stated many times by the Supreme Court. That court has steadily pursued this practice from *The Divina Pastora*, 4 Wheat. 52, 65, 4 L. Ed. 512, to *Murdock v. Ward*, 178 U. S. 139, 149, 20 Sup. Ct. 775, 44 L. Ed. 1009. *Ballard v. Searls*, 130 U. S. 50, 56, 9 Sup. Ct. 418, 32 L. Ed. 846, was not an exception, because there the new matter strictly supplemented the decree below.

On an interlocutory decree, however, like that now before us, the Circuit Court has the case in its own breast, and on the dismissal of an appeal without prejudice can reopen any interlocutory proceedings if justice requires it. There may be some special exceptions to this general rule, although none now occurs to us. Notwithstanding this, however, the rule with reference to final decrees so far applies that we cannot ourselves interfere with further proceedings below without first reopening the interlocutory decree, either by a reversal or a modification of it. To remand without reversing or modifying is merely to dismiss the appeal.

It therefore follows that the original application could not be granted in the terms in which it was expressed. Subsequently the appellants twice amended their petition; the first time asking for a continuance in order to make, meanwhile, an application to the Circuit Court, and, next, to the effect that the decree below be reversed, and the cause remanded to the Circuit Court, in order that the court might reopen it, and permit the parties to proceed further. But to reverse even this interlocutory decree would be a serious matter, because thereby the complainant would lose its injunction pending a rehearing in the Circuit Court and another decree. Even in the ordinary case of an application to the appellate tribunal, after a decree, for leave to apply to the court below for supplemental proceedings, investigation is required, as was fully explained by us in *Re Gamewell Company*, 73 Fed. 908, 20 C. C. A. 111, and as practically applied with very much care and scrutiny in *Boston & Revere Electric Street Railway Company v. Bemis Car-Box Company*, 98 Fed. 121, 38 C. C. A. 661. Therefore, as a reversal means so much, any motion therefor, though only for the purpose of further proceedings in the court below, might involve such an examination of the merits as to require postponement of its consideration until the record is opened on the merits; but a proper application in this case would require no such labor.

The appellee remonstrates against the applications made by the appellants, but closes its brief as follows:

"Appellee, therefore, respectfully insists upon a hearing when the cause is reached in its order, unless the appeal before that day shall be dismissed on request of appellants. This was the course in *Marden v. Campbell Co.*, 67 Fed. 809, 15 C. C. A. 26, and seems the proper practice."

We think this reference in every way pertinent. We have examined the record in *Marden v. Campbell Co.*, and find the case in all respects like that at bar. There was an interlocutory decree for an injunction and a master, which had been appealed from. In fact, both parties appealed, but the cross-appeal we need not refer to. After the appeal was entered in this court, and the time within which a new

appeal could be taken had expired, the defendants below filed precisely the same motion as was the present application in its original form, and they accompanied it with affidavits of new matter, as now the appellants have done. The appellee objected to the motion on the ground that it was merely hanging up the case, "like Mahomet's coffin," between the two courts. In our opinion we observed—what has already been stated—that this court "has no power to remand except for the purpose of giving effect to some judgment of its own." We further added as follows:

"It is, however, entirely plain that the appeal given by the seventh section of the act referred to is a privilege or option, and in no way affects or diminishes the right to appeal from the final decree; and as the defendants below, on receiving from this court an oral intimation of the views above expressed, elect to dismiss their appeal without prejudice to their right to take any other appeal which the law may give them, and without prejudice to the questions which may thus be raised, we permit them so to do."

The order in that case was as follows:

"It is ordered that the appeal of the defendants below be dismissed without prejudice to any proceedings in the Circuit Court, or to their right to take any subsequent appeal, and without prejudice to the questions which may be raised by such subsequent appeal, if lawfully taken, but with costs for the complainant below."

In *Seymour v. White County*, 92 Fed. 115, 34 C. C. A. 240, it was held by the Circuit Court of Appeals for the Seventh Circuit that, even on petition for leave to commence in the lower court supplemental proceedings after a final decree on appeal, leave should be granted as a matter of course, unless there were special reasons to the contrary. As already shown with reference to proceedings of that character, we have refused to go to that extent; but in *Marden v. Campbell Co.*, *ubi supra*, it appearing to us that the appellees were acting in good faith, and there being no special cause to the contrary, we gave them the proper relief, notwithstanding the form of their application, and allowed them to dismiss their appeal without prejudice. We can perceive no reason why we should not take the same course in the case at bar.

There is nothing in this conclusion inconsistent with what we held in *Donallan v. The Tannage Patent Company*, 79 Fed. 385, 24 C. C. A. 647. We there stated that an appellant cannot as of right dismiss his own appeal. That is clearly settled, and needs no further observation. We refused to expressly order that the dismissal should be without prejudice, although we said that we left it for the appellant to consider whether or not, after all, he would not obtain, by a mere dismissal of his appeal, all he would obtain if thus expressed. The circumstances were peculiar, as an examination of the record and the briefs makes clear. The appeal was from an *ad interim* injunction, and not from an injunction granted after a hearing on bill, answer, and proofs. The motion to dismiss was without any explanation of the reasons therefor. The appellee did not object to the dismissal, but it did object to its being expressed without prejudice. An *ad interim* injunction, notwithstanding an appeal, remains, to a certain extent, in the breast of the court below; and as it was not at all clear what effect

the court below might give to a dismissal expressed as asked for by the appellant, and as the appellee did not object to dismissal, but did object to the proposed qualification, and as, moreover, the appellant gave no reason for his application, we refused to interfere between the parties, and merely granted what the appellee consented to. In view, especially, of the fact stated in our opinion, that whether the appellant was not, in any event, sure of all he desired to reserve by the words "without prejudice" was for him to consider, it is plain that we determined nothing. We, however, did add to our judgment that the dismissal was on the motion of the appellant, and before any hearing on the merits; and, either with or without that statement, the probable effect of the dismissal would have been without prejudice.

We may well add here that the Supreme Court has shown a growing tendency to approve the practice of making it clear that a dismissal is without prejudice, or without a hearing on the merits, when there has been no such hearing. This begins at least as far back as the case of *Durant v. Essex Company*, 7 Wall. 109, 19 L. Ed. 154. So, in *Gregory v. Boston Safe-Deposit & Trust Company*, 144 U. S. 665, 668, 12 Sup. Ct. 783, 36 L. Ed. 585, the court was careful to modify the decree accordingly, thus acting out of greater caution to save the parties possible future embarrassment. Of course, under the English equity practice with regard to drawing decrees, nothing of this kind would be required, because the ground of dismissal appears; but with us, pursuant to the equity rules of the Supreme Court directing the forms of decrees, there is often an absence of any statement in this particular. The wisdom of this practice of expressing "without prejudice" when the case is not heard on the merits was shown in a marked way in *Baker v. Cummings*, 181 U. S. 117, 125, 21 Sup. Ct. 578, 45 L. Ed. 776, where long litigation was necessary in order to determine the fact whether the dismissal of a prior bill was a bar. Indeed, it would be sufficient on this point to quote *Durant v. Essex Company*, at page 109, 7 Wall., 9 L. Ed. 154, where the opinion says:

"Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in the proper case will be corrected by this court on appeal."

Therefore, there would seem to be no question that, if this appeal is dismissed, the form of order used in *Marden v. The Campbell Company*, 67 Fed. 809, 15 C. C. A. 26, should be used.

The edition of *Daniell's Chancery Practice* of 1837-1841, commended to us by the Supreme Court as determining the rules of equity practice when not otherwise fixed by that court, says that, if an "appellant finds it expedient to withdraw his appeal, he must obtain leave of the House to do so by petition," but that the House will not grant the prayer "in some instances without the consent of the respondent's agent." The author adds, "For there may be cases in which it would be unjust to permit the appellant to withdraw his appeal, and thereby leave him at liberty, at a considerable distance of time afterwards, to bring a new appeal." This is the rule laid down in *The United States*



v. The Minnesota and Northwestern Railroad Company, 18 How. 241, 15 L. Ed. 347. At page 242, 18 How., 15 L. Ed. 347, the opinion says:

"The discontinuance is usually granted on the application, unless some special reason be shown by the defendant for retaining the case with a view to a determination on the merits. Usually, the courts will not allow it, if the party intend at some future time to bring a new appeal, as the allowance under such circumstances would be unjust to the defendant. There is no such ground of objection here, as the Attorney General disclaims trying the questions involved upon the present pleadings."

Also, at page 243, 18 How., 15 L. Ed. 347, the opinion says:

"The Attorney General, however, avers that there are other questions than those appearing on the record, which he deems material to be brought to the consideration of the court in deciding upon the force and effect of these acts of Congress referred to, and without which he is unwilling to submit the case to the final determination of this court; and asks, therefore, for a withdrawal of the appeal. Without expressing any opinion whether there may or may not be questions presented, other than those appearing upon this record, bearing upon the general matters involved in the litigation, the court are of opinion that the grounds stated by the Attorney General, and his opinion expressed as the legal representative of the government, are sufficient to justify us in granting leave for the discontinuance."

The result was that, although the motion was resisted by the counsel for the appellees, the court permitted the dismissal on the mere assurance of the Attorney General that he could make in the court below a different case from that which had come up on the writ of error. Indeed, everything which bears on an order to dismiss, which appeared in the case last cited, appears at bar; in each instance the court having only an assurance of good faith on the part of the appellant, with an absence of any particular circumstances to indicate that the appellee would be especially prejudiced by the dismissal. That we are not required to go further, or to investigate the probable result of an application on the part of the appellant to reopen the case in the court below, was absolutely settled by *United States v. Griffith*, 141 U. S. 212, 11 Sup. Ct. 1005, 35 L. Ed. 719. There the motion by appellants for leave to dismiss the appeal was accompanied by certain correspondence, which the court directed to be withdrawn, so as to leave no inference that it had reached any conclusion as to any matter touching the merits. The court added that the appellants might renew the motion, unaccompanied by other matter, and then the order of dismissal would be entered.

We are not dealing here with any special circumstances showing that the dismissal of the appeal would result in any peculiar injustice to the appellee. Indeed, as we have already shown, the appellee has made no objection; and we had no occasion to investigate the matters to which this opinion relates, except to make sure, in our own behalf, that our conclusions offer no inducement to a loose practice in the respects which the case involves.

The appeal is dismissed, without prejudice to any proceedings in the Circuit Court, or to the right to take any subsequent appeal, and without prejudice to the questions which may be raised by such subsequent appeal, if lawfully taken; and the appellee recovers its costs of appeal.

MOSSBERG et al. v. NUTTER et al.

(Circuit Court of Appeals, First Circuit. March 10, 1903.)

No. 449.

1. APPEAL—DISMISSAL ON APPLICATION OF APPELLANT—REOPENING OF CASE IN TRIAL COURT.

A request from the judge of the trial court, which entered an interlocutory decree for an injunction and accounting in a patent suit, from which decree an appeal is pending in the Circuit Court of Appeals, asking the return of the record that a supplemental bill in the nature of a bill of review may be permitted to be filed by defendant, based upon an examination of the showing of newly discovered evidence offered in support of the application, is sufficient to warrant the dismissal of the appeal without prejudice, as the decree appealed from was not final. *Roemer v. Simon*, 91 U. S. 149, 23 L. Ed. 267, discussed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

See (C. C.) 118 Fed. 168.

William R. Tillinghast and Benjamin Phillips, for appellants.

James E. Maynadier, for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge: This case is practically disposed of by our opinion in *Greene v. United Shoe Machinery Company* (passed down this day) 124 Fed. 961. As there, a bill was brought for the alleged infringement of letters patent for an invention, and the decree below was for an injunction and an account, after a hearing on bill, answer, and proofs. An appeal was taken, as in *Greene v. United Shoe Machinery Company*, under the provision of statute relating to appeals from interlocutory decrees granting injunctions. The appellants now seek to have the case remitted to the Circuit Court for supplemental proceedings in that court by reason of alleged newly discovered evidence. They have not presented any formal motion, but they rely on a request from the learned judge who heard the case in the Circuit Court, as follows:

"To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit, Greeting:

"A petition having been filed in the Circuit Court for the District of Massachusetts by the defendants in the case of *Charles A. Nutter et al. v. Frank Mossberg et al.*, Equity No. 1,288, now pending upon appeal from this court under the title No. 449, *Frank Mossberg et al. v. Charles A. Nutter et al.*, Equity, said petition praying that the said Circuit Court request from the Circuit Court of Appeals a return of the record in order that said Circuit Court may proceed further with the cause and grant leave to the said defendants to file in said Circuit Court a supplemental bill in the nature of a bill of review on the ground of newly discovered evidence, and it appearing to said Circuit Court after full hearing thereon that the prayer of said petition should be granted,

"The Circuit Court hereby, and upon the application of said defendants, requests the Honorable Circuit Court of Appeals to return to the Circuit Court the record in this cause in order that said Circuit Court may take further proceedings therein."

"October 15, 1902.

Arthur L. Brown, Judge."

While, as we have said, the appellants make no specific motion, they authenticate this request to the effect that we "return the record" in order that the Circuit Court may take further proceedings. To "return the record" is in effect to "remand" the case; so that what we have said in *Greene v. United Shoe Machinery Company* applies here. We can make no order with reference to proceedings in the Circuit Court unless we first reverse or modify, so that to "return the record" or to "remand" would be, in effect, the same; that is, to dismiss the appeal.

The method of proceeding here adopted for the purpose of securing a further opportunity in the Circuit Court is that suggested by the opinion of the Chief Justice in *Roemer v. Simon*, 91 U. S. 149, 23 L. Ed. 267. It was there said in substance that the Supreme Court could not proceed on the application of the parties, and that only the court below could make a request to the appellate tribunal looking to further proceedings below, so that the parties must address themselves to that court, and not to the appellate tribunal. The result of all that was said in *Roemer v. Simon*, if in all respects according to law, would seem to leave no remedy, even in a case of clear injustice, where an appeal had been taken from a final decree, and the term at which the decree was entered had expired, unless the appellate tribunal heard the case on its merits, and thereupon either reversed or affirmed, and, if affirming, granted leave to the parties to file an application for supplemental proceedings below. It may be that such is the law with reference to final decrees, although a careful consideration of some of the earlier decisions of the Supreme Court, and especially the later, seem to support a more liberal rule. *The Divina Pastora*, 4 Wheat. 52, 64, 65, 4 L. Ed. 512; *Estho v. Lear*, 7 Pet. 130, 131, 8 L. Ed. 632; *Flanders v. Tweed*, 9 Wall. 425, 431, 19 L. Ed. 678, 680; *Wiggins Ferry Company v. Ohio and Mississippi Railway Company*, 142 U. S. 396, 413, 416, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Mills v. Green*, 159 U. S. 651, 653, 16 Sup. Ct. 132, 40 L. Ed. 293; *Aldrich v. The Chemical Bank*, 176 U. S. 622, 623, 20 Sup. Ct. 498, 44 L. Ed. 611; *Murdock v. Ward*, 178 U. S. 139, 149, 20 Sup. Ct. 775, 44 L. Ed. 1009; *United States v. Rio Grande Company*, 184 U. S. 423, 22 Sup. Ct. 428, 46 L. Ed. 619. In various proceedings which have been determined by the Supreme Court to be moot cases, the most informal method of ascertaining the facts has been accepted, and *Kimball v. Kimball*, 174 U. S. 158, 162, 19 Sup. Ct. 639, 641, 43 L. Ed. 932, laid down broadly the following rule:

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence."

Finally, the liberality of the practice to which we refer is illustrated by the Circuit Court of Appeals for the Sixth Circuit in *Barber v. Coit*, 118 Fed. 272, 55 C. C. A. 145, and by us in *The Carbonero*, 106 Fed. 329, 45 C. C. A. 314. However, it is not necessary on this motion to scrutinize carefully *Roemer v. Simon*, *ubi supra*, because, among other reasons, that case related to a final decree, and, as shown in our opinion passed down in *Greene v. United Shoe Machinery*

Company, we are, on appeals from interlocutory decrees, free from many embarrassments arising on other appeals. In this case, the learned judge who sat in the Circuit Court has been willing to investigate the alleged new evidence, and to give the parties the benefit of his conclusions; and the fact that they have been laid before us by the appellants requires us to assume that they have adopted them. Therefore we have not only what was suggested by the Chief Justice in *Roemer v. Simon*, but all the assurance which was given us in *Greene v. United Shoe Machinery Company*, based on the result of the investigation of the learned judge who heard the case in the Circuit Court. This is, of course, sufficient for present purposes.

The appeal is dismissed, without prejudice to any proceedings in the Circuit Court, or to the right to take any subsequent appeal, and without prejudice to the questions which may be raised by such subsequent appeal, if lawfully taken; and the appellees recover their costs of appeal.

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FIRST NAT. BANK OF NEW KENSINGTON v. PENNSYLVANIA  
TRUST CO.

(Circuit Court of Appeals, Third Circuit. September 1, 1903.)

No. 19.

1. BANKRUPTCY—VALIDITY OF LIEN—PLEDGE.

A bank made a loan to a steel company, taking in pledge, as security therefor, and for any other debt which might be subsequently contracted, a quantity of steel billets, which were conveyed to it by bill of sale, set apart on the premises of the company, and marked with signs as the bank's property. A part of the note was paid, and another loan was subsequently made within four months prior to the company's bankruptcy. Before that time, the signs indicating the bank's ownership had been removed without its knowledge, but it caused them to be replaced after the making of the second loan, and before the bankruptcy. *Held*, that such removal did not impair its lien as security for its entire claim as against the bankrupt or its receiver or general creditors.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

John T. Moore, for appellant.

J. Rodgers McCreery, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. It appears from the record that on August 30, 1901, the appellant herein discounted a promissory note of the Hussey Steel Company for \$4,000, payable on demand, and took as security therefor 200 tons of steel billets. Incorporated in the note was the provision that the said collateral was to stand as security for the "payment of this or any other liability or liabilities, contingent or absolute, of ours (the Hussey Steel Company) to the holder hereof, now due or that may be hereafter contracted." On the same day the Hussey Steel Company executed and delivered to the bank a bill

of sale, absolute on its face, of said billets, which by reason of their weight and bulk were permitted to remain on the premises of the vendor. The billets, however, were marked by a sign, posted on the several piles, setting out that they were the property of the First National Bank of New Kensington. In October, 1901, the steel company paid one-half of said note, and the bank released one-half of said billets. On January 20, 1902, the bank discounted another note of the steel company for \$2,000. Neither the last-named note nor the balance of \$2,000 on the note of August 30, 1901, has been paid. The record fails to show how long the signs giving notice of the change of ownership of said billets, which were placed thereon August 30, 1901, remained in position; but the testimony of Mr. Lyon, who entered the employ of the steel company October 5, 1901, is that at that date they were not to be seen. The evidence fails to show that the bank had any knowledge of the removal or destruction of the signs until some time in March, 1902, when they caused the billets to be re-marked, by having their initials painted on the same. On April 23, 1902, the Hussey Steel Company was adjudged bankrupt upon a petition filed by creditors March 31, 1902, and afterwards the Pennsylvania Trust Company was appointed receiver. Upon the receiver's refusal to permit the bank, on request, to remove the billets, a rule to show cause was granted why the bank should not be permitted to do so, and this rule was afterwards discharged, and appeal taken.

It cannot be disputed that on the 30th day of August, 1901, when the bank discounted the note of the steel company, and took the bill of sale of the billets, it acquired a good and valid title thereto as between itself and the steel company. To complete its title or lien as against creditors and strangers, the bank was not obliged to take the billets into actual possession; it was sufficient to give notice of their lien or change of ownership. This they did by posting on the billets, which were in distinct and separate piles, the sign to which reference has been made, so that on August 30, 1901, the title of the bank or its right to a lien on the billets was good as against all of the world. If this situation had continued until after the adjudication of bankruptcy, no question could have arisen as to the title of the bank or the validity of its lien. The transaction was one made in the ordinary course of business, without fraud either in fact or in law; it was for a present valuable consideration, and completed more than four months before the adjudication of bankruptcy. The subsequent advance of \$2,000 in January, 1902, was made by the bank to the steel company in good faith, in accordance with the agreement made between the parties in August, 1901, that the billets should stand as security for any advance subsequently made. Though this loan was effected within four months of the adjudication of the bankruptcy, it does not constitute a preference, within the meaning of the act. "Prior to adjudication of bankruptcy, a party may deal with his property as he chooses, provided there be no purpose to defraud or delay his creditors, or give a preference to any one, and the value of his estate is not thereby impaired." *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816. The change of ownership, then, having been legally effected, how could the steel company, the vendor or pledgor, again become entitled to the property

without repayment of the purchase price, or the amount advanced thereon. The only answer suggested is by the removal of the signs indicating ownership, and the failure of the bank to replace them from October 5, 1901, to a time within four months of the adjudication. It may be that an innocent purchaser for value, or a judgment creditor without notice, might, by execution and levy, have acquired a prior lien; but surely, as against the pledgor, the bank's lien remained, notwithstanding the removal of the signs. Neither the general creditors nor the receiver of the bankrupt could acquire any better title to any property of the bankrupt than the bankrupt himself had at the time of filing the petition in bankruptcy, and therefore the lien was good as against them. The receiver in bankruptcy, standing in the place of the trustee, takes the property in question "as a purchaser from the bankrupt, with notice of all outstanding rights and equities." Whatever the bankrupt might do to make the property available to the general creditors, he may do nothing more, except that he may sue for and recover that which was conveyed in fraud of creditors. *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668. It is not suggested that the bank had any knowledge of the removal of the signs, or that it did not replace them so soon as their removal was brought to its notice. The effect of a re-marking of the billets was not to create a new lien, nor to acquire a preference for an antecedent debt between the parties. The lien acquired August 30, 1901, had not been lost, because no rights of third parties had intervened. The bank, under its contract, had a right of possession to the billets as security for the payment of debt, and could not be held guilty of securing a preference by exercising that right within four months preceding bankruptcy. *Sabin v. Camp*. (C. C.) 3 Am. Bankr. R. 578, 98 Fed. 974.

We are of the opinion that the bank acquired a valid lien on the billets for the amounts advanced by it to the steel company on both of its promissory notes, and that the lien was not lost by the accidental removal of the marks placed on the same. "Until the loan shall be paid, the pledgee is entitled to the possession of the property which he holds under a valid pledge, as security for his debts against the pledgors, notwithstanding a subsequent adjudication of bankruptcy against them." *Yeatman v. Savings Institution*, 95 U. S. 764, 24 L. Ed. 589.

The order of the district court should be reversed, and the rule to show cause made absolute.

## LOVELL MFG. CO. v. AUTOMATIC WRINGER CO.

(Circuit Court, W. D. Michigan, S. D. September 23, 1903.)

No. 1,491.

**1. PATENTS—SUIT FOR INFRINGEMENT—INTERROGATORIES IN BILL.**

A complainant in a suit for infringement of a patent cannot compel the defendant to state, in answer to interrogatories propounded by the bill, how many of the alleged infringing articles it has made or sold, when the infringement is denied in the answer, having no right to such information until infringement and the right to an accounting shall have been established. And the same rule applies in a suit for an accounting and recovery of royalties under a license, where the answer denies that the article inquired about is covered by the license agreement.

In Equity. On exceptions to answer.

G. A. Wolf (H. C. Lord, of counsel), for complainant.  
Taggart, Denison & Wilson, for defendant.

WANTY, District Judge. The question presented is on exceptions taken by the complainant to the failure of the defendant to answer certain interrogatories propounded in the bill. The bill is filed for the purpose of recovering royalties under a license agreement in which the defendant acknowledges the validity of the patent under which the articles are made. Accompanying the bill is an exhibit, which it is averred the defendant manufactures, and which it is averred comes within the license agreement. The interrogatories are as follows:

"(1) Whether between the 15th day of October, 1902, and the 1st day of April, 1903, and prior to the filing of this bill, the defendant, the Automatic Wringer Company, made, sold, or used, or caused to be made, sold, or used, any wringers like the wringer herewith filed, and marked 'Exhibit B,' and, if so, how many such wringers were made, sold, or used, or caused to be made, sold, or used, by defendant during said period.

"(2) Whether defendant, the Automatic Wringer Company, between the 15th day of October, 1902, and the 1st day of April, 1903, made, sold, or used, or caused to be made, sold, or used, any wringer clamps similar to the clamps on the wringer marked 'Exhibit B,' and, if so, how many such clamps were made, sold, or used, or caused to be made, sold, or used, by defendant during said period."

The defendant by its answer admits that it made and sold the exhibit referred to in complainant's bill, and manufactured and sold articles similar to that exhibit, but denies that the exhibit embodies the device covered by the license agreement, or that the defendant has made, sold, or used, or caused to be made, sold, or used, any article or device coming within the terms of the license agreement, and therefore it declines to answer the interrogatory as to the number of articles it had made, sold, or used. The interrogatories propounded in the bill were taken from the interrogatory reported in the case of National Hollow Brake Beam Company v. Interchangeable Brake Beam Company (C. C.) 83 Fed. 26. In that case the defendant failed to answer these interrogatories, and exceptions were taken to the answer, as in this case, and the exceptions were sustained. It was pointed out by Judge Lacombe in the case of Keller v. Strauss (C. C.) 88 Fed. 517,

that it is not material to the issues raised by the pleadings how many infringing articles defendant may have made, used, or sold until the complainant has succeeded at final hearing in showing his right to an accounting. In that case the validity of the patent had not been established, and therefore the exceptions were overruled. A complainant's right to an accounting not only involves the validity of the patent, but must also involve infringement by the defendant. In this case the validity of the patent cannot be denied by the defendant, and it admits that it made and sold the articles alleged to come within the license agreement, but it denies that these articles do come within the license agreement, which is the issue to be tried. No court of equity should discourage the practice of simplifying the issues and limiting the expense of taking testimony by compelling defendants to answer all proper interrogatories propounded in bills of complaint, but until the validity of a patent and its infringement are in some manner adjudicated the complainant has no right to exact information as to the details of the defendant's business. Any competitor, under the claim made here, could, by the simple allegation that certain articles manufactured by a defendant infringed a patent owned by complainant which had been adjudicated valid, exact the information of just how many such articles the defendant had sold, when, as a matter of fact, the devices were so unlike that no infringement could be found. We are still of the opinion, expressed on the hearing, that until the infringement, as well as the validity of the patent, is established, the number of the alleged infringing devices sold by the defendant is not material. So, until it is found that the exhibit comes within the license agreement, the complainant has no right to compel the defendant to disclose how many such articles it has sold. In distinguishing the case of *Keller v. Strauss*, Judge Hazel, in *Haarmann v. Lueders* (C. C.) 109 Fed. 327, says that in that case the validity of the patent was at issue and exceptions were directed to the answer; but I can see no reason why the question of infringement is not equally important with the question of validity, when the details of a man's business are to be inquired into.

The exceptions are overruled.

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**JANNEY v. PANCOAST INTERNATIONAL VENTILATOR CO. et al.**

(Circuit Court, E. D. Pennsylvania. September 17, 1903.)

No. 28.

**1. PATENTS—PERSONS BOUND BY—DECREE FOR INFRINGEMENT—VIOLATION OF INJUNCTION.**

Pending a suit for infringement of a patent against a corporation, its president resigned his office, but continued the business and the manufacture of the article in controversy after it had been adjudged an infringement, and an injunction had been issued and served upon him as president of the company, merely operating in a different name, and slightly changing the name of the article. *Held*, that the adjudication was conclusive against him, as well as the corporation, and that he was guilty of contempt for violation of the injunction.

**On Motion to Punish for Contempt.**



Albert B. Weimer, for complainant.  
Wm. S. Furst, for Joseph C. Hennis.

Before DALLAS, Circuit Judge, and J. B. McPHERSON, District Judge.

PER CURIAM. This suit was brought to restrain the defendants from infringing two patents of the United States, Nos. 476,682 and 605,508. The defendants did not deny the making and selling of the patented ventilator, but made defense upon a claim of title. On final hearing it was decided that the plaintiff was entitled to the usual decree for an injunction and an account, and accordingly such decree was entered. It appears from the marshal's return that on April 3, 1903, the injunction which was issued in pursuance of that decree was served "on Pancoast International Ventilator Company by giving a true and attested copy thereof, together with a copy of the decree, to Joseph C. Hennis, president of said company." Said Hennis was president of the company when the bill of complaint was filed on November 20, 1901, and he continued to be so, as well as its general manager, until, as he now avers, he resigned those offices on August 4, 1902. But he still pursued the business which he had theretofore conducted for the Pancoast International Ventilator Company, though at some time during the pendency of the suit he ceased the use of that name, and substituted the words "Pan-Coast Ventilator Co.," in connection with the words "J. C. Hennis & Co." Under this latter designation, he has, with notice of the decree and injunction above mentioned, since sold ventilators substantially identical with those which in this case were adjudged to be infringements; and in attempted justification he has taken two positions, neither of which is tenable. The change of name to which he resorted was manifestly designed to evade the operation of the decree which he apprehended would be, and which in fact was, made in this case. But he could not, by formally resigning the office of president of the International Company, and adopting a different but similar name under which to carry on the same business, acquire a right to do that which, if avowedly done as president of the defendant company, would unquestionably have been violative of the mandate of this court. It appears from the proofs that the "Pan-Coast Ventilators" which he is now selling are, as we have said, identical with the "Pancoast Ventilators" which were manufactured for the defendants. These have been adjudged to be infringements, and that adjudication is, for the present purpose, a final and conclusive one. Therefore the vague and unsatisfactory evidence which has been now submitted for the purpose of showing noninfringement is inadmissible, and need not be discussed.

An order will be made adjudging Joseph C. Hennis to be in contempt, in having disobeyed the decree of this court of April 3, 1903, and requiring him to pay a fine of \$20 and the costs of this proceeding within five days from the date of the order.

WESTERN UNION TELEGRAPH CO. v. PHILADELPHIA, B. & W. R.  
CO. et al.

(Circuit Court, D. Delaware. August 21, 1903.)

No. 241.

1. TEMPORARY INJUNCTION.

On the hearing of a motion for a preliminary injunction, *held* that, under the particular circumstances disclosed, the motion should be granted, in order to preserve the status quo, without any present expression of opinion or decision on the merits.

(Syllabus by the Court.)

In Equity.

Willard Saulsbury and Rush Taggart, for complainant.

Ward & Gray and John G. Johnson, for defendants.

BRADFORD, District Judge. The Western Union Telegraph Company, a corporation of New York, has filed its bill of complaint against the Philadelphia, Baltimore and Washington Railroad Company, a corporation existing under the laws of Pennsylvania, Delaware and Maryland, and the Delaware Railroad Company, a corporation of Delaware, praying, among other things, that the defendants be restrained by injunction until the final decree or the further order of the court from interfering in any manner with the use and operation of the complainant's telegraph lines upon the roadway and right of way of the defendants. The case is before the court on a motion for a preliminary injunction. There are controlling reasons why the motion should be granted to the extent of restraining the defendants as prayed for until the further order of the court. The Western Union Telegraph Company, complainant herein, filed its bill of complaint November 22, 1902, in the circuit court for the district of New Jersey against the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, praying, among other things, for a temporary injunction against those companies restraining them from interfering with the use and operation of the complainant's telegraph lines upon their roadway or right of way. On this bill the court awarded a preliminary injunction as prayed January 21, 1903. 120 Fed. 981. Thereafter the circuit court of appeals reversed the interlocutory decree for an injunction. 123 Fed. 33. An appeal by the Western Union Telegraph Company to the Supreme Court of the United States having been allowed, an order for the continuance of the status quo was made by Mr. Justice Peckham June 17, 1903, directing that on the conditions therein set forth "the status quo and the present condition of the parties and property involved in this suit be continued and maintained until a decision shall be made on this appeal by the Supreme Court of the United States, or until this court shall order to the contrary." It appears that the Western Union Telegraph Company, the appellant, has up to the present time fully complied with the required conditions. The facts here disclosed in the bill and affidavits are not in all respects similar to those in the New Jersey case. There are, however, certain legal questions, of an

important and probably pivotal nature, common to both cases and involving the consideration, among other things, of the scope and effect of the act of Congress of July 24, 1866, entitled "An Act to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the same for postal, military, and other Purposes." 14 Stat. 221, c. 230. Under these circumstances it is unnecessary and would be improper that this court should now express any opinion, or render any decision, on the merits of the case in hand. The result is that until the Supreme Court shall decide or decline to decide the New Jersey case on its merits the status quo should be preserved and, consequently, until the further order of the court the defendants should be enjoined and restrained as prayed.

Let an interlocutory decree for an injunction be prepared in accordance with this opinion.

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THE TITANIA.

(District Court, S. D. New York. July 2, 1903.)

1. SHIPPING—FAILURE TO DELIVER GOODS—BILLS OF LADING AS EVIDENCE OF RECEIPT.

Bills of lading issued by the master of a ship are prima facie evidence that the goods therein described were received on board, and the burden rests on the carrier to prove the contrary by clear evidence, to avoid liability for a failure to deliver in accordance with the bills.

2. SAME—RESPONSIBILITY OF CARRIER FOR GOODS AFTER UNLOADING.

After the delivery of goods on a wharf, notice to the consignee, and a reasonable time thereafter for the consignee to take the goods away, the carrier is not under the strict liability of a carrier, but is charged with liability as a warehouseman or bailee, and with the duty of exercising reasonable care and attention to prevent loss or injury to the goods.

In Admiralty. Action for failure to deliver cargo.

E. N. & T. M. Taft, for libelants.

Convers & Kirlin, for claimant.

HOLT, District Judge. This action was brought to recover \$1,286.22, the value of 56 bales of hemp. The libelants are assignees of three bills of lading issued on December 1, 1902, by the master of the steamship *Titania*, then lying at Manila, each for 500 bales of hemp, acknowledged to have been shipped in good order and condition upon the steamship. These 1,500 bales were a portion of a shipment of about 7,000 bales by W. F. Stevenson & Co., libelants' assignors, and of a cargo of about 19,000 bales shipped on the steamship upon that voyage. Each of the bills of lading on the margin described by particular marks the particular bales covered by the bill. On the arrival of the ship at New York, 1,444 bales were delivered to the libelants; the rest have not been delivered. There is no satisfactory evidence as to what has become of the 56 bales. There is no evidence that they were not shipped at Manila. There is some evidence, of an unsatisfactory kind, that the total number of bales supposed to be in the cargo was not shipped at Manila, but there is no evidence that any

¶ 2. See Carriers, vol. 9, Cent. Dig. § 610½.

of the particular 1,500 bales, with the particular marks described on the margin of the bills of lading held by the libelants, were not shipped at Manila. The evidence shows that all the bales which were put in the ship at Manila were in the ship when she arrived at New York; but if the total number of bales called for by the bills of lading was shipped at Manila and arrived at New York, there is no evidence of what has become of the missing bales. The marks on the bales were placed sometimes on tags fastened to the bales, and sometimes on the bales themselves, and some of the marks, in the course of the shipment, or after the bales were landed on the wharf at New York, became obliterated, and some of the bales which were delivered were bales having no marks, but which were accepted as a good delivery, because their general appearance and quality was similar to those retaining the proper marks. Under these circumstances, in my opinion, the evidence contained in the bills of lading that the steamship received the 1,500 bales owned by the libelants is controlling. The bills of lading are prima facie evidence that the goods were on board. *Nelson v. Woodruff*, 1 Black, 156, 17 L. Ed. 97. If the carrier claims that they were not in fact received, the burden of proof is upon him to show that fact by clear evidence. No such evidence having been given in this case, it must be assumed that they were received on board. The carrier thereupon became an absolute insurer for their safe carriage and delivery. The claimant claims that they were delivered on the wharf, and that their loss was due to the delay of the libelants in taking them away. It is true that a carrier does not remain under the very strict liability of a carrier after a delivery on the wharf, notice to the consignees, and a reasonable time for the consignees to take the goods away; but the carrier, after such time, is not justified in failing to exercise reasonable care for the preservation and protection of the goods. He is no longer charged with the strict liability of a carrier, but he is charged with the liability of a warehouseman or bailee, having the duty of exercising reasonable care and attention to prevent loss or injury to the goods. But in this case there is no evidence to show that the goods were not lost before a reasonable time had elapsed for the consignees to take them away, or that they were not afterwards lost under circumstances for which the carrier might be responsible. The most plausible supposition seems to me to be that there was a shortage of 56 bales in the original shipment, and that all the other consignees received the full amount called for by their bills of lading, and that these consignees did not; but that supposition is a mere guess. So far as the evidence stands, the only evidence in the case is that contained in the receipt in the bills of lading, and that binds the ship until it shows by equally cogent proof either that the bills of lading were false, or that it has delivered the goods.

My conclusion is that there should be a decree for the libelants, as demanded in the libel, with interest and costs.

## UNITED STATES v. LUYTIES et al.

(Circuit Court, S. D. New York. August 1, 1903.)

No. 3,225.

## 1. CUSTOMS DUTIES—RECIPROCITY TREATY—PLACE OF EXPORTATION.

Where it was proved that absinthe imported was manufactured in Pontarlier, France, the fact that the bill of lading was dated at Basle, Switzerland, the point of shipment, did not justify a finding that the consignment was not exported from France, and therefore not entitled to admission at reduced rates of duty, under the reciprocity treaty between France and the United States.

## 2. SAME—BRANDIES AND OTHER SPIRITS.

Absinthe is a liqueur within the French reciprocity agreement, providing for reduced duties on brandies and other spirits.

D. Frank Lloyd, for the United States.

Wm. A. Keener and J. Stuart Tompkins, for appellees.

HAZEL, District Judge. The articles involved consist of absinthe, a product of France. It is contended by the government that the importation was not exported from France to the United States, and therefore such articles do not come within the purview of the reciprocity agreement entered into between these countries. The inference from the fact that the bill of lading is dated at Basle, Switzerland, the point of shipment, is outweighed by abundant evidence in behalf of the importers showing the product to have been manufactured in Pontarlier, France. The other questions involved upon this appeal are precisely similar to those considered and decided by Judge Townsend in *Nicholas v. The United States* (C. C.) 122 Fed. 892. In that case, from which no appeal was taken, it was held that articles commonly known as "liqueurs" are included in the reciprocal commercial agreement by which the duties of "brandies and other spirits" were reduced, entered into between the United States and France, under section 3 of the Tariff Act of July 24, 1897, 30 Stat. 203, c. 11 [U. S. Comp. St. 1901, p. 1690]. Absinthe, the article in controversy here, is a liqueur, as that term is ordinarily understood. This court considers itself bound by the decision in the *Nicholas Case*. Hence, it would serve no useful purpose to elaborate upon the question there decided. The decision of the Board of General Appraisers sustaining the protest of the importers is affirmed.

## THE MARY WEAVER.

## THE HARRY G. RUNKLE.

(District Court, E. D. New York. July 17, 1903.)

## 1. COLLISION—TUG WITH TOWS AND ANCHORED SCHOONER—FAILURE TO SOUND FOG SIGNALS.

A tug passing down New York Bay to sea at night with a number of dumpers in tow held in fault for a collision between one of the dumpers and an anchored schooner, on the ground that she was passing through the anchorage grounds; and the schooner also held in fault for failing to

sound fog signals as required by the rules (article 15, subd. "d," Act June 7, 1897, c. 4, 30 Stat. 99 [U. S. Comp. St. 1901, p. 2880]), the evidence showing that she was near the limits of the anchorage grounds next the channel, and that there was such fog that her single light could not be seen from the tug until she was within 500 feet.

In Admiralty. Cross-libels for collision.

Hyland & Zabriskie, for schooner Mary Weaver and libelant Burden.

Alexander & Ash, for tug Harry G. Runkle and libelants Booth and others.

THOMAS, District Judge. On the night of November 1, 1902, at about 2 a. m., the tug Runkle was towing, on a hawser of some 80 fathoms, four dumpers singled out on lines severally about 60 fathoms in length. The tug was bound for sea, and pursued her course down the Upper Bay until the master of the tug saw, about 500 feet away, the schooner Mary Weaver, whose stern was swinging so far to the westward, as is claimed, that the tug's pilot deemed it prudent to attempt to avoid her by hard-astarboarding and going to port across her bows, whereby he entered the anchorage grounds. In this way the tug cleared the schooner, but the second dumper, No. 4, in passing came in collision with the jibboom and martingale of the schooner, and injuries arose both to her and to the dumper, which are involved in the above actions. The dumpers had steering apparatus, but no system of steering signals, the master of each dumper directing his course by that of the tug or of the dumper ahead. In this case each master so acted in that regard, except the master of the last dumper, who did not discover the light of the schooner until it was so late that he ported his helm and cut his hawser, so as to pass on the west side of the schooner. The schooner's light was burning. Her crew consisted of five men. The captain was ashore, and the mate, a person of doubtful responsibility, was in charge. There are two principal questions involved: First. Was the schooner on the anchorage grounds? Second. Should the schooner have rung a fog bell?

The evidence concerning the position of the vessel is very conflicting. It is unnecessary to discuss in detail the statements of the several witnesses on each side, which have been carefully considered, but there is a single fact which determines the probability against the tug. Kelly, master of the tug, testified that he set his course southwest by south 500 feet to the westward of the bell buoy at the lower part of the breakwater below Governor's Island, and that he continued on such course until opposite Buoy No. 14, which he cleared by 300 yards, when he changed his course to southwest by south one-half south, although the usual course from that point was south southwest. He also states that upon such course he would clear the bell buoy opposite Bay Ridge by about 150 yards. But if this course be laid down upon the map, it is perfectly clear that it crosses the anchorage grounds. The master of the tug also states that the schooner was "lying a little below half way between Buoy 14 and Bay Ridge bell," and that when he saw her 500 feet away "she was head on, little bit on the starboard; that is, the bulk of the vessel was on the starboard

side." He further states: "She was about on a line with 14 and the bell. She might been little outside of it, but from where I was it looked like she was on the line." He further states that she was about abeam with Robins' Reef light. The evidence of the master of the tug shows that his course took him across the anchorage grounds, and was calculated to bring him into collision with a vessel on such grounds. He admits that his usual course was half a point farther to the southward. If he pursued his usual course, much the more would he trespass upon the anchorage grounds. The superintendent, who visited the place the next afternoon, placed the schooner 1,000 feet outside the westerly limits of the anchorage grounds, and 1,000 feet above the white buoy, and 1,500 feet above the bell buoy. If she were 1,500 feet above the bell buoy, she was below the white buoy. He also places her 1,000 feet to the westward of the anchorage grounds. If so, the tug Runkle, upon the course ascribed to her by her master, would have passed far to the eastward of the schooner, and could not have collided with her.

There is much conflicting evidence as to the location of the schooner, but the statement of the master of the tug as to the point where he began to lay his course, and the course pursued by him, shows irresistibly that he was upon a course that would cross the anchorage grounds, and that he would not have cleared the Bay Ridge bell buoy by 150 yards to the westward. The course described shows that the master was headed for the anchorage grounds, and it is probable he entered it before the collision. In order to come in collision with the schooner if she were in the position stated by the superintendent, it would have been necessary for the tug to lay her course some 1,800 feet off from the bell at Governor's Island; and to have cleared the bell buoy to the westward by 150 yards the tug must have laid her course at a distance from the bell buoy at Governor's Island largely in excess of that stated by the captain, and it would have been necessary for him to have cleared Buoy No. 14 by a much greater distance. But he gives two fixed positions—one 500 feet off the bell buoy at Governor's Island; the other 300 yards off Buoy No. 14, where he changed his course to the southward by half a point. Using either of these distances for the purpose of ascertaining his course, and making a fair allowance for inaccurate estimate of distances, he must inevitably have gone upon the anchorage grounds.

Was there a fog that prevented the tug, using due diligence, from seeing the schooner at an earlier time, and such as required a bell to be rung on the schooner pursuant to article 15, subd. "d," of the International Rules and Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 99 [U. S. Comp. St. 1901, p. 2880])? The requirement is that "a vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds." The schooner attempts to show that there was no fog during the night, and the contention is upheld by all her witnesses, except the keeper at Robins' Reef light, who produced an official record made by him showing a fog between 3 and 11 o'clock a. m., sufficient to require fog signals to be given for the whole eight hours. He testified that such signals were given. The collision was about 2 a. m., but the evidence of the lighthouse

keeper indicates that the fog could reach the eastern anchorage grounds before it came to Robins' Reef. The record evidence of the keeper discredits the schooner's other evidence in regard to fog, and corroborates the evidence of the tug. The master of the schooner was ashore. The vessel was left in charge of the mate, who, as a witness, found favor with neither party; while the multiplicity of the cook's awakenings and visits to the deck were not demanded by any service or usual necessity, and the rest of the crew contributed no information. The fact is that the whole crew was fast asleep below, indifferent to any condition of weather, with the schooner near the boundary of a narrow channel, through which all the inbound and outbound vessels of the principal port of the country passed. While it is concluded that the schooner was within the anchorage grounds, she was near its westerly limits, and the fog, if not dense, was sufficient to obscure her. The only warning on the schooner was a white light, which was dimly seen by those on the tug when she was about 500 feet away. The fog may not have been as dense as the libellant Booth contends, but it was a fog obscuring a schooner not far within the anchorage grounds, whose entire crew was asleep below. The case falls within the rule. If the rule is to be of value, it should be followed, not only when a profound fog settles over the entire approach to a great port, but when it is sufficient to prevent moving vessels from discovering a ship at anchor in sufficient time to make usual maneuvers to avoid her. The case is more unfavorable to the schooner than was *The Ophelia* (D. C.) 44 Fed. 941, which is ample authority for the present conclusion.

Pursuant to these views, the damages and costs will be divided.

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In re UPSON.

(District Court, N. D. New York. July 17, 1903.)

**1. BANKRUPTCY—APPLICATION FOR REVOCATION OF DISCHARGE—LACHES OF CREDITOR.**

A creditor who had ample opportunity during the pendency of the proceedings to fully examine the bankrupt as to all matters, and who appeared in opposition to his discharge, and was given time to file specifications of objection, but failed to do so, and permitted the discharge to be granted without further objection, was guilty of undue laches, and is not entitled to be heard on a subsequent application to revoke the discharge made under Bankr. Act July 1, 1898, c. 541, § 15, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428].

In Bankruptcy. This is an application by the First National Bank of Baldwinsville, N. Y., to revoke the discharge of the above-named bankrupt, granted on or about the 1st day of December, 1902.

Wallace H. Failing and G. W. O'Brien, for petitioner.

J. R. Shea and M. E. Driscoll, for bankrupt.

RAY, District Judge. On or about the 1st day of December, 1902, on application duly made and notice duly given, James W. Upson, the above-named bankrupt, was granted a discharge under the provisions



of the national bankruptcy law. On the hearing of that application the moving creditor here appeared and asked for time to file specifications of objection to the discharge of the bankrupt, and 20 days' time was granted for that purpose; but no objections were filed, and the discharge was subsequently granted. Thereafter the said creditor instituted a proceeding before the referee having jurisdiction in the matter for an examination of the bankrupt, and, as a result of that examination, this motion to revoke the discharge is made.

By section 15 of the act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) it is provided as follows:

"Sec. 15. Discharges, When Revoked.—(a) The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."

It will be noted that a revocation of the discharge may be made on the application of parties in interest who have not been guilty of undue laches, if it shall be made to appear that the discharge was obtained through the fraud of the bankrupt, and that the knowledge of such fraud has come to the petitioner since the granting of such discharge, and it shall also appear that the actual facts did not warrant the discharge. All these conditions must exist. Having carefully examined the evidence, the briefs of counsel for the respective parties, and the authorities applicable, this court feels compelled to deny the application to revoke the discharge. The petitioning creditor had every opportunity to fully examine the bankrupt and all persons having knowledge on the subject during the pendency of the bankruptcy proceedings, but, without excuse or justification, failed to do so as fully as it might, it now asserts; but the petitioner does not show that such failure was owing to any fraud of the bankrupt, or any act on his part. In opposition to the motion the bankrupt presents his own affidavit with those of Albert E. Nettleton, one of the trustees, Hon. Frank Hiscock, James R. Shea, and James D. Decker, and, taking the conceded facts in connection with these affidavits and the evidence taken by the referee, it is clear that nothing particularly new has been brought to light since the discharge was granted. There were three trustees, one of whom was an officer of the bank, the petitioner here, and all these trustees were gentlemen of character and of business experience and ability, and they had the aid of efficient counsel of high standing and character. All the matters now in question were then inquired into to a certain extent, and might have been examined into with great particularity. The petitioner has been guilty of undue laches.

Again, it is not shown, assuming that the bankrupt was guilty of fraud in concealing facts, that the knowledge of such fraud has come to the petitioner since the granting of the discharge. It is true that certain officers of the bank have testified that they had no knowledge of certain facts proved before the referee; but it does not appear that other officers or that the board of directors did not have full knowl-

edge, and in truth it would seem that the bank did have all the knowledge on the subject it cared for at the time. Having appeared to oppose the discharge, and having been given 20 days in which to file specifications in opposition, the bank was certainly guilty of undue laches in not filing its specifications and proceeding to produce evidence on the subject.

Again, this court is not satisfied that the actual facts did not warrant the discharge. It is quite true that the bankrupt has given evidence as to the disposition of certain of his property and certain of his money in a confused manner, but the court does not see that he was dishonest, or that he intentionally misrepresented any of the facts. A creditor who desires to oppose the discharge of the bankrupt should see to it that the bankrupt is fully examined as to all his business transactions, and, when opportunity is given to file specifications of objection and test the merits of the application for a discharge, the creditor should be diligent in investigating the facts. This court holds as matter of fact that it is not shown that the actual facts did not warrant the discharge. It must be made to appear upon the trial that the actual facts did not warrant the discharge. It is true in this case that the trial before the court has not yet been had, but the petitioning creditor applied to the referee, and produced evidence bearing on this question, and it is now for the court to say whether it will order a trial, or, on the objections now made and the facts now appearing, dismiss this proceeding, and refuse to revoke the discharge. The decision of this motion is not based upon the failure of the evidence to show that the actual facts did not warrant the discharge, but upon the ground that it fully appears to the court at this stage of the proceeding that the petitioning creditor has been guilty of undue laches. This court holds that it was incumbent upon the petitioner, when it brought this matter before the court and submitted the motion upon the evidence taken, to show due diligence on its part, which it has failed to do.

On the hearing of this motion it was agreed that the evidence taken before the referee might be read by the court, and considered as evidence taken by it as on a trial of the question on the merits. So far as payments made on the claim of the daughter are concerned, this court has already passed on that question, and finds no ground on that score, to criticise the bankrupt. The bankrupt is open to criticism in that he failed to keep such books of account as show clearly all his financial transactions, but it does not appear that, in contemplation of bankruptcy, he failed to keep books of account, or records from which his true condition might be ascertained.

The application to revoke the discharge is therefore denied, and an order to that effect will be entered.

## DAVENPORT v. SOUTHERN RY. CO. et al.

(Circuit Court, D. South Carolina. August 20, 1903.)

## 1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—JOINT ACTION FOR TORT.

An action against a railroad company and certain of its servants to recover for the death of a person, alleged to have been caused by the reckless, wanton, willful, and malicious acts of such servants while engaged in the duties of their employment, where the complaint alleges no facts to charge the company with participation in such acts of its servants, involves a separable controversy; the causes of action and the measure of damages recoverable against the company and its codefendants being different, and the cause is removable by the company, where the requisite diversity of citizenship exists.

On Motion to Remand to State Court.

Haynsworth, Parker & Patterson, for plaintiff.

T. P. Cothian, for defendants.

SIMONTON, Circuit Judge. This case comes up on a motion to remand. The action was originally brought in the court of common pleas for Greenville county, S. C., against the Southern Railway Company, a body corporate of the state of Virginia, and Richard Joel and William Jones, citizens of South Carolina. The cause of action was for personal injuries to the plaintiff's intestate, resulting in her death. She was killed in collision with a hand car of the defendant company, operated by the other defendants. The accident, as detailed in the complaint, occurred in this way: Many years ago a spur or side track was constructed from the main line of the Southern Railway at Piedmont, at a point near the mills of the Piedmont Manufacturing Company. The side track was constructed over lands of the manufacturing company, and is used by the Southern Railway Company as licensee. It is used only occasionally, hauling freight to and from the mills. On this track is a trestle, over which is a plank walkway, the width of the track, which is habitually used, and has been used for very many years, by the people of the town of Piedmont. On the day of the accident, plaintiff's intestate was on this walkway, proceeding toward the mill. She had nearly crossed it, when from behind a bend in a deep cut, a short distance away from her, a hand car, heavily loaded with cross-ties, appeared, coming at great speed down an incline at that point. She used every effort to escape, but could not do so. She was struck by the hand car, was precipitated over the trestle, and lost her life. This hand car was operated by, and was under the care and control of, the defendants Joel and Jones, servants of the Southern Railway Company. It had been carried by them up the side track, and had been heavily loaded with cross-ties. On its return they pushed the car to a point where it struck the down grade leading to the trestle, and at this point they negligently and recklessly turned the car loose without getting on it, and without taking any precautions whatever to control it, and

¶ 1. Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valletytown Mineral Co.*, 35 C. C. A. 155.

without making any effort to see if any one was on the walkway on the track. The car went forward with great speed and violence, striking the plaintiff's intestate, and causing her death. The complaint charges that this conduct of these defendants was reckless, willful, and malicious, and in total disregard of the safety of the public; that the defendants, in handling the car as aforesaid, and in allowing it to escape and kill plaintiff's intestate, were negligent; that the death of plaintiff's intestate occurred through the joint and concurrent carelessness, negligence, recklessness, wantonness, and willfulness of the defendants, as aforesaid.

The ground upon which the Southern Railway Company sought the removal of the cause is that there is in the pleading a separable controversy with it.

It will be observed that the only charge against the Southern Railway Company is because of the acts of these agents of it, and of them alone, committed in the absence of any official, or of any other agent of that company; that the acts of these agents are characterized as reckless, willful, and malicious. Indeed, the whole charge of the complaint seems to be for the acts of these two men, Joel and Jones. After stating that these two men had control of the car, the complaint in the ninth paragraph says: "That the conduct of the defendants [these two men] in turning loose the said hand car, and in allowing it to run loose, \* \* \* was reckless, willful, and malicious." In the tenth paragraph it says: "That the defendant, in handling the car, as aforesaid [that is, these two men], and in allowing it to kill plaintiff's intestate, were negligent." And in the eleventh paragraph it says: "That the death of plaintiff's intestate occurred through the joint and concurrent carelessness, negligence, recklessness, wantonness, and willfulness of the defendants, as aforesaid." These two men, whose conduct is thus characterized, and whose acts are thus complained of, are made parties defendant, and judgment is sought against them.

There are clearly in this complaint two controversies,—one against the Southern Railway Company because of the negligence of its servants; the other against these servants themselves because of their own recklessness, willfulness, and malice. The controversy with the Southern Railway Company is because of the acts of its agents, for which the policy of the law makes it responsible; that with these individuals is upon their own personal responsibility, for their own reckless, wanton, and malicious act. The Southern Railway Company is responsible to third persons for the negligence of its agents, but for negligence merely these agents are not responsible to third persons. *Ewell's Evans on Agency*, 438. Negligence is negative in its character. It is the omission to perform some duty. *Milwaukee, &c., Rd. v. Arms*, 91 U. S. 489, 23 L. Ed. 374. It implies nonfeasance, and is contradistinguished from misfeasance. To make the agent responsible to third persons, there must be some positive act of wrong on his part. The whole doctrine is clearly stated in *Story on Agency* (9th Ed.) §§ 308-309:

"We come, in the next place, to the consideration of the liabilities of agents to third persons in regard to torts or wrongs done by them in the course of

their agency. \* \* \* And here the distinction ordinarily taken is between acts of misfeasance, or positive wrongs, and nonfeasance, or mere omissions of duty by private agents. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases when the tort is of such a nature as that he is entitled to compensation. The agent is also liable to third persons for his own misfeasances and positive wrongs. But he is not liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal."

In an action against a principal for the acts of his agent, he is liable not only for acts of negligence, but also for willful and malicious acts done in the course of his employment. *Andrews American Law*, 860, quoting *Chicago, &c., v. West*, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380, and other authorities. In such an action the principal is liable only for compensatory damages. *Vicksburg & M. R. R. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257. But it is not responsible in punitive or vindictive damages or smart money, unless the principal participated in the wrongful act of its agents, expressly or impliedly, by its conduct, authorizing or approving of it either before or after it was committed. *Lake Shore, &c., v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. "A corporation, like a natural person, may be held liable in exemplary or punitive damages for the acts of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. So a railroad corporation cannot be charged with punitive or exemplary damages for the illegal, wanton, or oppressive conduct of a conductor of one of its trains to a passenger." *Id.* There is nothing in this complaint which measures up to these requirements as against the Southern Railway. Indeed, in the acts complained of, and in its mode of stating them, the averments of the complaint wholly negative the idea that the corporation could have participated. Before the corporation can be held to the same responsibility as Joel and Jones, the two other defendants, it must be averred and proved that their wanton, willful, and malicious acts were done by its authority. But the plaintiff, not content with his claim against the Southern Railway Company, and his right to obtain compensation, seeks also damages at the hands of Joel and Jones for wanton, willful, and malicious conduct. His remedy as against them is different, far more extensive, and requiring a different judgment. There is thus a controversy with the Southern Railway Company separable from that with the other defendants, and the cause is removable.

The motion to remand is refused.

## GIBERSON v. COOK et al.

(Circuit Court, W. D. Arkansas, Harrison Division. March 25, 1903.)

## 1. EQUITY JURISDICTION—FEDERAL COURTS—ADEQUATE REMEDY AT LAW.

Under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law," a federal court is without jurisdiction to determine a suit to quiet title to a mining claim, submitted on bill and answer, where the bill alleges possession in complainant, but the answer denies such allegation, and alleges possession in defendants.

## 2. SAME—REMEDY GIVEN BY STATE STATUTE.

A state statute cannot confer on a federal court jurisdiction of a suit in equity to quiet title to real estate of which defendant is in possession.

In Equity. Submitted for final decision on bill, demurrer, pleas, and answer.

W. S. Chastain, for complainant.

J. C. Floyd and Horton & South, for defendants.

ROGERS, District Judge. The bill in this case was filed on July 12, 1902, and the amended bill was filed on the 29th of October, 1902. The amended bill charges that E. C. Giberson is a citizen of the state of Illinois, and that S. E. Cook and E. C. Cook are both residents of the county of Marion, and citizens of the state of Arkansas. It then alleges that on the 20th of June, 1899, the government of the United States was seized and possessed of the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 14, township 7 N., range 14 W., in Marion county, Ark., which lands were admitted to be subject to location and appropriation as mining lands, under the laws of the United States, the local laws, rules, and regulations of the state of Arkansas and the Marion county mining district, and that said complainant's grantors entered upon and located said land, and made and filed a mining location of the same, in accordance with all the laws, by making discovery of ore and posting notices on said lands; all said locators being citizens of the United States, and qualified to make mining locations of United States lands. The complainant then alleges that afterwards he became the possessory owner, by purchase, of all the original locators, and that he was at the time the bill was filed in possession of said lands in compliance of law, holding and mining the same, and that he has the exclusive right to do so. He further alleges that he has made applications for patents from the United States for said lands, and that the defendants have colluded and combined and made protest against his application, under some pretended claim that they are setting up against said land without right to the same, and that complainant believes that they are claiming to have located said lands as a mining claim on the 25th of November, 1896, and states that if said defendants are so claiming to have made said location, or are so claiming to have performed the annual assessment work during 1898 on said land, and are trying to convert said land

¶1. See Quieting Title, vol. 41, Cent. Dig. §§ 8, 9.

to their own use, that they are doing so without making satisfaction to the complainant for his right to said land; that the land exceeds in value the sum of \$2,000, exclusive of interest, costs, etc. Then follow certain interrogatories, and a prayer for process and relief.

The defendants filed a general demurrer and two pleas supported by an answer. The first plea sets up that the property is not worth the sum of \$2,000, exclusive of interest, costs, etc. The second plea pleads the statutes of Arkansas, which require suits for mining claims to be filed within one year after the cause of action accrues. Without going into details, the answer practically denies all the allegations in the bill, including the possession of the complainant to the property, and affirmatively alleges that the defendants are in possession, and have been since 1896, and that they have been doing all the work on such place, each year, which the law required.

The complainant files a replication to the answer, but does not file any replication to the two pleas; and the whole case was, by stipulation, submitted to the court on the demurrer, the two pleas, and the answer, and certain depositions. The latter I need not notice, as they are not essential to the determination of the case; the demurrer I may waive.

On their face, both pleas seem to be good, and perhaps, in view of the manner in which the case has been submitted, the bill should be dismissed without looking to the answer at all. "The office of a plea is to present some distinct fact which of itself is a bar to the suit, and avoids the necessity of going into the evidence at large. When a plea is interposed, the complainant has the option to set it down for argument, and thereby to challenge its legal sufficiency, or to deny the truth of the averments it contains, and to go to a hearing on the questions of fact. If he adopts the former course (which was done in this case), he thereby admits the truth of the facts stated in the plea, but denies their sufficiency in law to prevent his recovery. If he takes the latter course, he admits that, if the facts stated in the plea existed, they were legally sufficient to defeat his suit, but denies their existence. The appellant took the latter course. She did not set the plea down for argument, but she filed a general replication to it, and went to a final hearing upon the issue thus presented. She thereby admitted that the plea was sufficient in law, and the only question she raised was whether or not the allegations of the plea were true in fact; and if, upon the final hearing, they proved to be true, the appellees were entitled to a dismissal of the bill." *Daniels v. Benedict et al.*, 97 Fed. 374, 38 C. C. A. 592, citing *U. S. v. California & O. Land Co.*, 148 U. S. 31, 39, 13 Sup. Ct. 458, 37 L. Ed. 354; *Farley v. Kittson*, 120 U. S. 303, 314, 315, 316, 7 Sup. Ct. 534, 30 L. Ed. 684; *Hughes v. Blake*, 6 Wheat. 453, 472, 5 L. Ed. 303; *Rhode Island v. Massachusetts*, 14 Pet. 210, 215, 10 L. Ed. 423.

But the question was raised in this case, where the pleas were set down for hearing without a replication, as to what course the court should pursue, after having held the pleas to be good; that is to say, whether it should dismiss the bill, or send it back to rules, permitting a replication to be filed to the pleas, and give the complainant an opportunity to show that they were false. Ordinarily, where a case

is submitted in the regular way, upon a plea to which no replication has been filed, if the plea is held good the complainant should be allowed to file his replication, and go to trial on the facts. *U. S. v. Dalles Military Road Co.*, 140 U. S. 599, 11 Sup. Ct. 988, 35 L. Ed. 560.

This cause, however, having been submitted on stipulation for final determination, the court, under ordinary circumstances, might well be justified in dismissing the bill. Inasmuch, however, as the court has but recently been established, and the chancery practice is not as well understood as it might be, the court has concluded to make no decision on the pleas, but to look to the bill and answer, which raises another question fatal to the bill, for which no amendment could, in any event, avail. The bill alleges that the plaintiff is in actual possession of the property; the answer denies it. Can a court of chancery, under federal procedure, take jurisdiction of such a case? The answer must be in the negative. The reason is plain. Section 723 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 583] provides: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." If the complainant is out of possession, and the defendants are in possession, ejectment will lie, which is a complete remedy; and if neither party is in possession a bill in equity will not lie, under the English chancery practice, to quiet the title.

Chapter 128 of Sandel's & Hill's Digest of the statutes of Arkansas makes provision for filing bills in equity by persons out of possession. This statute enlarges the remedies existing under the equity chancery practice in force in the federal courts. The question arises whether or not state statutes may enlarge the jurisdiction of the chancery courts of the United States? In many instances they may; in others they cannot. The line of distinction is well stated by Judge Wellborn in *Davidson et al. v. Calkins et al.* (C. C.) 92 Fed. 231, in these words:

"Enlarged equitable remedies given by the statutes of a state may be administered by a federal court unless they conflict with the distinction, strictly observed in said courts, between law and equity; but where there is a plain, adequate, and complete remedy at law for the enforcement of the right a federal court, under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], is without jurisdiction of a suit in equity. A federal court is without jurisdiction of a suit in equity to determine or quiet the title to real estate of which defendant is in possession, though such a suit is authorized by the statute of the state, as the effect would be to draw into a court of equity a controversy properly cognizable at law. A right of action of a claimant to a mining claim who is out of possession, against another in possession, concerns possessory rights, the title being in the United States, and his remedy is at law."

These quotations are taken from the syllabus of the opinion. The opinion itself will be found exhaustive and instructive.

The court holds, therefore, that it is without jurisdiction to try this case, and the bill must be dismissed, at the cost of the complainant. It is so ordered.



## THE CHARLOTTE.

(District Court, E. D. Virginia.. August 11, 1903.)

## 1. COLLISION—STEAMER AND SCHOONER—EXCESSIVE SPEED IN FOG.

A steamer which entered a dense fog bank on a river at a speed of 10 miles an hour was clearly negligent, and must be held in fault for a collision with a schooner, which resulted.

## 2. SAME—FOG SIGNALS—WEIGHT OF TESTIMONY.

The testimony of witnesses on a steamer that they heard only a single fog signal from a schooner in a fog, and with which the steamer shortly after came in collision, indicating that she was on the starboard tack, when she was in fact on the port tack, and approaching the course of the steamer, is not sufficient to establish such fact as against the testimony of persons on the schooner, one of whom was disinterested, re-enforced by that of two other disinterested witnesses, who were in the immediate vicinity, that the schooner gave the proper signal of two blasts.

## 3. DAMAGES—WRONGFUL DEATH.

An award of \$1,600 damages, made for the death of a boy 18 years old, leaving infant brothers and sisters in part dependent upon him, and \$900 for the death of a boy of 15, leaving only a father, not dependent, is reasonable.

In Admiralty. Suits to recover damages sustained in collision.

Kelly & Edwards, for libelants.

Foster & Foster and Herbert I. Lewis, for respondent.

WADDILL, District Judge. These libels were filed to recover damages arising from the loss of the lives of the libelants' intestates, respectively, in a collision between the respondent's steamship Charlotte and the schooner Annie M. Harris, the causes being heard together by consent of parties, as they depend, so far as the collision is concerned, upon the same state of facts. The Charlotte, an iron screw steam vessel of 1,746 tons register, 1,300 horse power engines, of a speed of some 15 knots per hour, owned by the Chesapeake Steamship Company, of Baltimore City, and plying between the ports of Baltimore, Md., and West Point, Va., and the Annie M. Harris, a two-masted wooden vessel, 27 tons register, some 53 feet in length over all, 18 feet beam, engaged in the oyster business on York river, on the morning of the 30th of August, 1902, about 6:45 o'clock, as each vessel was proceeding up the river, came in collision in a fog, and as a result the schooner was sunk, and the decedents, respectively, both of whom were employed on the Harris as seamen, and the first named also acting as mate, lost their lives.

The faults assigned against the steamship are, briefly, running at too rapid rate of speed in a fog; failure to give proper fog signals; failure properly to slacken her speed, or stop, or reverse, upon approaching the Harris; and the lack of a proper lookout. The faults assigned against the Harris are that she failed to give the proper signals indicating her movements while navigating in the fog, in that she gave only one blast of her horn, indicating that she was on the

¶ 1. Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.

See Collision, vol. 10, Cent. Dig. § 215.

starboard tack, proceeding to the westward, and away from the Charlotte, when in point of fact she was on a port tack, proceeding to the eastward, and across the bow of the Charlotte, without giving two blasts on her horn, indicating such tack.

The faults against the Charlotte will be first considered. The evidence, particularly on the question on which the cases turn, is meager, and much less conflicting than is usual in collision cases. So far as the Charlotte is concerned, the same turns almost entirely upon the speed of the vessel, and, as to the Harris, whether, at the time of the collision, it was giving the port or starboard signals required to be given in a fog. The evidence of the libelants established the fact that there was a very heavy fog on the morning in question, whereas that of the steamship is to the effect that there was considerable fog from Almond's Wharf, some five miles below the scene of the collision, particularly inshore, on both sides of the river, but that in the channel it was not such as to prevent seeing, or that seriously interrupted the navigation of the ship, until about the time of the collision, when a fog bank was entered, extending entirely across the river, and up the river for a very short distance. The evidence of the steamship's master is that he entered this fog bank running at a speed of 10 miles an hour; that he suddenly heard the single blast of the Harris' fog horn on his port bow, and proceeding, as he supposed, on a starboard tack to the westward, when he slowed down, and stopped his engine, and in a little time put his wheel to port, and subsequently reversed, and ordered his engine full speed astern; after which he heard another blast of the fog horn, still indicating, as he supposed, that the vessel was to his port; but in a moment the schooner loomed up across his bow, when it was too late to avert the collision.

The libelants earnestly insist that the steamship, upon hearing the first signal of the Harris in the fog, and which indicated she was apparently half a mile away, should have stopped and reversed her engines until the exact location of the schooner was ascertained, and not have slowed down and ported as was done, and as a result of which the collision occurred. Whatever may be the merits of this contention—and it cannot be said that it is without evidence to support it—it is immaterial in this case, as, in the view taken by the court, it abundantly appears, as well from the pleadings in the cause as the evidence of the respondent, that the steamship was clearly negligent in running into the fog bank at the speed it confessedly did, and as a consequence of which this collision happened. Conceding the condition of the fog to be as claimed by the steamer up to the time of entering the fog bank—certainly before entering it—she should have slowed down. The law on this subject is too well settled to admit of controversy, and its wisdom is apparent to all. The rule requiring vessels to go at a moderate speed in a fog would be of little avail to persons within and closely upon the edge of a fog bank, if other vessels navigating in the clear, and before entering such bank, should proceed at full speed into the same. *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; *The Martello v. The Willey*, 153 U. S. 70, 14 Sup. Ct. 723, 38 L. Ed. 637; *The Milanese*, 4 Asp. 438; *The Perkiomen*

(D. C.) 27 Fed. 573; *The Trave* (D. C.) 55 Fed. 117; *Hughes*, Adm. 227.

The faults assigned against the *Harris* turn upon whether or not she gave proper fog signals at the time of the collision; the contention being that she gave one signal, indicating she was on her star-board tack, when in fact she was on a port tack, and failed to give the two signals required. This presents a question of fact to be determined by the court from the evidence before it, and the evidence very largely preponderates in favor of the schooner, and the probabilities of the case also coincide with this view. It is true that the master and other witnesses from the steamer, who appeared to be of unusual frankness and fairness, testified with apparent truthfulness that they only heard one signal from the *Harris*; but two witnesses from the *Harris*—her master and an uninterested person traveling on the vessel at the time—as well as two other witnesses who were in the immediate vicinity of the accident, all testified that the *Harris* gave the two signals, indicating that she was on the port tack at the time of the collision. Three of these witnesses were uninterested, and two of them on the vessel, and the others in a better position to hear the signals than the witnesses from the steamer, then under way; and their evidence should be accepted as to whether or not the proper signals were given, their demeanor on the stand being such as to convince the court that they were speaking truthfully. Positive evidence of witnesses who hear a sound or see an object is entitled to greater weight than the negative evidence of persons who failed to see or hear the same. The failure to hear a signal cannot be said to disprove the fact that it was given, and this is strikingly true as to witnesses on board the vessel at the time, who heard the signals given. *The Richmond* (D. C.) 114 Fed. 208, 211, and cases there cited. It should not lightly be assumed that the navigator of a schooner would proceed under wrong signals at a time when it involved risk of collision, with such serious consequences to himself and those on board his vessel. It follows from what has been said, that the collision resulted solely from the negligence of the *Charlotte*, and a decree will be entered so determining.

The assessment of damages in these cases is, as usual, a matter of delicacy and difficulty, and one largely in the discretion of the court. In the first-named case, the libellant's intestate was a young white man, 18 years old, of good habits and character, earning \$15 per month, and was about to be advanced to \$20, having several infant brothers and sisters in part dependent on him for support. In the last-named case the decedent was a colored boy of good habits and character, 15 years of age, and earning \$10 per month, his father living, 51 years old. Taking in view all the circumstances of these cases, particularly in the one case that the parties who will receive the benefit are brothers and sisters, and in the other a father, who would be entitled to the earnings of his child only during his minority, an award of \$1,600 in behalf of the first-named libellant and of \$900 for the last-named libellant is thought to be reasonable, and the same will be accordingly allowed.

**POND v. NEW YORK NATIONAL EXCH. BANK.**

(District Court, S. D. New York. July 1, 1903.)

**1. BANKRUPT ACT—AMENDMENT—EFFECT.**

Act Cong. Feb. 5, 1903, c. 487, § 19 (32 Stat. 801), amending Bankr. Act 1898, and providing that it should not apply to bankruptcy cases pending when the act took effect, but that such cases should be adjudicated and disposed of conformably to the provisions of the original act, prevents the application of the amendment to bankruptcy cases proper, not including a suit by the trustee to recover a preference.

**2. SAME—JURISDICTION—VESTED RIGHTS.**

Act Cong. Feb. 5, 1903, c. 487, § 19 (32 Stat. 801), conferring on the federal courts of bankruptcy jurisdiction of a suit brought by a trustee in bankruptcy to recover a preference, conferred jurisdiction on a court which previously did not have jurisdiction of such suit, and was not confined to rights of action subsequently arising, but was available to enforce existing rights of action.

**3. SAME—ADEQUATE REMEDY AT LAW.**

Action by a bankrupt's trustee to recover a payment by the bankrupt, alleged to constitute a prohibited preference, authorized to be maintained in the bankruptcy courts by Act Cong. Feb. 5, 1903, c. 487, § 19 (32 Stat. 801), is analogous to a suit by a judgment creditor to set aside a fraudulent conveyance, and hence its maintenance as a suit in equity is not objectionable on the ground of the existence of an adequate remedy at law.

In Bankruptcy.

Richard B. Aldcroft, for complainant.

George C. De Lacy (Frank L. Crocker, of counsel), for defendant.

**HOLT**, District Judge. This is a demurrer to a bill in equity filed to recover \$16,000, paid by the bankrupt to the defendant, on the ground that it constituted a preference, prohibited by the bankrupt act. Various grounds of demurrer are stated. The only two grounds which require any consideration, in my opinion, are that this court has no jurisdiction, and that the complainant has an adequate remedy at law. The adjudication in bankruptcy and the election of a trustee took place before the amendment of 1903, authorizing such a suit to be brought in this court. The defendant claims that the amendment applies only to suits brought by trustees appointed in bankruptcy proceedings in which the adjudication took place after the amendment was adopted. The amendatory act (Feb. 5, 1903, c. 487, § 19, 32 Stat. 801) provides that it "shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions" of the original act. I think that this provision applies to the administration of bankruptcy cases proper, and not to a suit brought by a trustee. Such a suit is not a bankruptcy case, within the meaning of the provision in the amended act. The general rule is that the right to any particular remedy is not a vested right, and that a statute creating new remedies, or conferring jurisdiction upon courts which previously did not have it, is not confined to rights of action arising thereafter, but may be availed of to enforce any existing rights of action. *Cooley's Constitutional*

¶ 3. See Bankruptcy, vol. 6, Cent. Dig. § 446.

Limitations (5th Ed.) 443, and cases there cited. Section 723 of the U. S. Revised Statutes [U. S. Comp. St. 1901, p. 583] provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." Under this section it is well settled that it is not enough that there is a remedy at law, it must be plain, adequate and complete; that is, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 213, 7 L. Ed. 655; *Thompson v. Allen Co.*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472.

This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance. The original payment, when made, was valid. It would not have been voidable by the bankrupt. It has only become voidable at the election of the trustee in bankruptcy, in the same manner as a fraudulent conveyance may be set aside by a judgment creditor. The jurisdiction in such cases has always been in equity. Many such suits in equity were brought by trustees in bankruptcy under the act of 1867; for instance, *Grant v. Natl. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. Under the present act, it has been held that a suit in equity is the proper remedy. *Wall v. Cox*, 101 Fed. 403, 41 C. C. A. 408. This was one of the cases which held that the district court had jurisdiction of such suits under the original act, before the decision of the United States Supreme Court in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, which established the contrary rule; but the portion of the opinion which relates to the question whether such a suit shall be brought in equity or at law is entirely applicable to cases arising under the amended act.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer upon payment of costs.

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THE RICHMOND. THE GEORGIA. COASTWISE S. S. CO. v. DICK.

(District Court, S. D. New York. July 15, 1903.)

1. COLLISION—STEAM VESSELS MEETING—VIOLATION OF PILOT RULES 1 AND 6.

A tug with a barge in tow on her side and a steam yacht meeting in East river nearly head on, in the daytime, both held in fault for a collision for attempting to pass starboard and starboard, and in not signaling until when within 1,000 feet of each other, in violation of pilot rules 1 and 6, and in not sooner stopping and reversing when danger of collision appeared; the yacht being primarily in fault for initiating the improper signal, and for failure to promptly execute the maneuver when agreed upon.

In Admiralty. Cross-litigations for collision.

Wheeler & Cortis, for E. R. Dick.

Butler, Notman, Joline & Mynderse, for the Coastwise Steamship Company.

ADAMS, District Judge. These actions arose out of a collision which occurred on the Brooklyn side of the East River, a short distance above the Brooklyn Bridge, about 3 o'clock p. m. July 31, 1901, between the steam yacht *Elsa*, owned by E. R. Dick, and the barge *Georgia*, in tow of the tug *Richmond*, on the tug's port side. The barge and tug were owned by the Coastwise Steamship Company. The yacht was bound down the river, intending to go through the Buttermilk Channel, and the *Richmond* and the barge, the latter laden with about 3,000 tons of coal, were bound east. The tide was flood and it was a clear bright day. The yacht was going at the rate of about 7 miles per hour and the tug and barge, aided by the tide, about 5 miles. The *Elsa* was very slightly to the starboard of the tug and barge, but they were practically head and head and there was risk of collision if both vessels kept their courses. When they were less than a quarter of a mile apart, the yacht blew a signal of two whistles to the tug and starboarded her helm. The signal was not heard on the tug and two more two blast signals were blown by the yacht to her. One of these two, probably the first, was answered with a similar signal by the tug and she starboarded her helm and directed the barge to do likewise. The barge was large and unwieldy and did not respond quickly to the helm and such effect as it would have had was counteracted by the reversing of the tug's screw, which was ordered when a collision was imminent. The collision, however, could not be avoided and the barge's starboard bow, which projected ahead of the tug about 75 feet, came in contact with the yacht's starboard side, abaft amidships, and some injury was done to both vessels.

I find that the yacht was primarily in fault for the collision for initiating a two whistle starboard to starboard course, when the rule required that they should take a one whistle port to port course. The yacht claims that there was no room for her on the Manhattan side, because of the presence of numerous vessels there, yet she crowded the tug and barge and expected them to find room, though they occupied a space of 75 or 80 feet in the water, while she only had a beam of 23½ feet. I find that there was in fact plenty of room for the vessels to manœuvre according to rule. She was also in fault for failing to exert the necessary vigilance in carrying out the manœuvre she initiated. The situation required an almost immediate hard-a-starboard helm on her part, whereas it was not so put until the vessels were close together and then the effect was to throw the yacht's stern to the starboard and against the bow of the barge. She was also in fault for giving her signals to the tug too late, admittedly not until the vessels were within a quarter of a mile of each other. The tug claims that the distance between them when the tug answered was 600 or 700 feet. As this was probably the second signal, the first was doubtless given when the vessels were not more than 1,000 feet apart, instead of a half of a mile as required by Pilot Rule 6. She was also in fault for not stopping and reversing when danger of collision appeared.

I must also hold the tug in fault. She paid no attention to the yacht until the vessels were within 1,000 feet of each other and approaching at the respective rates of 7 and 5 miles, or at a combined

rate of about 12 miles per hour, so that they were, when the yacht was observed on the tug, within less than a minute of collision. The navigator of the tug, concluding from the yacht's appearance that she was a high speed and easily manœuvred vessel, evidently expected that the yacht would exert her supposed powers to keep out of the way of the tug and barge, and left it to her to adopt a course of navigation for that purpose. The yacht adopted an improper course and executed the manœuvres to carry it out poorly, but that afforded no excuse to the tug for her omission of duty. She should have seen the yacht before and signalled to her in conformity with the rule and in the absence of proper action on the part of the yacht, should have blown danger signals and stopped and reversed. The tug was not a privileged vessel.

The case is one of negligent navigation on the part of both vessels and both must be held. Decrees accordingly, with orders of reference.

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KENWORTHY et al. v. HIRST.

(Circuit Court, E. D. Pennsylvania. July 13, 1903.)

No. 3.

1. PLEADING—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

Under the rule that an affidavit of defense is sufficient if it sets forth a substantially good defense, giving to its averments a reasonable intendment, an averment in a statement of claim that on a certain date there was a balance due plaintiffs upon an agreed settlement of account is sufficiently answered by an affidavit of defense categorically denying that on such date there was an agreed settlement of account, which must be construed to mean that on such date no such agreed settlement was in existence; the ambiguity, if any, as to the date of the settlement having its origin in the declaration.

2. SAME.

An affidavit of defense to a statement of claim on an account for goods sold and delivered, setting up the contract under which the goods were purchased, and its breach by plaintiffs, considered, and *held* sufficient.

At Law. On rules for judgment for insufficient affidavit of defense.

Charles H. Edmunds and John Sparhawk, Jr., for plaintiffs.

R. C. Dale, for defendant.

DALLAS, Circuit Judge. The plaintiffs' statement of claim is the equivalent of the common count for goods sold and delivered, with a bill of particulars annexed, which is alleged to be a copy of the plaintiffs' book of original entry. The first item of this bill is: "Jan. 1, 1897. To balance due plaintiffs upon agreed settlement of account, \$40,260.09." I think a mistake must have occurred in presenting this as an entry contained in a book of account, for it is improbable that the word "plaintiffs" would be employed by a bookkeeper, especially at a time when, so far as appears, there was no pending litigation between the parties. But, be this as it may, it certainly is not a charge for goods sold and delivered, and its association with the statement of claim can be made available to the plaintiffs only by regarding it as, in effect, a separate count for money due and owing upon an

account stated and settled. The date is specified without a videlicet, and a plea traversing the allegation of settlement as of that date would, I think, even under the old system, be a good one. But, whatever may be the rule of strict pleading, an affidavit of defense is sufficient if "it sets forth substantially a good defense, \* \* \* giving to its averments a reasonable intendment." *Hoopes v. Bank*, 102 Fed. 448, 42 C. C. A. 436. It is entitled, at least, to as much liberality in construction as may be accorded to the statement to which it is responsive; and therefore, if in this instance the peculiar terms of the plaintiffs' claim may be interpreted to mean that a previously agreed settlement of account was in existence on the 1st day of January, 1897, then surely the defendant's categorical answer that "it is not true, as is averred in said statement, that on January 1, 1897, there was an agreed settlement of account," should, in fairness, be taken to import that no such agreement, at any time made, was existent on that day. In short, if there really is any ambiguity respecting this matter of date, the fault originated in the declaration, not in the affidavit. Whatever the plaintiffs may have intended to allege, the defendant has met by a positive denial, and, as nothing more could be required of him, a judgment for want of a sufficient affidavit of defense cannot be awarded.

The plaintiffs, however, have taken an additional rule for judgment "for the portion or portions of plaintiffs' claim as to which the court shall adjudge the affidavit of defense to be insufficient"; and under this latter rule, the affidavit, as related to the remaining debit items of the account, is still to be considered. They consist, exclusive of interest, wholly of charges for yarn sold and delivered. No contract of sale is set forth or mentioned. No doubt, a cause of action is alleged, but the terms or conditions, other than prices, of the sales and purchases are not specified. These are, for the first time, referred to in the affidavit of defense. It is there averred that the yarns purchased by the defendant from the plaintiffs did not correspond in quality and quantity with the items of the plaintiffs' statement; that "much of the yarn delivered by the plaintiffs to the defendant, for which this suit is brought, was not yarn such as the plaintiffs had promised to deliver; \* \* \* instead of being pure yarn, it was made up of shoddy, and borax and soap were added for the purpose of giving it weight." As to the alleged deficiency in quantity, it is averred "that on the gray yarn sold by the plaintiffs to me [defendant] from July 13, 1893, to April 25, 1900" (settlement as of or before January 1, 1897, having been previously denied), "the actual length was twenty per cent. less than the amount charged." And it is further averred "that the usual loss in the weight in cleaning yarn of the character which the plaintiffs contracted to sell to the defendant is from 16 per cent. to 18 per cent., but that by reason of the large amount of foreign matter contained in the yarn supplied by plaintiffs to defendant, the loss was from 25 per cent. to 35 per cent., or on the average of at least 10 per cent. in weight more than the loss which should have occurred."

I have included in the foregoing epitome only those portions of the affidavit which I deem to be of most importance, and I feel myself constrained to hold that they aver the contract between these parties,



and its breach by the plaintiffs, with sufficient particularity and fullness to send the case to a jury. *Hoopes v. Northern National Bank*, 102 Fed. 448, 42 C. C. A. 436. I have not referred to the affiant's statements of damages, set-off, and counterclaim, because the solution of the questions which they involve is not essential to the proper adjudication of the matter now before the court. *Id.*

Both of the plaintiffs' rules for judgment are discharged.

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UTARD v. UNITED STATES.

(Circuit Court, S. D. New York. July 23, 1903.)

No. 3,144.

1. CUSTOMS DUTIES—CLASSIFICATION—BOTTLES WITH GROUND GLASS STOPPERS.

*Held*, that the language of the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 (U. S. Comp. St. 1901, p. 1633), for "glass bottles \* \* \* ground (except such grinding as is necessary for fitting stoppers)", indicates an intention of Congress to include in that provision all bottles of ground glass, except where the grinding is only for fitting stoppers, and that certain perfumery bottles of molded or pressed glass, with stoppers of cut or ground glass, are dutiable under said paragraph, and not under paragraph 99 of said act (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]), as "molded or pressed \* \* \* glass bottles."

On application by the importer to review the decision (G. A. 4,769) of the Board of General Appraisers affirming the classification of the collector of customs at the port of New York.

F. W. Brooks, for petitioner.

Henry C. Platt, for the United States.

HAZEL, District Judge. The appellant imported perfume bottles of different sizes and styles under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]. The collector holding the articles dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, paragraph 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], exacted a duty of 60 per cent. ad valorem. Thereupon a protest was filed by the importer, which resulted in a decision by the Board of General Appraisers sustaining the collector, and holding that glass bottles having ground or cut glass stoppers are included within the scope of paragraph 100 of the tariff act of 1897, which reads as follows:

"Glass bottles, decanters, or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated or ground (except such grinding as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all the foregoing filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem."

The appellant contends that the articles of merchandise are dutiable under paragraph 99, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]. This paragraph reads as follows:

"99. Plain green or colored, molded or pressed, and flint, lime, or lead glass bottles, vials, jars, and covered or uncovered demijohns and carboys, any of

the foregoing, filled or unfilled, not otherwise specially provided for, and whether their contents be dutiable or free, (except such as contain merchandise subject to an ad valorem rate of duty or to a rate of duty based in whole or in part upon the value thereof, which shall be dutiable at the rate applicable to their contents), shall pay duty as follows: If holding more than one pint, one cent per pound; if holding not more than one pint, and not less than one-fourth of a pint, one and one-half cents per pound; if holding less than one-fourth of a pint, fifty cents per gross: provided, that none of the above articles shall pay a less rate of duty than forty per centum ad valorem."

The bottles in evidence are molded or pressed glass, but for the purpose of assessing duty the ground stopper, when affixed, became a part of the bottle. Therefore the only question here is whether the grinding of the stopper justifies the decision of the Board of General Appraisers. I am unable to perceive how any other conclusion could reasonably have been reached. The argument proceeded upon the theory that the undoubted construction of paragraph 100 is to make the language of that section applicable to glass bottles of better quality and greater commercial value than such as are specifically enumerated in paragraph 99. It will be observed, however, by a reading of paragraph 100, that an exception is made if the stoppers require grinding for fitting them to the glass bottles. This case does not come within the excepted provision. I think the phraseology of the paragraph under consideration quite clearly indicates that Congress intended to include ground glass stoppers when affixed to bottles as within the classification protested against.

It is contended that the Koscherak Case, reported in 98 Fed. 596, 39 C. C. A. 166, is decisive of the point raised upon this appeal. That decision was based upon Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule B, par. 90, 28 Stat. 513, which substantially provided for the assessment of duties upon bottles "when cut, engraved \* \* \* etched or otherwise ornamented or decorated, except such as have ground necks and stoppers only." The court held generally that the process of etching must be sufficiently substantial to remove the articles from the group of plain to the group of decorated and ornamented glassware. This holding would undoubtedly have application here, were it not that under the subsequent tariff act of 1897 significant language is employed by Congress, which would seem to indicate, as already stated, that Congress intended all ground bottles (except when necessarily ground for fitting the stoppers), should pay an increased duty over the plain bottles specifically enumerated in paragraph 99. The decision in the Koscherak Case lays stress upon the word "otherwise," found in section 1, Schedule B, par. 97, Tariff Act Aug. 27, 1894 (28 Stat. 514). It was deduced by the court from the use of the word "otherwise" that Congress intended the paragraph considered in that case to apply to ornamented or decorated glassware only, and therefore the language of the paragraph was qualified. This holding is quite distinguishable from the case at bar. The record discloses that the grinding process upon the outside portions of the stopper, which undoubtedly improves the appearance of the bottle and gives to it a semblance of cut glass, is not necessary for fitting the stopper to the bottle. Upon the authority of *U. S. v. Altman*, 107 Fed. 15, 46 C. C. A. 116, such grinding cannot be deemed to be merely incidental

or immaterial to the bottle in its entirety. Other cases to which my attention is called by counsel for appellant in view of the construction here given to paragraph 100 have no application.

The decision of the Board of General Appraisers is affirmed.

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LEAYCRAFT & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. July 23, 1903.)

No. 3,045.

1. CUSTOMS DUTIES—CLASSIFICATION—ARROWROOT STARCH.

Arrowroot in the form of starch, produced from arrowroot tubers by a process of manufacture, is not within the provision in the free list of Tariff Act July 24, 1897, c. 11, § 2, par. 478, 30 Stat. 195, c. 11 (U. S. Comp. St. 1901, p. 1680), for "arrowroot in its natural state and not manufactured," but is dutiable as "starch," under paragraph 285 of said act (30 Stat. 173 [U. S. Comp. St. 1901, p. 1653]).

On application by the importers to review the decision (G. A. 4,491) of the Board of General Appraisers, which affirmed the decision of the collector of customs at the port of New York.

Stephen G. Clarke, for appellants.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. This application by Leaycraft & Co., importers of an article commercially named "arrowroot," is for a review of the decision of the Board of General Appraisers approving the collector's assessment of the duty at the rate of 1½ cents per pound, and classifying the imported article as starch, under paragraph 285 of the act of July 24, 1897, c. 11, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653]. The amount assessed was paid, the importers reserving a claim to have refunded to them the excessive duty. The sole question submitted by the record is whether the invoice is arrowroot in its natural, unmanufactured state, or whether it is a starch. Upon the protest of the importers the Board of General Appraisers took testimony, and then, following their prior decisions upon similar classifications, held that the article was not arrowroot in its natural state, but merely a starch obtained therefrom, and known under that name. Paragraph 285 of the act of July, 1897, under which the duty was assessed, reads as follows:

"285. Starch, including all preparations from whatever substance produced, if for use as starch, one and one-half cents per pound."

Paragraph 478 (30 Stat. 195 [U. S. Comp. St. 1901, p. 1680]), upon which the importers claim exemption from the payment of duty, is in these words: "478. Arrowroot in its natural state and not manufactured." The language employed appears to be singularly free from doubt as to its meaning. Whatever uncertainty there may be arises from what is commercially understood and meant by "arrowroot." Mr. Baker, expert witness for the government, testified that the exhibit sample of the article found to be dutiable as starch resem-

bles arrowroot and to the taste seems to be arrowroot starch. He further testified that arrowroot in its crude state is in the form of tubers. The proofs show, and upon referring to the subject of "arrowroot" in the Encyclopedia Britannica, the evidence finds corroboration that genuine arrowroot is a tropical plant in its natural or crude state, and of the species of maranta. The fresh roots contain, besides 25 per cent. of starch, a portion of woody tissue, vegetable albumen, and various salts. By peeling the root, and grating or rubbing it in water, the starch falls to the bottom. It is also stated in the Encyclopedia Britannica that the process of manufacture of arrowroot on a large scale is carried on by specially prepared machinery. Under the provisions of the tariff act of 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat. 567), arrowroot, raw or unmanufactured, was admitted into the United States free of duty. The free list of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]) is apparently limited in its entry to such arrowroot only as is in its natural state and unmanufactured. The sample exhibited in evidence was not such. Indeed, it is not contended by the importers, who gave testimony in their own behalf, that the article had not, prior to importation, passed through a process of manufacture. It seems to be clearly established by the record that the decision of the Board of General Appraisers is right.

The decision is affirmed.

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LAWRENCE, JOHNSON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. July 23, 1903.)

No. 2,917.

I. CUSTOMS DUTIES—CLASSIFICATION—SHEEPSKINS WITH THE WOOL ON—CABRETTE SKINS.

In construing Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 664, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1638], which provides for the exemption from duty of certain skins, except "sheepskins with the wool on," held that skins with the wool on of the cabretta, a hybrid resulting from a cross between a sheep and a goat, are "sheepskins," within the meaning of said paragraph, and should be classified as such for duty purposes.

On application of importers to review a decision of the Board of General Appraisers, which affirmed the classification of the collector of customs at the port of New York.

Howard T. Walden, for appellants.

D. F. Lloyd, for the United States.

HAZEL, District Judge. The merchandise covered by the protest of the importers consists of skins with the wool on of the cabretta, a cross between a sheep and a goat. The admixture between the sheep and the goat results in the production of a hybrid that is neither the one nor the other. Some cabrettas have wool on their skins, and others, resembling the goat, have practically none, or only hair,

like the goat; hence their skins can be utilized only as goatskins. It appears by the evidence that these skins, arriving from Brazil, are tied in bales, each bale holding approximately 250 skins. The total number having wool on, in the shipment, is ascertained by an examination of a separated few in each bale, and then the number and their weight are averaged. Usually the percentage of wool-bearing skins in each bale is 40 to 50 per cent. No duty was assessed upon the raw skins, as such skins are admitted free, under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 664, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], but the collector assessed duty upon the skins with the wool on at the rate of 3 cents per pound, holding such wool to be wool on a sheepskin. The protestants claim that as the animals from which the skins were taken were hybrids, and were not skins of sheep, the wool on the skins is entitled to free entry. The ruling of the collector was sustained by the Board of General Appraisers without examining the skins, or taking evidence of their character to support their finding. Evidence was then taken on reference, preliminary to the review of the decision of the Board of General Appraisers by this court. I have examined the proofs, and am of the opinion that the collector was correct in assessing the cabretta skins with the wool on as sheepskins with the wool on. My reasons for that conclusion, briefly stated, are that the cabretta belongs not only to the specie of sheep, but is so closely related that it is difficult to distinguish the difference between the wool-bearing skins of the sheep and of the hybrid, except that the cabretta ordinarily has wool on the sides, with hair, or an admixture of wool and hair, down the back. Moreover, the expert witness for the government testified that cabretta skins with the wool on are also called sheepskins. The denominative exception in paragraph 664 is sufficiently broad, in my opinion, to include the cabretta skin with the wool on. It cannot reasonably be contended that importers of this class of merchandise did not clearly understand that the intent of Congress, at the time of the passage of the tariff act, was to assess a duty upon wool of the sheep and their species. The importers do not seriously claim that the cabretta at the time of the passage of the tariff act had a commercial designation which distinguished that animal from the sheep. In accordance with these views, the classification of the skins with the wool on by the collector was right.

The decision of the Board of General Appraisers is approved.

**SPENCER v. PHILADELPHIA SMELTING & REFINING CO.**

(Circuit Court, D. Colorado. May 15, 1899.)

**1. CUSTOMS DUTIES—CLASSIFICATION—COPPER MATTE—REGULUS.**

Copper matte, an article containing lead and copper, and produced in smelting ores, which is not strictly an ore itself, and which is shown to be known commercially and scientifically as copper regulus, is not dutiable under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 181, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1644], for "lead-bearing ore of all kinds," but is free of duty as "copper, regulus of," under Free List, § 2, par. 534, of said act, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1682].

Appeal by Otis B. Spencer, surveyor of customs at the port of Denver, from a decision (G. A. 4308) of the Board of General Appraisers, reversing his classification of certain importations.

MARSHALL, District Judge (orally). This is an appeal from a decision of the Board of General Appraisers on the following facts: A smelting company imported from Mexico certain copper matte, and entered it at the port of Pueblo. The surveyor of customs classified it for duty as "lead-bearing ore." The smelting company protested against this classification, and this protest was heard by the Board of General Appraisers, and decided in favor of the smelter; the board holding that this matte was in fact copper regulus, and not lead-bearing ore. There was an appeal taken to this court from that decision. Paragraph 181, Schedule C, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1644], makes dutiable "lead-bearing ore of all kinds" at the rate of one and one-half cents per pound on the lead contents thereof. Paragraph 534, Free List, § 2, of the same act of 1897, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1682], puts on the free list copper regulus, and the question submitted is whether this copper matte is copper regulus. It appears that the copper matte contained about 25 per cent. lead and about 34 per cent. copper, and that it is not an ore in any strict sense of the term, but is a product of smelting. On the hearing before the Board of Appraisers, the witnesses were unanimous to the effect that, as used commercially, copper regulus and copper matte mean the same thing. The recent scientific authorities, also, as quoted by them, define copper matte as synonymous with copper regulus. Perhaps a few years ago there was a slight distinction between the two. Copper matte always contains sulphur. When freed of this sulphur, it would become copper regulus. But this distinction has been abandoned in recent years, and both commercially and scientifically they have been used as synonymous terms. The government introduced no witnesses before the board disputing this fact. In the tariff act of March 3, 1883 (22 Stat. 488), copper regulus was dutiable. It then became a question as to whether a matte of nickel and copper was a copper regulus under that act, and the Treasury Department held that it was in fact copper regulus, and was dutiable under the provisions of the act. After the act of 1894 was passed, copper regulus was put on the free list. The question then arose in the Treasury Department as to whether a matte

containing lead and copper, similar to the particular matte here, was copper regulus, and it was held by this Board of General Appraisers that it was copper regulus, and was entitled to be admitted free of duty. In re American Metal Company, G. A. 3394. This ruling was adopted by the Treasury Department, and adhered to by it. This ruling was, of course, or must be presumed to have been, known by Congress when it passed the tariff act of 1897. It has placed on the free list copper regulus in a paragraph in the same words as that of the tariff act of 1894. It must be presumed that it was done in view of the fact that copper matte and copper regulus had been determined to be the same, and with the intent that copper matte should be admitted free under the paragraph. In view of the well-settled principle of construction of such acts, any ambiguity or uncertainty is to be resolved in favor of the importer, and against the government.

The decision appealed from must be affirmed.

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GOLDENBERG BROS. & CO. v. UNITED STATES.

.(Circuit Court, S. D. New York. July 23, 1903.)

No. 3,185.

1. CUSTOMS DUTIES—CLASSIFICATION—LACE NECKWEAR.

*Held*, that the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 314, 30 Stat. 178 (U. S. Comp. St. 1901, p. 1659), "articles of wearing apparel of every description, including neckties or neckwear \* \* \* not specially provided for," does not constitute such a special provision for lace neckwear as to remove it from the scope of the provision in paragraph 339 of said act (Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]), for "wearing apparel \* \* \* made wholly or in part of lace, \* \* \* not elsewhere specially provided for."

2. SAME.

The words "neckwear" and "neckties" in paragraph 314, Tariff Act July 24, 1897, are not terms of commercial designation.

On application of the importers to review a decision of the Board of General Appraisers, which affirmed the classification of the collector of customs at the port of New York.

James W. Purdy and W. E. Hampton, for petitioners.

D. Frank Lloyd, for the United States.

HAZEL, District Judge. An ad valorem duty of 60 per centum having been assessed by the collector under paragraph 339 of the tariff act of July 24, 1897, c. 11, § 1, Schedule J., 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], upon an importation of various lace articles of wearing apparel, commonly known as neckwear, the importers paid the entries, duly protesting in writing that such articles should have been assessed as dutiable under paragraph 314 (Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]), providing for the payment of 50 per centum ad valorem. The collector was sustained by the Board of General Appraisers; hence application to this court for a reversal of their decision.

Paragraph 314 reads as follows:

"314. Clothing, ready-made, and articles of wearing apparel of every description, including neck-ties, or neck wear composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part by the tailor, seamstress or manufacturer, and not otherwise provided for in this act, fifty per centum ad valorem."

Paragraph 339, so far as relevant, is in these words:

"Laces \* \* \* and other lace articles, \* \* \* wearing apparel and other articles made wholly or in part of lace, or in imitation of lace; \* \* \* all of the foregoing composed wholly or in chief value of flax, cotton or other vegetable fiber and not elsewhere specially provided for in this act, \* \* \* sixty per centum ad valorem."

It is admitted that the imported articles are made in part of lace, and are variously described as lace collars and neck ties. The question here is whether "neckwear composed of cotton, \* \* \* and not otherwise provided for," as provided in paragraph 314, includes neckwear or neckties made "wholly or in part of lace," as covered by paragraph 339. By reason of the expression, "not elsewhere specially provided for," in paragraph 339, it would seem that the classification of the articles in question, in view of the absence of a special provision covering neckties of such material, properly belongs to that paragraph. This paragraph broadly includes laces and other lace articles, among which are enumerated wearing apparel and other articles made wholly or in part of lace. As importance is attached to the qualifying words in paragraph 339, "and not elsewhere specially provided for," the issue would seem to be whether neckties and neckwear are specially designated in paragraph 314, or whether such articles are generally covered by paragraph 339. I incline to the view that the former paragraph does not designate by name and character of material the articles included in the term "neckwear" or "neckties" with such special reference as to justify taking them out of the broad scope of paragraph 339. The theory of the importers is based upon the proofs that the enumerated articles have a commercial designation among traders and importers, such as enunciated by the Supreme Court of the United States in *Arthur v. Lahey*, 96 U. S. 112, 24 L. Ed. 766, that:

"When Congress has designated an article by its specific name, and imposed a duty upon it by such name, general terms in a subsequent act, or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it."

But, as already stated, the rule does not apply here, for the reason that, in my opinion, the paragraph on which the petitioners rely to establish it does not specifically designate the articles by name, or make provision for assessing duties upon such articles. The evidence in the case, therefore, tending to show that the enumerated articles have a commercial designation is of no avail.

Decision of the Board of General Appraisers affirmed.



## UNITED STATES v. HUNTER.

(Circuit Court, S. D. New York. January 25, 1900.)

No. 2,654.

**1. CUSTOMS DUTIES—GUMMED PAPER—SUFFICIENCY OF PROTEST.**

Certain gummed paper for adhesive purposes was erroneously assessed for duty as surface-coated paper, under Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule M, par. 308, 28 Stat. 532, and the importer protested against this assessment, claiming the merchandise to be dutiable under paragraph 313 of said act (28 Stat. 533), as a manufacture "of paper, or of which paper is the component material of chief value, not specially provided for." This claim having been sustained by the Board of General Appraisers, the government appealed, contending that the proper classification should have been under paragraph 310 of said act, which relates to "paper not specially provided for," but provides the same rate as said paragraph 313. *Held* that, as the rate was the same in both paragraphs, the government had nothing to complain of.

Appeal from a decision of the Board of General Appraisers, which reversed the assessment of duty by the collector of customs on certain merchandise imported at the port of New York. Note G. A. 3700 and G. A. 4837. See *Bayersdorfer v. U. S.* (C. C.) 122 Fed. 969; *Knowles v. U. S.* (C. C.) 122 Fed. 971; *Weil v. U. S.* (C. C.) 124 Fed. 1006; and *U. S. v. Shea*, 114 Fed. 38, 51 C. C. A. 664.

WHEELER, District Judge. This is gummed paper for adhesive purposes. It was assessed by the collector at 30 per cent., as surface-coated paper, under Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule M, par. 308, 28 Stat. 532. The importer protested that it should be assessed at 20 per cent., as a manufacture "of paper, or of which paper is the component material of chief value, not specially provided for," under paragraph 313. The board decided that it should be assessed at 20 per cent., as "paper not specially provided for," under paragraph 310. The only question here is as to the sufficiency of the protest for the action of the board. As the gummed paper is a manufacture of paper of which paper must be the component material of chief value, perhaps it would fall quite as properly under paragraph 313, but as the rate there is the same as under paragraph 310, it is right either way, and the government has nothing to complain of by way of appeal.

Decision affirmed.

## WEIL v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,706.

## 1. CUSTOMS DUTIES—SUFFICIENCY OF PROTEST—SKINS.

Certain long-haired Russian calfskins were classified as dutiable as "hides of cattle," under paragraph 437, Schedule N, c. 11, § 1, Tariff Act July 24, 1897, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], when they should have been classified as free of duty, under paragraph 664 of said act [U. S. Comp. St. 1901, p. 1688], covering "skins of all kinds, raw." The importers' protest against the assessment of the collector did not refer to the proper paragraph (664), but only to paragraphs 561 and 562 of said act [U. S. Comp. St. 1901, p. 1683], which relate respectively to "furs, undressed," and "fur skins." Held, that this was a sufficient compliance with the requirement in Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], that protests shall set forth "distinctly and specifically" the importer's objections to the collector's decision.

Appeal by the importers, Leopold Weil & Bros., from a decision of the Board of General Appraisers (In re Weil, G. A. 4065), which overruled their protest against the assessment of duty by the collector of customs on certain merchandise imported at the port of New York.

The merchandise consists of long-haired Russian calfskins, assessed for duty under the provision in paragraph 437, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), for "hides of cattle, raw or uncured." The importers protested against this assessment, contending that the articles are free of duty under the provisions in paragraphs 561 and 562, Free List, § 2 of said act, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1683), relating respectively to "furs, undressed," and "fur skins of all kinds not dressed in any manner and not specially provided for." The board found on the evidence before it that the skins in question are not "hides," as classified by the collector, or "furs" or "fur skins," under said paragraphs 561 and 562, as contended by the importers, but that they are in fact raw skins, which are made free of duty by paragraph 664 of said act, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1688), relating to "skins of all kinds, raw." Inasmuch as the importers' protest did not refer to the proper paragraph in the tariff, it was overruled by the board, on the ground that it did not answer the requirements of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933), where it is provided that an importer, in making his protest against the decision of the collector, shall set forth "therein distinctly and specifically \* \* \* the reasons for his objections."

See *Bayersdorfer v. U. S.* (C. C.) 122 Fed. 969; *Knowles v. U. S.* (C. C.) 122 Fed. 971; *U. S. v. Hunter* (C. C.) 124 Fed. 1005; *U. S. v. Shea*, 114 Fed. 38, 51 C. C. A. 664.

William B. Coughtry, for importers.

WHEELER, District Judge. These Russian calfskins do not appear to be raw hides of cattle, under paragraph 437, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), where they were assessed. If not "furs, undressed," under paragraph 561, Free List, § 2, c. 11, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1683), nor "fur skins," undressed, under paragraph 562 (U. S. Comp. St. 1901, p. 1683), they would seem to be either skins or hides

not specially provided for in that act, under paragraph 664, Free List, § 2, c. 11, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1688), and free. The protest, which is questioned, appears to be well enough, according to U. S. v. Salambier, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167. Decision reversed.

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## LAZARUS v. BARBER et al.

(District Court, S. D. New York. October 1, 1903.)

## 1. SHIPPING—DAMAGE TO CARGO—NEGLIGENT STOWAGE.

Charterers of a vessel *held* liable, on the ground of negligent stowage, for damage done to a cargo of goatskins caused by a leakage of brine from casks of citron, which, as shown by the evidence, usually leaked, and in close proximity to which the skins were stowed.

In Admiralty. Suit for damage to cargo.

Gifford, Stearns & Hobbs, for libellant.

Convers & Kirlin, for respondents.

ADAMS, District Judge. This is an action which was brought by the libellant, the purchaser of certain bills of lading, to recover damages sustained through some part of 280 bales of goatskins delivered in February, 1900, by the assignor of the libellant to the respondents' agents for shipment on the steamship Brand. The skins became wet with brine through alleged negligent stowage, in connection with some casks of citron on a voyage from Constantinople to New York. The respondents were the charterers of the steamship and, by their agents in Constantinople, gave the bills of lading in question for the skins, acknowledging their receipt in good order. It is undisputed that they were delivered in New York in bad order and the question to be determined is, whether the respondents are relieved from liability by the exceptions in the bills of lading, which provided, *inter alia*, that the carrier should not be liable for "any loss or damage arising from the nature of the goods \* \* \* nor for any loss or damage caused by \* \* \* decay, putrefaction \* \* \* sweat \* \* \* nor for any country damage."

The skins were stowed in the lower after hold of the steamship, in close proximity to some casks of citron. Some of the fruit was taken on board at Syra, about two weeks before the steamship reached Constantinople. Some of the skins were loaded at Salonica and some, afterwards, at Constantinople, the former being dry and the latter salted. The contention of the libellant is, that the damage came from leakage of the brine from the casks, which contained the citron. That of the respondents is, that some skins were in process of decay when loaded, and that the damage arose from causes falling within the exceptions in the bills of lading.

In my judgment, the evidence leaves no doubt that the injury was due to the brine escaping from the citron casks. Although the skins were not stowed under the casks, yet the proximity was such that when the casks leaked, as the evidence shows they usually do, and

did in this case, the skins, by reason of their absorbent qualities, became wet, heavy and affected to their detriment. There was an absence on the part of the respondents of the special care that they were required to exercise by reason of the character of the cargo and the libellant is entitled to recover. *The Sabioncello*, 7 Ben. 357, Fed. Cas. No. 12,198; *Mainwaring v. The Carrie Delap* (D. C.) 1 Fed. 874; *Paturzo v. Compagnie Francaise* (D. C.) 31 Fed. 611; *Knott v. Botany Worsted Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90; *Butterfield v. The Hudson* (D. C.) 122 Fed. 96.

Decree for the libellant, with an order of reference.

### THE VILLE DE ST. NAZAIRE.

(District Court, D. Oregon. August 18, 1903.)

No. 4,658.

#### 1. ADMIRALTY—SUITS IN REM—GROUNDS OF RECOVERY.

A suit in rem against a ship cannot be maintained to recover for damage to a tug which was hired and used by the master in a towage service, on the ground that he was bound to return the tug in as good condition as when received, usual wear excepted; the right of action being against the owners on the contract, and not one based on any fault of the ship.

In Admiralty. Suit in rem to recover damages for injury of steamer.

Dolph, Mallory, Simon & Gearin, for libellant.

Williams, Wood & Linthicum, for respondent.

BELLINGER, District Judge. This is a suit in admiralty against the ship *Ville de St. Nazaire* for damages to the libellant's steamboat *Regulator*. The ship *Ville de St. Nazaire* was lying in the Willamette river, at the Oceanic dock, and was about to move to Columbia dock, a half a mile up stream, to complete her cargo. The master of the ship hired the *Regulator* to assist in towing the ship from one dock to the other, and for this purpose the steamer was turned over to the said master, and was used under his direction in the service for which she was hired. While performing this service, in conjunction with another steamer hired by the master for the same purpose, and while the steamers and ship were moving up the river under the charge of a pilot employed by the ship's master, the *Regulator* was caught between the *Ville de St. Nazaire* and the ship *Desaix*, which was anchored in the stream, and was crushed and damaged. It is the contention of the libellant that it was the duty of the master of the *Ville de St. Nazaire* to return the *Regulator* in as good a condition as when he received her, reasonable wear excepted, and that, not having done so, the libellant company is entitled to proceed against the ship for the damages sustained. The distinguishing feature of proceedings in rem is that the vessel or thing proceeded against is impleaded as the real defendant. In a case for damages such as this, some fault or negligence on

¶ 1. See Admiralty, vol. 1, Cent. Dig. § 279.

the part of those in control must be imputed to the ship, in order to charge it with liability. The ship must be regarded as an actor, whose offending has caused the injury complained of. Here the liability sought to be enforced arises out of a contract obligation of the master of the ship to return the steamer in as good condition as she was when she undertook the towage service. The liability sought to be enforced is that of the owner, against whom the injured party is entitled to have its remedy by a proceeding in personam.

The libel is dismissed, at the libelant's costs.

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THE EL CID.

(District Court, S. D. New York. June 29, 1903.)

1. COLLISION—VESSEL AT ANCHOR—STEAMSHIP OUT OF FAIRWAY.

The steering gear of the steamship *El Cid* became disabled in New York Bay as she was going out to sea, and she drifted with the tide upon the steamship *Himera*, lying at anchor, and a collision resulted. *Held*, on the evidence, that the *Himera* was within the anchorage grounds, and that the *El Cid* was in fault for the collision solely because she was out of the fairway; the case being otherwise one of accident which could not have been foreseen, or its results averted.

In Admiralty. Suit for collision.

Maxwell Evarts, for claimant.

Henry W. Goodrich, for libelant.

HOLT, District Judge. This is an action to recover damages for a collision between the steamships *Himera* and *El Cid* on the morning of February 6, 1903. The *Himera* was lying at anchor on the west side of New York Harbor, below the Statue of Liberty. The *El Cid* was going out to sea, and when a short distance above the *Himera*, her steering gear became disabled, so that she was not under control. Under those circumstances, she drifted with the tide upon the *Himera*, and the collision resulted.

In my opinion this was a case of a pure accident, which could not have been foreseen, or its results averted. For such an accident neither vessel would be held in fault, if it were not for the question which arises as to their position at the time of the accident. The *Himera* claims that she was anchored within the anchorage grounds on the west side of the harbor. The *El Cid* claims that the *Himera* was lying in the fairway, out of the anchorage grounds. If the collision occurred in the anchorage grounds, the *El Cid* was in fault for going there. If it occurred in the fairway, the *Himera* was in fault for being there. The question what was the actual place where the collision occurred is, therefore, the sole question in the case.

In my opinion the evidence shows that the *Himera* was anchored, and that the collision occurred within the anchorage limits. The evidence of the witnesses who saw the vessel at anchor, in my opinion, preponderates that that was her position. The absence of proof of any contemporaneous claim on the part of the *El Cid* that the *Himera*

was anchored in the fairway, as shown by the fact that there was no such entry in the log, and that nothing of the kind was said when the officers of the *El Cid* visited the *Himera* immediately after the accident, is weighty. The proof is clear that the *Himera* was originally anchored on February 5th well within the limits of the anchorage ground, and the claimant's counsel in his brief admits it. The claim is that she dragged her anchors in the high wind of the day and night after she came to anchor. I think the evidence preponderates that she did not. The relative positions of the other vessels in the neighborhood were the same on the morning of the 6th as they had been on the 5th, and it is quite improbable that they should all have dragged their anchors in such a way as to remain in the same relative positions to each other. The evidence given by the captain of the *El Cid* of her bearings while at anchor after the collision would be very weighty if others on the ship had witnessed his taking of the bearings, or had taken the bearings themselves, which it seems to me he should have had them do. As the evidence stands, I cannot avoid the conclusion that the captain's bearings are erroneous for some reason.

My conclusion is that there should be a decree for the libelant, with costs, and the usual reference to ascertain the amount of damage.

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WAKEMAN v. THROCKMORTON et al.

(Circuit Court, D. Connecticut. June 29, 1903.)

No. 1,120.

1. REMOVAL OF CAUSES—AMOUNT IN DISPUTE—SUIT TO FORECLOSE LIEN.

In a suit to foreclose a lien, the amount in dispute, for the purpose of determining the jurisdiction of a federal court or the right of removal thereto, is the amount sought to be recovered under the lien.

In Equity. On motion to remand to state court.

Beecher & Canfield, for plaintiff.

Wm. F. Henney, for defendants.

PLATT, District Judge. An action was brought in the court of common pleas for Fairfield county, returnable on the first Monday of April, 1903, seeking to foreclose a judgment lien of \$827.69 against the interest of John I. Throckmorton in certain lands in that county. His wife and himself seem to absorb the equity, and various incumbancers are joined as defendants. The Throckmortons insist that the controversy is separable, and that they, as citizens of Ohio, have the right to remove it to this court.

The motion to remand is supported by three lines of reasoning: (1) The matter in dispute, exclusive of interest and costs, does not exceed the sum or value of \$2,000. (2) If it does exceed that amount,

¶ 1. Jurisdiction of Circuit Courts, as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

the matter in dispute was beyond the jurisdiction of the common pleas court. (3) The controversy is not separable, and the Throckmortons alone have joined in the petition, omitting therefrom several citizens of Connecticut who are defendants in the Fairfield county case.

Let me first dispose of the third contention. It may be assumed, although I am very far from admitting it, that the controversy between the plaintiff and the Throckmortons is separable from that between him and the other defendants, and even then the ground for removing the suit into this forum is not evident.

The matter in dispute never drifts appreciably away from the foreclosure of a judgment lien for \$827.60. The right to establish such lien, so that it can be foreclosed, and the method of foreclosure, are in all respects creatures of the local law, and by that law the matter in demand for jurisdictional purposes is fixed by the amount of the lien. Because the action is a new statutory right, and also because the statutes establish a rule governing the acquisition and transmission of Connecticut property, it might, if occasion required, be the duty of the federal court to follow the local statutes.

Passing by these considerations, however, without basing my action upon them, I find that the federal courts have conclusively settled the proposition that the amount in dispute which shall govern them when the question of jurisdiction arises shall be the amount sought to be recovered under the lien. *Gibson v. Shufeldt*, 122 U. S. 29, 30, 7 Sup. Ct. 1066, 30 L. Ed. 1083, settles the matter, and leaves no room for discussion.

The cases cited by counsel opposing the motion to remand fail to sustain his contention. They are *Stinson v. Dousman*, 20 How. 466, 15 L. Ed. 966; *Dickinson v. Trust Co. (C. C.)* 64 Fed. 895; *L. Z. & I. Co. v. N. J. Z. & I. Co. (C. C.)* 43 Fed. 545. In each of those cases the determination of the matter in dispute would have settled finally and conclusively, without further proceedings, the title to property or an interest in the title, and in each case the property or the interest therein confessedly exceeded the required amount.

Let the case be remanded

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In re BYBEE.

(District Court, N. D. California. September 14, 1903.)

No. 4,092.

**1. BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—PRIOR ADJUDICATION.**

A judgment denying a debtor a discharge from a debt under a state insolvency law is not an adjudication of his right to a discharge from such debt in bankruptcy, where it does not appear upon what grounds such judgment was based.

In Bankruptcy. On motion to vacate order staying execution against the bankrupt.

F. V. Meyers, for petitioning creditor.

Joseph E. Bein and Robert Richards, for bankrupt.

DE HAVEN, District Judge. This is a motion to vacate the order heretofore made in this proceeding, staying execution of a judgment obtained against the bankrupt in a justice's court of the city and county of San Francisco, state of California, on December 26, 1902. The motion is based upon the alleged facts that prior to the enactment of the present bankruptcy act the bankrupt commenced in the superior court of the city and county of San Francisco, state of California, proceedings for his discharge, under the insolvency law of the state, from the indebtedness upon which the judgment in the justice's court referred to was founded, and that his application for such discharge was denied. It is argued that the right of the bankrupt to be discharged from such indebtedness has thus been finally determined against him, and therefore the creditor should be allowed to enforce the judgment obtained by him in the justice's court. The particular facts which were in issue and determined in the insolvency proceeding are not shown. Section 17 of the bankruptcy act of July 1, 1898 (chapter 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), provides that a discharge in bankruptcy shall release the bankrupt from all of his provable debts, with certain exceptions, and it does not appear from the affidavit filed in support of the present motion that the judgment in the insolvency proceeding in the state court was based upon any fact falling within these exceptions. That judgment may, under the law of the state, have been given for reasons and upon grounds other than the existence of facts which would prevent a release under the bankruptcy act, and, if so, would not affect the decree of discharge granted in this proceeding. Upon this state of the record, the motion to vacate the order staying the proceedings upon the judgment in the justice's court must be denied. *Dean v. Justices of the Municipal Court*, 2 Am. Bankr. R. 163, 53 Fed. 893.

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#### UNITED STATES v. MARKT.

(Circuit Court, S. D. New York. January 13, 1899.)

No. 2,535.

##### 1. CUSTOMS DUTIES—CLASSIFICATION—WIRE BOLTING CLOTH.

*Held*, that the provision in Tariff Act Aug. 28, 1894, c. 349, § 2, Free List, par. 407, 28 Stat. 538, for "bolting cloths, especially for milling purposes, but not suitable for the manufacture of wearing apparel," is not limited to bolting cloth composed of silk, but includes also bolting cloth made of fine copper-wire gauze.

Appeal from a decision of the Board of General Appraisers, reversing the classification by the collector of customs at the port of New York of merchandise imported by Markt & Co.

The reasons for the board's action appear from its opinion (G. A. 3635), as follows:

Sharretts, General Appraiser. The merchandise covered by this protest is fine copper-wire gauze. It was assessed for duty at 35 per cent. ad valorem, under Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule C, par. 177, 28 Stat. 520, as a manufacture of metal. The appellants claim it is entitled to free entry



under the provision of paragraph 407 (section 2, Free List, 28 Stat. 538) for "bolting cloths, especially for milling purposes, but not suitable for the manufacture of wearing apparel." The board has made as careful an investigation regarding the proper classification of this material as the circumstances will permit. There seems to be some doubt touching the precise time when the merchandise came into use in this country. One of the witnesses testified, however, that he had been familiar with it for two years and a half, or prior to August 28, 1894. All of the witnesses agreed in their testimony that it was known as bolting cloth, or as copper-wire bolting cloth, and that it was made expressly for milling purposes, and was fit for no other use. This fabric seems to be a substitute for silk bolting cloth, the two being made of corresponding fineness of mesh. On the evidence, we find as a fact: (1) That the merchandise is commercially known as bolting cloth; that it was manufactured especially for milling purposes, and is not suitable for the manufacture of wearing apparel; (2) that it is a manufacture of metal; and we hold, in law, that the claim of the appellants is well founded. Paragraph 407 does not limit the free entry of bolting cloth to that which is composed of silk, but provides for bolting cloths presumably made of different materials, which term, we think, is broad enough to include all merchandise known as bolting cloth, not fit to be manufactured into wearing apparel, and made expressly for milling purposes. It is manifest that the intent of Congress was to favor the milling industry of this country by giving them free of duty the cloth used for bolting purposes; and we do not think that we can properly discriminate between bolting cloth made of silk and that which is made of other material. We sustain the protest, and reverse the collector's decision.

Henry C. Platt, Asst. U. S. Atty.  
Comstock & Brown, for importers.

WHEELER, District Judge. The question is whether this copper-wire gauze is of "bolting cloths, especially for milling purposes, but not suitable for the manufacture of wearing apparel," under Tariff Act Aug. 28, 1894, c. 349, § 2, Free List, par. 407, 28 Stat. 538. That it is not suitable for wearing apparel is apparent. It is a kind of cloth, and, as such, is found to be used as bolting cloth for milling purposes; so it appears to come within the description of that paragraph.

Decision affirmed.

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#### UNITED STATES v. ROBINSON.

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,820.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—EMBROIDERED GLOVES.

Certain embroidered leather gloves, the embroidery being in three rows, each of which presents the appearance of three-plait crochetwork, this effect being produced by the needle with only one cord or strand of thread, are held not to be gloves "stitched or embroidered with more than three single strands or cords," as provided for in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 445, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1677].

Appeal by the United States from a decision of the Board of General Appraisers, which reversed the decision of the collector of customs in the assessment of duty on certain merchandise imported at the port of New York by H. Robinson.

The decision of the board in *Re Robinson, G. A. 4241*, is as follows:

Wilkinson, General Appraiser. The goods are leather gloves, which were assessed with the embroidery duty of 40 cents a dozen pairs, under Act July, 1897, c. 11, § 2, Schedule N, par. 445, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1677]. It is claimed that the gloves are not "stitched or embroidered with more than three single strands or cords," and that they are not liable, therefore, to the additional duty for embroidery. The embroidery is in three rows. On the back of the glove each row presents the appearance of three-plait crochetwork, but this effect is produced by the needle with only one cord or strand of thread, as is shown by the stitching through and on the inside of the glove. Eight competent experts were examined at the hearing, and we find from their unanimous testimony upon the official samples that the gloves described in the schedule are not stitched or embroidered with more than three single strands or cords, and we sustain the claim that they are not liable to additional duty for embroidery. The decision of the collector is otherwise affirmed.

Henry L. Burnett, U. S. Atty.  
Comstock & Brown, for importer.

WHEELER, District Judge. These are gloves with three rows of embroidery, each of a single cord, but passing more than once throughout the decoration. Paragraph 445 provides for an additional duty "on all gloves stitched or embroidered with more than three single strands or cords," of 40 cents per dozen pairs. The addition is to cords, and not to turns or directions of the same cord. Here are but three cords. In *Wertheimer v. U. S. (C. C.) 65 Fed. 186*, on appeal, *Id.*, 5 C. C. A. 107, 55 Fed. 281, the gloves "had more than three single strands or cords in the embroidery," while these have not. Decision affirmed.

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#### FLEMING v. UNITED STATES.

(Circuit Court, S. D. New York. January 13, 1899.)

No. 2,749.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—MAGNESIC FIRE-BRICK.

Certain magnesic brick, glazed, not known in commerce as fire-brick, are not within the provision in Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule B, par. 77, 28 Stat. 512, for "magnesic fire-brick," but are dutiable as "brick \* \* \* glazed," under paragraph 76 of said act.

Appeal by Fleming & Co. from a decision of the Board of General Appraisers, which affirmed the decision of the collector of customs at the port of New York. See *G. A. 3266*.

Howard T. Walden, for importers.  
Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. These importations are of brick, returned by the appraiser as glazed brick, and assessed at 30 per cent., under paragraph 76, Schedule B, § 1, c. 349, Tariff Act Aug. 28, 1894 (28 Stat. 512), against a protest that they are dutiable as "magnesic fire-brick," under paragraph 77, at one dollar per ton. Further testimony has been taken. The question on the whole is whether these

are so magnesian fire-brick as to sustain the protest. On careful examination of all, they do not appear to be, in commerce, fire-brick, and the same conclusion is reached as was before in *Fleming Cement & Brick Co. v. United States* (C. C.) 84 Fed. 158.

Decision affirmed.

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UNITED STATES v. LEGGETT.

(Circuit Court, S. D. New York. January 13, 1899.)

No. 2,817.

1. CUSTOMS DUTIES—CLASSIFICATION—PEPPER SHELLS.

Shells of pepper, which, when ground, make a low grade of black pepper, are within the provision for the entry free of duty of "pepper, white or black, \* \* \* when unground," in Free List, par. 667, Tariff Act July 24, 1897, c. 11, § 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688].

Appeal from a decision of the Board of General Appraisers (G. A. 4230), which reversed the classification of the collector of customs at the port of New York on an importation by Francis H. Leggett & Co.

D. Frank Lloyd, Asst. U. S. Atty.  
Everit Brown, for importers.

WHEELER, District Judge. The question is whether these shells are dutiable as "spices not specially provided for," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 287, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653], or are free, as "pepper, white or black, \* \* \* when unground," under section 2, Free List, par. 667, 30 Stat. 201, of said act [U. S. Comp. St. 1901, p. 1688]. Testimony has been taken here which shows that these are the shells of pepper berries, which, when ground whole, make black pepper, and the kernels of which, when ground, make white pepper, and that the shells, when ground alone, make a low grade of black pepper. Neither the berries, kernels, nor shells are anything but pepper. The shells, therefore, are pepper unground.

Decision affirmed.

**MEMORANDUM DECISIONS.**

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**AMERICAN BRIDGE CO. v. CADY.** (Circuit Court of Appeals, Sixth Circuit. June 13, 1903.) No. 1,181. In Error to the Circuit Court of the United States for the Northern District of Ohio. E. W. Tolerton, for plaintiff in error. Grant & Sieber, for defendant in error. No opinion. Affirmed.

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**BELL v. FULLER & JOHNSON MFG. CO.** (Circuit Court of Appeals, Seventh Circuit. August 8, 1903.) No. 998. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. Charles M. Peck and Lysander Hill, for appellant. William R. Bagley, for appellee. No opinion. Dismissed pursuant to rule 20.

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**BJOIN v. FULLER & JOHNSON MFG. CO.** (Circuit Court of Appeals, Seventh Circuit. August 8, 1903.) No. 995. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. Charles M. Peck and Lysander Hill, for appellant. William R. Bagley, for appellee. No opinion. Dismissed pursuant to rule 20.

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**BOWSHER v. LAKE ERIE & W. R. CO.** (Circuit Court of Appeals, Sixth Circuit. January 8, 1903.) No. 1,096. In Error to the Circuit Court of the United States for the Northern District of Ohio. Charles A. Thatcher, for plaintiff in error. John B. Cockrum and Doyle & Lewis, for defendant in error. No opinion. Reversed.

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**THE CARBONERO (2). READING CO. v. MUNSON.** (Circuit Court of Appeals, First Circuit. June 4, 1903.) No. 436. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

**PER CURIAM.** The court having carefully considered the petition for a rehearing filed by the appellant May 23, 1903, and the brief in support thereof, and thereupon, no judge who concurred in the judgment desiring a rehearing, the petition is denied. See (C. C. A.) 122 Fed. 753.

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**C. CRANE & CO. v. THISTLEWAITE.** (Circuit Court of Appeals, Sixth Circuit. November 13, 1902.) No. 1,119. In Error to the Circuit Court of the United States for the Southern District of Ohio. O'Hara & Jordon, for plaintiff in error. C. F. Droste and Walter W. Schoenle, for defendant in error. No opinion. Reversed and remanded.

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**DONNOVAN et al. v. PENNSYLVANIA CO.** (Circuit Court of Appeals, Seventh Circuit. May 13, 1903.) No. 987. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Richard J. Cooney and James R. Ward, for appellants. E. A. Bancroft, Frank J. Loesch, and Charles F. Loesch, for appellee. No opinion. Affirmed. For opinion below, see (C. C.) 116 Fed. 907.

DRESBACH v. FELTON. (Circuit Court of Appeals, Sixth Circuit. November 6, 1902.) No. 1,075. In Error to the Circuit Court of the United States for the Eastern District of Kentucky. Chas. M. & Edgar W. Cist, for plaintiff in error. Simrall & Galvin and Edward Colston, for defendant in error. No opinion. Affirmed.

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EBBOTT v. FULLER & JOHNSON MFG. CO. (Circuit Court of Appeals, Seventh Circuit. August 8, 1903.) No. 997. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. Charles M. Peck and Lysander Hill, for appellant. William R. Bagley, for appellee. No opinion. Dismissed pursuant to rule 20.

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In re GAILEY. GAILEY v. LaFAYETTE SMITH GROCER CO. (Circuit Court of Appeals, Seventh Circuit. June 24, 1903.) No. 1,003. Appeal from the District Court of the United States for the Southern District of Illinois. Dismissed pursuant to rule 16.

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HADDEN RODEE CO. v. BOARD OF TRADE OF CITY OF CHICAGO. (Circuit Court of Appeals, Seventh Circuit. May 1, 1903.) No. 952. Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin. T. W. Spence, for appellant. H. S. Robbins and George H. Noyes, for appellee. No opinion. Affirmed. See (C. C.) 109 Fed. 705.

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HAULEY DOWN DRAFT FURNACE CO. v. PEERLESS PORTLAND CEMENT CO. (Circuit Court of Appeals, Sixth Circuit. November 15, 1902.) No. 1,021. In Error to the Circuit Court of the United States for the Eastern District of Michigan. Leo. M. Butzel, for plaintiff in error. Otto Kirchner, for defendant in error. No opinion. Affirmed.

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HUB TRANSFER CO. v. WAKEMAN. (Circuit Court of Appeals, Sixth Circuit. February 13, 1903.) No. 1,138. In Error to the Circuit Court of the United States for the Northern District of Ohio. Ford, Snyder, Henry & McGraw, for plaintiff in error. A. W. Mayers and M. A. Foran, for defendant in error. No opinion. Affirmed.

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KERR v. UNITED STATES. (Circuit Court of Appeals, Seventh Circuit. April 24, 1903.) No. 964. In Error to the Circuit Court of the United States for the Western District of Wisconsin. A. L. Sanborn and L. A. Doolittle, for plaintiff in error. William G. Wheeler and Henry T. Sheldon, for defendant in error. No opinion. Affirmed.

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LANDER, County Treasurer, v. NATIONAL CITY BANK OF CLEVELAND, OHIO. SAME v. COMMERCIAL NAT. BANK OF CLEVELAND, OHIO. SAME v. PARK NAT. BANK OF CLEVELAND, OHIO. SAME v. FIRST NAT. BANK OF CLEVELAND, OHIO. SAME v. UNION NAT. BANK OF CLEVELAND, OHIO. SAME v. CLEVELAND BANK. SAME v. NATIONAL BANK OF COMMERCE OF CLEVELAND, OHIO. SAME v. CENTRAL NAT. BANK OF CLEVELAND, OHIO. SAME v. EUCLID AVE. NAT. BANK OF CLEVELAND, OHIO. SAME v. STATE NAT. BANK

OF CLEVELAND, OHIO. SAME v. WESTERN RESERVE BANK OF CLEVELAND, OHIO. (Circuit Court of Appeals, Sixth Circuit, November 5, 1902.) Nos. 1,049-1,059. Appeal from the Circuit Court of the United States for the Northern District of Ohio. P. H. Kaiser and A. B. Benedict, for appellant. E. S. Cook, for appellees Central Nat. Bank and Euclid Ave. Nat. Bank. A. C. Dustin, for appellee Western Reserve Bank. W. H. Boynton and Norton T. Horr, for other appellees. No opinion. Affirmed.

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McEVOY v. C. MANGOLD MILLING CO. et al. (Circuit Court of Appeals, Sixth Circuit, October 18, 1902.) No. 1,091. In Error to the District Court of the United States for the Western District of Michigan. Bundy & Travis, for plaintiff in error. Frank L. Fowler and Bloodgood, Kemper & Bloodgood, for defendant in error. No opinion. Affirmed.

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MOORE v. SOUTHERN RY. CO. (Circuit Court of Appeals, Sixth Circuit, October 18, 1902.) No. 1,085. In Error to the Circuit Court of the United States for the Eastern District of Tennessee. H. H. Ingersoll, for plaintiff in error. Jourolmon, Welker & Hudson and Shoun & Susong, for defendant in error. No opinion. Affirmed.

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PENNSYLVANIA CO. v. CARROLL. (Circuit Court of Appeals, Sixth Circuit, October 18, 1902.) No. 1,081. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Squire, Sanders & Dempsey, for plaintiff in error. Murray & Koonce, for defendant in error. No opinion. Affirmed.

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PHILLIPS v. ILLINOIS CENT. R. CO. et al. (Circuit Court of Appeals, Sixth Circuit, February 13, 1902.) No. 1,093. In Error to the Circuit Court of the United States for the Western District of Tennessee. Greer & Greer, for plaintiff in error. Fentress & Cooper, for defendant in error. No opinion. Affirmed.

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ST. LOUIS, I. M. & S. RY. CO. v. HORTON. (Circuit Court of Appeals, Sixth Circuit, March 11, 1903.) No. 1,150. In Error to the Circuit Court of the United States for the Western District of Tennessee. McFarland & Neblett and J. W. Canada, for plaintiff in error. H. N. Moon and Francis Byrne, for defendant in error. No opinion. Reversed and remanded.

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In re SCHWAB. SCHWAB v. MAY et al. (Circuit Court of Appeals, Seventh Circuit, April 21, 1903.) No. 963. Appeal from the District Court of the United States for the District of Indiana. De Witt C. Wilson, for appellant. Robert P. Davidson and Allen Boulds, for appellee. No opinion. Dismissed on stipulation of counsel.

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SECURITY TRUST CO. OF TOLEDO v. McCULLOUGH. (Circuit Court of Appeals, Sixth Circuit, June 13, 1903.) No. 1,158. Appeal from the District Court of the United States for the Eastern District of Michigan. Chittenden & Chittenden, for appellant. Chauncy H. Gage and Searl & Montfort, for appellee. No opinion. Affirmed.

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STRANG v. FULLER & JOHNSON MFG. CO. (Circuit Court of Appeals, Seventh Circuit, August 8, 1903.) No. 996. Appeal from the Circuit Court

of the United States for the Western District of Wisconsin. Charles M. Peck and Lysander Hill, for appellant. William R. Bagley, for appellee. No opinion. Dismissed pursuant to rule 20.

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In re TAYLOR. (Circuit Court of Appeals, Seventh Circuit. May 1, 1903.) No. 991. Original Petition in Bankruptcy to Review and Revise an Order of the District Court of the United States for the Southern District of Illinois. Charles M. Peirce and A. L. Phillips, for petitioner. J. E. Pollock and L. C. Hay, for respondent. No opinion. Order reversing.

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In re TAYLOR. SHOLTY v. WILSON. (Circuit Court of Appeals, Seventh Circuit. May 1, 1903.) No. 980. Appeal from the District Court of the United States for the Southern District of Illinois. Charles M. Peirce and A. L. Phillips, for appellant. J. E. Pollock and L. C. Hay, for appellee. No opinion. Dismissed.

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UNION CASUALTY & SURETY CO. v. AYLER. (Circuit Court of Appeals, Sixth Circuit. March 14, 1903.) No. 1,154. In Error to the Circuit Court of the United States for the Middle District of Tennessee. Vertrees & Vertrees, for plaintiff in error. W. H. Williamson and Arthur Crownover, for defendant in error. No opinion. Affirmed.

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UNITED STATES v. T. BUETTNER & CO. (Circuit Court of Appeals, Seventh Circuit. May 5, 1903.) No. 960. Appeal from the Circuit Court of the United States for the Northern District of Illinois. S. H. Bethea, for appellant. J. H. Defrees, William Brace, and John G. Campbell, for appellee. No opinion. Dismissed on motion of appellant.

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VILLAGE OF MARICE CITY v. CLAPP. (Circuit Court of Appeals, Sixth Circuit. February 13, 1903.) No. 1,141. In Error to the Circuit Court of the United States for the Northern District of Ohio. Seney & Johnson and Watts & Moore, for plaintiff in error. Cable & Parmenter and W. B. Richie, for defendant in error. No opinion. Affirmed.

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BRODRICK COPYGRAPH CO. OF NEW JERSEY et al. v. ROPER. (Circuit Court, D. Rhode Island. May 11, 1903.) No. 2,633. In Equity. Samuel Owen Edmonds, for complainants. Franklin P. Owen, for defendant.

BROWN, District Judge. I am of the opinion that the complainant is entitled to a preliminary injunction upon the authority of the following cases: Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 85 L. R. A. 728; Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671; Tubular Rivet & Steel Co. v. O'Brien (C. C.) 93 Fed. 200. See, also, Victor Talking Machine Co. et al. v. The Fair (decision of the Circuit Court of Appeals for the Seventh Circuit, January session, 1903) 123 Fed. 424; Beament v. National Harrow Co., 186 U. S. 70, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058. A preliminary injunction in the form prayed for, however, would be too broad, since it would cover the making and selling of duplicating ink for legitimate purposes, and sales in which the complainants' right would not be either directly or indirectly infringed. A decree may be presented so limited as to obviate this objection, and otherwise framed according to the prayer of the bill.

**CONKLIN et al. v. UNITED STATES SHIPBUILDING CO. et al.** (Circuit Court, D. Maine. September 11, 1903.)

**PUTNAM**, Circuit Judge. On the application of the complainants in this cause, filed the 13th day of July, 1903, the Court, having heard the parties, orders and decrees as follows:

(1) That the order made by the United States Circuit Court for the District of New Jersey, sustaining the application of the complainants for the appointment of a receiver, and appointing said James Smith, Jr., as receiver, with certain powers and under certain instructions set forth in said order of appointment, is hereby, for interlocutory purposes within this district, ratified, confirmed, and approved; and the said James Smith, Jr., as such receiver, is hereby, for interlocutory purposes within this district, vested with the same powers, rights, and privileges as are conferred by said order of said United States Circuit Court for the District of New Jersey over all the property and assets of every name and kind of the defendant corporation United States Shipbuilding Company within this district, except as here otherwise expressly provided; and the said receiver, having already taken and subscribed the oath of office and executed the bond in the manner prescribed by the order of the United States Circuit Court for the District of New Jersey, is hereby authorized to take possession of all property of the defendant corporation United States Shipbuilding Company within this district, except as herein otherwise expressly provided, and to act as such receiver within this district, without taking further oath of office or executing any further bond.

(2) It is further ordered that the officers and directors of the Hyde Windlass Company forthwith deliver to said receiver possession of the real property, plant, machinery, assets, and effects now in their possession and within this district belonging to the defendant corporation United States Shipbuilding Company, being the property, assets, and effects that were leased to the Hyde Windlass Company by said United States Shipbuilding Company by an instrument in writing bearing date the 8th day of August, 1902; provided, however, that the receiver shall from time to time furnish the Hyde Windlass Company with all convenient facilities to enable the latter to complete the work it had on hand at the date of the entry of this order. It is further ordered that the receiver shall continue the business of the Hyde Windlass Company until further order, making new contracts and taking new orders from time to time as found expedient; provided that no contract shall be made, without further orders from this court, which cannot, in the orderly course of business, be performed and completed within one year from the entry hereof. The business is to be done by the Hyde Windlass Company and in its name as the agent of the receiver, and the Hyde Windlass Company is to remain on the leased premises for that purpose; but everything is to be subject to orders which may be given from time to time by the receiver. All liabilities arising from the business carried on as aforesaid shall be chargeable against the assets of the Hyde Windlass Company, and it shall be credited with the profit thereof. Separate books of account shall be opened, in which shall be kept all transactions in which the receiver is concerned, including contracts and orders for all new business which may be taken subsequently to the entry of this order, and special deposits shall be made of all moneys received therefrom. No moneys now in hand or hereafter to be received by the Hyde Windlass Company, either on its own account or on account of the receiver, shall be disbursed for any purpose, except to discharge and protect liabilities and current expenses of the business, without special order of this court. The president, treasurer, and general superintendent of the Hyde Windlass Company shall not be changed by the receiver or corporation, unless by order of this court. The Hyde Windlass Company and the receiver shall have liberty to apply from time to time for modifications of this order, or for orders amendatory thereof or supplementary thereto.

(3) It is further ordered that said Hyde Windlass Company account to the said receiver for all personal property within this district delivered to it, said Hyde Windlass Company, by the defendant United States Shipbuilding Company, at the time of the making of the aforesaid lease or subsequent thereto, and, further, that said Hyde Windlass Company account to said re-



ceiver with reference to the conduct of its business since the making of said lease, for the purpose of ascertaining the profits to be paid over to the United States Shipbuilding Company according thereto, and, further, that said Hyde Windlass Company shall from time to time, when ordered by this court, pay over to said receiver such profits when ascertained, and the value of such personal property consumed by it and not made good; and all of said accounts shall be taken and said profits ascertained by the masters hereinafter appointed, and reports thereof made by said masters to this court.

(4) It is further ordered that the present application for the delivery to the receiver of possession of the land, plant, buildings, machinery, and personal property that were leased to the Bath Iron Works by the defendant corporation United States Shipbuilding Company for the term of one year, expiring on the 12th day of August, 1903, is denied; and it is hereby adjudged that, by virtue of the fact that at the time of the execution of said lease said United States Shipbuilding Company knew that the Bath Iron Works had under construction on its land and in its buildings aforesaid certain vessels which could not be completed within said year, necessarily using therefor all the property, real and personal, aforesaid, said Bath Iron Works is entitled to retain the exclusive possession of all said property within this district, real and personal, until the completion of said vessels, and use the same for their construction; and the exclusive possession of all said property, real and personal, shall be kept by said Bath Iron Works, and used for the purpose of completing said vessels and in the construction thereof; provided, however, that said receiver, as claiming the ownership of the entire share capital of said Bath Iron Works, may from time to time nominate a representative, who shall be paid by the receiver and be kept informed from time to time of the various business operations and affairs of said corporation; and that the officers of said Bath Iron Works shall advise with the receiver, and endeavor to act in harmony with his views in the conduct of the business of that corporation and the administration of its affairs, provided, further, that said Bath Iron Works shall proceed with diligence in the construction of said vessels.

(5) It is further ordered that the said Bath Iron Works account to the said receiver for all personal property within this district delivered to it, said Bath Iron Works, by the defendant United States Shipbuilding Company at the time of the making of the aforesaid lease, or subsequent thereto, and, further, that said Bath Iron Works account to said receiver with reference to the conduct of its business since the making of said lease, for the purpose of ascertaining the profits to be paid to the United States Shipbuilding Company according thereto, and, further, that said Bath Iron Works shall from time to time, when ordered by this court, pay to said receiver such profits when ascertained, and the value of such personal property consumed by it and not made good. All of said accounts shall be taken and said profits ascertained by the masters hereinafter appointed, and reports thereof made by said masters to this court; provided that said payments to said receiver, and each of them, shall only be from money or property not needed to discharge or protect other liabilities of said Bath Iron Works.

(6) It is further ordered that Charles F. Libby, Esq., as the nominee of the complainants, Seth M. Carter, Esq., as the nominee of the defendant corporations, and Mr. George F. Morse, selected by the court, are hereby appointed masters to take and state proper and several inventories of all said property within this district of each of said corporations and report the same to this court, with any opinions or suggestions which they may deem useful in reference thereto; that for these purposes they, as said masters, are authorized to make investigation of the accounts and books of account of each of said corporations, and take such proofs as they may be advised, or as shall be submitted to them by either of the parties hereto, so far as the same may aid in determining any matter submitted to them; and that it shall be their further duty, as such masters, to take and make several and proper inventories showing, respectively, what portions of the personal property leased by the defendant United States Shipbuilding Company to the Hyde Windlass Company and the Bath Iron Works now remain, or have been replaced by other property in lieu thereof—all in order and for the purpose

that there shall be several inventories of the various properties, real and personal, aforesaid, belonging to each of said defendant corporations, and several inventories of the personal property leased by the defendant United States Shipbuilding Company to each of the other corporations, now remaining on hand, including such personal property as has replaced other personal property consumed.

(7) It is further ordered that the complainants shall from time to time cause to be filed in this court, except as already filed, certified copies of all orders or decrees of a general nature in any way affecting the property situated within this district, made or which may be made by said Circuit Court of the United States for the District of New Jersey in the primary cause pending in said court.

(8) It is further ordered that the clerk of this court enter on the minutes a copy of the order of the Circuit Court of the United States for the District of New Jersey appointing said receiver, immediately following the entry of this order, unless the same has already been entered.

(9) It is further ordered that the receiver shall from time to time account to this court for all moneys received or which may be received by him from any matter or thing within this district; that he shall dispose of the same as shall hereafter from time to time be directed by it; and that he shall from time to time, as the same come in, deposit all such moneys in his name as receiver in this cause in some national banking association or associations within this district officially designated as depositories for the receipt of moneys of the United States, and shall there retain the same, except as drawn out for the purposes of the receivership within this district, or as ordered by this court.

(10) It is further ordered that, until further order of this court, no stockholders' meeting of either the Hyde Windlass Company or the Bath Iron Works shall take any action, except to adjourn to some future time, and no transfers of shares of the capital stock of either of said corporations shall be made upon their respective books, nor new certificates issued therefor.

(11) It is further ordered that nothing herein contained shall be held to impair the title or possession by or of the Hyde Windlass Company, or by or of the Bath Iron Works, of their present respective cash, bills or accounts receivable, materials now on hand or ordered, or which may hereafter be ordered, or received, for the completion of contracts already entered into, or amounts due or to come due to either of them on account of such existing contracts, or to give said receiver control of them, or any of them, or any right or title therein or thereto, except so far as he may be entitled to be paid therefrom as hereinbefore set out, if he proves so entitled.

(12) It is further ordered that either party to this cause, or the receiver, and also the Mercantile Trust Company, may from time to time apply for modifications of this order and decree, or for orders or decrees supplemental hereto or amendatory hereof.

(13) It is further ordered that a copy of this order and decree, certified by the clerk and delivered to one of the masters aforesaid, shall be their commission in reference to all matters to be done by them.

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NEW ENGLAND PHONOGRAPH CO. v. DAWSON CO. (Circuit Court, D. Rhode Island. March 17, 1903.) No. 2,627. In Equity. Howard W. Hayes, for complainant. Elisha K. Camp, for defendant.

BROWN, District Judge. While not satisfied that upon this petition for a preliminary injunction the court should go as far as to dismiss the bill for laches, I am of the opinion that the complainant's apparent acquiescence for many years in the violation of its alleged rights, the certificate showing that the complainant corporation has ceased for a considerable time to transact business, and the peculiar provisions of the agreement of October 12, 1888, raise serious doubts as to the existence of any rights arising from said agreement at the date of filing the bill. The doubts as to the complainant's right to relief, its acquiescence, and an entire lack of diligence require the denial of the petition for a preliminary injunction. Petition denied.

**UNITED STATES v. JULIUS WILE BRO. & CO.** (Circuit Court, S. D. New York. August 1, 1903.) No. 3,219. On application by the United States for a review of the decision of the Board of General Appraisers, which reversed the assessment of duty by the collector of customs at the port of New York. See G. A. 4736. D. Frank Lloyd, Asst. U. S. Atty. Albert Comstock, for appellees.

**HAZEL**, District Judge. This case comes within the ruling in *Nicholas v. United States* (C. C.) 122 Fed. 892. The merchandise involved consists of liqueurs commonly known as *creme de menthe*, *abricotine*, *maraschino*, and *aniset*. Counsel for importers insists that the imported articles are precisely within the terms of section 3 of the tariff act of 1897 (Act July 24, 1897, c. 11, Free List, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690]), and of the reciprocal commercial agreement by which the duties are reduced upon "brandies, or other spirits manufactured or distilled," in that liqueurs are spirits manufactured or distilled. The court will follow the decision in the *Nicholas Case* without passing upon this point. The decision of the Board of General Appraisers, sustaining the protest of the importers, is affirmed.

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**WESTERN UNION TEL. CO. v. PHILADELPHIA, B. & W. R. CO. et al.** (Circuit Court, D. Delaware. August 21, 1903.) No. 242. In Equity. Willard Saulsbury and Rush Taggart, for complainant. Ward & Gray and John G. Johnson, for defendants.

**BRADFORD**, District Judge. This case resembles in its nature and circumstances that of the Western Union Telegraph Company against the Philadelphia, Baltimore & Washington Railroad Company and the Delaware Railroad Company (this day decided by this court) 124 Fed. 974. For reasons similar to those expressed in the opinion in that case, a preliminary injunction must be awarded. Let an interlocutory decree be prepared accordingly.

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**In re ROSENBERG** (two cases). (District Court, E. D. Pennsylvania. September 25, 1903.) Nos. 358, 697. In Bankruptcy. On certificate of referee concerning ownership of fund. See (D. C.) 116 Fed. 402. Greenwald & Mayer, for Philip Rosenberg bankrupt. Alexander Simpson, Jr., and John Weaver, for creditors. James Collins Jones, and George B. Johnson, for trustee of estate of Emanuel Rosenberg, bankrupt.

**J. B. McPHERSON**, District Judge. I have read this voluminous testimony with special reference to the crucial question in the case, namely: Was Simon Abeles a party to (what may be assumed for the present to have been) the fraudulent failure of Emanuel Rosenberg in the spring of 1898? And I have come to the same conclusion that was forced upon the referee. I see no advantage in discussing the evidence in detail, and shall content myself, therefore, with saying that in my opinion the answer to the question must be that the complicity of Mr. Abeles has not been established. The result is that he must be held to have acquired a valid title to Emanuel Rosenberg's goods in the West Chester store at the sheriff's sale in June, and to have been able to transmit a valid title to Philip Rosenberg several months afterwards. The fund in controversy, therefore, which was produced by the sale of these goods, belongs to the bankrupt estate of Philip Rosenberg, and must be distributed among his creditors. The exceptions are dismissed, and the report of the referee is affirmed.